

(1988) 09 KL CK 0043

High Court Of Kerala

Case No: Ct R. P. No. 1767 of 1987

Cochin Refineries Ltd.

APPELLANT

Vs

C.S. Company, Engineering
Contractors and Another

RESPONDENT

Date of Decision: Sept. 6, 1988

Acts Referred:

- Arbitration Act, 1940 - Section 9, 9(b)
- Criminal Procedure Code, 1973 (CrPC) - Section 151

Citation: (1988) 2 KLJ 452

Hon'ble Judges: K.P. Radhakrishna Menon, J

Bench: Single Bench

Advocate: K A. Nair, for the Appellant; P. G. K. Wariyar, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K. P. Radhakrishna Menon, J.

The short but interesting question arising for consideration is the: Can a party to an arbitration agreement, on the death of the sole arbitrator appointed by him, appoint another in the place of the deceased without following the procedure prescribed u/s 9(b) for the appointment of a sole arbitrator? The facts essential and requisite to find an answer to the question, lie in a narrow compass. Complying with the procedure prescribed u/s 9 (b) of the Arbitration Act, the first respondent appointed one M. K. Abdul Khader as the sole arbitrator to resolve the dispute, Which according to it, had arisen out of the contract, it had entered into with the petitioner to ""execute the left over earth filling work of an earlier agency" in the petitioner's premises. Abdutkhader aocorduigly commenced the arbitration work. The petitioner there upon filed O. -P. (Arbitration) No. 114/85 before the Sub Court, Ernakulam for a declaration :that there is no arbitral dispute in existence" and consequently

10esirain the arbitrator from proceeding with the arbitration case. This petition was dismissed and the said order was under attack in C. R. P. 888 of 1987

2. During the pendency of C. R. P. 888/87, the sole arbitrator, M K. Abdulkhader died. The first respondent thereupon appointed the second respondent as the sole arbitrator in the place of deceased Abdulkhader. According to the petitioner, the second respondent -was appointed "s tae sole arbitrator without notice to it. The petitioner company has a further case that tilt the "date of the filing of the revision, the company BUS not been miormed as to when Abdulkhader died. The arbitration proceedings now under the control of second respondent must, therefore be held to be a fresh proceeding on and from 9-1 - 1987, the date on which the second respondent issued notice to the parties regarding the preliminary sitting scheduled to be held 17 - 1 - 1987, according to the company - petitioner. On seeing that the second respondent was continuing with the arbitration -proceedings, the petitioner filed its statement before the second respondent, about under protest. *

3. The petitioner under these circumstances filed the CM P. 17116 of 1987 under the proviso to clause (b) of Section 9 for an order allowing, it to appoint a co-arbitrator. This court transmitted this petition to the court below with a direction to dispose of the same on merits. The court below by the order under challenge dismissed the said petition.

4. Before I deal with the point, I would like to make it cleat that the question whether or not any arbitrable dispute exists is not dealt with in this order, as the same is not the subject-matter of the enquiry in this revision; this question therefore is left open.

5. Keeping these facts in mind we will try to get the answer to the question. The answerer in my view depends upon the construction of Section 9 of the Arbitration Act. This Section confers on a party to arbitration agreement the power to appoint a new arbitrator or in certain cases a sole arbitrator. This section however, has application only to those arbitration agreements under which a reference requires to be made to two arbitrators, one to be appointed by each party to the agreement. Clause (a) of Section 9 provides that if either of the appointed arbitrators, neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him has a right to appoint a new arbitrator in his place. In other words the right to appoint a new arbitrator within the meaning of clause (a) of the Section would arise only < on the happening of any of the contingencies namely the arbitrator already appointed neglects or refuses to act or is incapable of acting or dies. Clause (b) of Section 9 however, deals with a situation different from the one envisaged under clause (a). Clause (b) prescribes the procedure for the appointment of the sole arbitrator. The procedure prescribed under this clause shall strictly be observed before appointing the sole arbitraror. To say that a party has validly appointed a sole arbitrator, it should be established that the order appointing the sole arbitrator is one made in accordance with the provisions contained in clause (b). The procedure | prescribed

under clause (b) is this: If the party who failed to appoint an arbitrator either originally or by way of substitution as contemplated under clause (a) for 15 clear days after the service by the party who has appointed his arbitrator, of a notice in writing to make the appointment, the party who has already appointed an arbitrator can appoint that arbitrator to act as a sole arbitrator in the reference and his award shall be binding on both parties as if, he had been appointed by consent. The party who gives the notice should have appointed his arbitrator before giving the notice. The proviso to the section "enables the defaulting party that is, the party who failed to appoint his arbitrator either originally or by substitution of the one who neglected or refused to act or had become incapable of acting or had died, to move the court set aside the order appointing the sole arbitrator. To put it differently the court may state the appointment of the sole arbitrator, and may either on sufficient cause being shown allow the defaulting party further time, to nominate his arbitrator or pass such orders as it thinks fit. This Section, however, will apply only if there is no provision to the contrary in the agreement.

