

Cochin Refineries Ltd. Vs C.S. Company, Engineering Contractors and Another

Court: High Court Of Kerala

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 accordingly 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 1oesirain 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 informed 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 clear 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 answer 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 arbitrator. 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 in 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

causality 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 to meet the contingency namely the vacancy caused by the death of the arbitrator. The enquiry therefore just is, 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 but only,

Construing a similar provision in the Arbitration Act, Act 9 of 1899 it has been held thus in Vttamchand Brijat.Bqlmakand (A. 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 (l)(b); but that in S. 9 will be repeated and the party, who appointed the

arbitrator, who became the sole arbitrator, may appoint a fresh arbitrator after giving notice to the other side (See also Gopalj Kuverjiv.

MotarjiJeram 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 proceeding 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 Btenborough, C. J. in Holt v. Meddow Ctofi (1846 (4) M. N.S.467(See

Russell,oft Arbitration, 198 Edition, page 276) what else could be done by the petitioner who had protested against the initiation of the arbitration I

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,, 15 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 the expression in the proviso nursery "or pass such order as it (court) thinks fit" and a similar expression, in Section 151

C. P.C. (it should be noted that the petition from which this revision arises is 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 & ends of justice is so more a moot question in view of the, decision of

the Supreme Court in M/s. 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 to 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 set 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 to the proceedings an opportunity to nominate their arbitrators in terms of the agreement and in accordance

with the provisions contained in Section 9(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.