6. The Statement in the preceding paragraph reflects the Scheme of the Section. It is clear from this that the Section does not contain provision to cover the situation which will be brought about on the death of the sole arbitrator. A Question therefore would arise as to how the vacuum caused by the death of the sole arbitrator be filled up? The answer can function only in terms of the agreement, and within the framework of the arbitration law which, it is trite knowledge is procedural in nature." It is profitable in this connection to remember that, if an arbitration agreement does envisage the contingency and provides, for it, however, does not, periods for it fully, that part which is left unprovided for will be covered by the provisions contained in Section 9- That is the intention of the legislature is clear from the expression "unless a different intention is expressed in the agreement" in Section 9. A similar view expressed by the Bombay High. Court (Sec V, V. Ruia v Daunia. A. I. R. 1968 Bombay, 347), with respect, I agree with, it is relevant in this context to, note that it is not the case, of the first respondent that the agreement contains requisite provision for the contingency namely the vacancy caused by the death of the arbitrator. The enquiry therefore just be, does Section 9 provide for meeting the contingency? My answer is no. The clause relevant in the context is clause (b) of Section 9. It provides for the appointment of sole arbitrator. But it does not prescribe any procedure for the appointment of a substitute in the place of sole arbitrator who, died without completing the arbitration. That means, on the death of the sole Arbitrator, the procedure laid down in Section 9 will have to be repeated. A sole arbitrator in such circumstances can validly be nominated, complying with the procedure prescribed by Section 9 only, Construing a similar provision in the Arbitration Act, Act 9 of 1899 it has been held thus in Vttramchand Brijat. B. I. R. 1929 Sind 1955)

Where an arbitrator appointed by one party is made sole arbitrator under s 9, the other party having refused to appoint its own, but he afterwards refuses to act, the

procedure to be followed is. not that laid down in S. 8 (1)(b); but that in S. 9 will be repeated and the party, who appointed the first arbitrator, who became the sole arbitrator, may appoint a fresh arbitrator after giving notice to the other side (See also Gopalji Kuverji v. Motarji Jiram Naranji (1919 43 Bom 809). With respect I agree with the above view.

7. Considered in the light of the above principle, I am of the view that the appointment of the second respondent, K. Jacob Thomas as the sole arbitrator in the place of deceased arbitrator, Abdulkaader is liable to be declared as invalid.

8. The learned counsel for the 1st respondent however argues that inasmuch as the petitioner company has acquiesced in the appointment of the second respondent as the sole arbitrator, by participating in the proceedings the petitioner company shall not be permitted to invoke the provisions of the proviso to Section 9 and seek an order setting aside the appointment of second respondent as the sole arbitrator or seek further time to appoint its arbitrator for hearing the dispute along with the second respondent. It is further argued that so far as the prayer to set aside the appointment of the second respondent as the sole arbitrator is concerned, the petition from which this revision arises does not contain the requisite prayer. It is true that there is no specific prayer in the petition in this regard: but the statements contained in paragraph 8 of the petition do contain an implied prayer that the second respondent, since he was appointed contrary to the provisions of Section 9(b), may be declared as not having been validly appointed as the sole arbitrator. It may in this context be noted that the participation of the petitioner in the proceedings was under protest. The irregularity in appointing the second respondent as the sole arbitrator coupled with the fact that the participation by the petitioner in the proceedings commenced by the second respondent was under protest, is more than sufficient to hold that the petitioner company has not waived its rights that flow from the proviso to Section 9. Participation in the proceedings under such circumstances does not amount to a waiver on the part of the petitioner.

Being tied to the stake and dragged on to trial" as observed by Lord Broughborough, C. J. in *Holt v. Meddow Ctofi* (1846 (4) M. N.S.467 (See Russell on Arbitration, 198 Edition, page 276) what else could be done by the petitioner who had protested against the initiation of the arbitration proceedings by the second respondent who was appointed contrary to law but to participate in the said proceedings. Under these circumstances it cannot be said that the petitioner company has acquiesced in the appointment of the second respondent as the sole arbitrator. Merely because there is no specific prayer in the petition to set aside the appointment of second respondent as the sole arbitrator, the said relief cannot be denied to the petitioner especially when such a prayer can be inferred from the pleadings in the petition. I shall now read para 8 of the petition.

The petitioner was denied the opportunity to consider and appoint the second arbitrator under such a circumstance. Under clause (b) of Section 9 when the second counter-petitioner was appointed by the 1st counter-petitioner as arbitrator,, IS clear days written notice should be been, given to (he petitioner; calling upon them to appoint the second arbitrator failing which only the counter-petitioner had the right to proceed with the arbitration with the Sole Arbitrator.

May be that the prayer to set aside the appointment of the second respondent as sole arbitrator as such is not implied in para 8 of the petition; even then in view of die expression in the proviso nursery "or pass such offer order as it (court) thinks fit" and a similar expression, in Section 151 C. PC. (it should be noted chat the petition from which this revision arises 1s u/s 151 C. P. C. also I am of the view that the court has the power to mould the relief, provided there exists so Sufficient (Headings, of great file same, that the courts have the power to adopt such a course in the absence of. any express or implied prohibition and growth the relief, for &e ends of justice is so more a moat question in view of the, decision of the Supreme Court in Mfs. Jaipur Mineral Development indicate, Jaipur V-The commissioner of Income Tax (A. I. R. 1977 SC, 4349. That- there is no prohibition express or implied disabling the court to mould the relief tod pass an order, the absence of which would" indisputably result in manifest injustice, is beyond dispute. The above argument of the learned counsel for the respondent therefore is rejected.

The order under challenge therefore is sef aside And the matter is remanded to the court below for the purpose of disposal of the matter in accordance with the following directions:-

i. The court below shall give the parties jto tfco ocaedings an opportunity to nominate their arbitrators in terms of the agreement and in accordance with die provisions contained in Sbcidn9(a) of the Arbitration Act ii. The court below shall also pass such other consequential orders it deems fit to pass in the circumstances of the case.

The C. R. P. is allowed No costs.