

(1970) 08 CAL CK 0002

Calcutta High Court

Case No: Award No. 63 of 1970

Oriental Engineering and
Construction Company

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Aug. 26, 1970

Acts Referred:

- Arbitration Act, 1940 - Section 2, 4, 8, 9

Citation: (1974) 1 ILR (Cal) 251

Hon'ble Judges: Masud, J

Bench: Single Bench

Advocate: Sankar Ghose, for the Appellant; Protiva Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Masud, J.

The Petitioner, Oriental Engineering & Construction Co., has made this application u/s 8 of the Indian Arbitration Act, 1940, for appointment of N.S. Tayebji, retired Chief Engineer, Indian Railways, or any other person as Arbitrator in respect of the disputes between the parties. The tender of the Petitioner, as subsequently modified, was duly accepted by the State of West Bengal through the office of the Superintending Engineer, Western Circle, on November 18, 1966. A formal deed of contract, being B.F. No. 2911 (ii) was executed and the Petitioner undertook the works as contemplated by the said tender. After completion of the work the Petitioner submitted a final bill for a sum of Rs. 3,15,723-94. The State of West Bengal raised various objections to different items in the said final bill. In the premises, disputes and differences arose between the parties and the Petitioner by the letter dated March 24, 1970, called upon the State of West Bengal to refer the disputes to arbitration under cl. 25 of the conditions of contract within a fortnight from the date of the receipt of the said letter. The letter was addressed to the Superintending Engineer, Western Circle, Public Health, Engineering Directorate,

and two copies were sent to the Chief Engineer, Public Health, Engineering Directorate, Government of West Bengal, and also to the Executive Engineer, Calcutta Division, Public Health, Engineering Department, for information. By a letter dated April 7, 1970, the Superintending Engineer, Western Circle, wrote to the Chief Engineer, Public Health, Engineering Department, referring the disputes between the parties to the sole arbitration to him under the said arbitration clause. On May 16, 1970, Oriental Engineering & Construction Co. wrote to the Superintending Engineer, Western Circle, that as the Chief Engineer did not enter or proceed with the reference within one month after the request was made by him the Petitioner appointed Sri N. S. Tayebji to be the sole Arbitrator for settlement of the disputes.- On June 11, 1970, the present application has been filed.

2. Mr. Sankar Ghosh, on behalf of the Petitioner, has drawn my attention to the Explanation to Section 9 of the Arbitration Act and has submitted that as the Chief Engineer failed to enter on the reference or to appoint his nominee within 30 days from the date when request was made to him to enter on the reference as set out in the letter of the Respondent dated April 7, 1970, the Petitioner has lawfully appointed N. S. Tayebji as the sole Arbitrator as communicated to the Respondent by their letter dated May 16, 1970.

3. Mrs. Banerjee, on behalf of the State of West Bengal, has contended that this application is not maintainable u/s 8 of the Act inasmuch as the Petitioner is bound by the arbitration clause u/s 4 and until the provisions of the said clause are complied with, Section 8 of the Act is not attracted.

4. The application could be disposed of on the short point that as the Chief Engineer has not nominated any person as the Arbitrator under the arbitration clause the question of removal of the Chief Engineer or his nominee and appointment of Sri Tayebji or any other person as the sole Arbitrator does not arise. But elaborate arguments have been made by the counsel for both the parties on the scope of Sections 4 and 8. Before the points of law are discussed, it is necessary to set out the arbitration clause which reads as follows:

Clause 25--Except as otherwise provided in the- contract, all questions and disputes relating to. the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment the \$e of, shall be referred to the sole arbitration of the Chief - Engineer of the department. Should the" Chief Engineer be for any reason unwilling or unable to act as such Arbitrator, such questions and disputes shall be referred, to an Arbitrator to be appointed by the Chief Engineer. The award of the Arbitrator shall be final, conclusive and binding

on all parties to this contract.

It is clear from the said clause that the parties have decided their disputes to be determined by reference to arbitration. Further, the parties have also agreed that the Chief Engineer of the Public Health, Engineering Department would be the sole Arbitrator of the disputes between the parties. It is further provided that, if the Chief Engineer for any reason is unable or unwilling to act as Arbitrator, the disputes shall be referred to an Arbitrator to be appointed by the Chief Engineer. Section 4 of the Arbitration Act reads as follows:

The parties to an arbitration agreement may agree that any reference thereunder shall be to an Arbitrator or Arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

Under Section 2 of the Act an arbitration agreement may or may not mention the name of an Arbitrator. But, it is quite possible that the arbitration agreement instead of mentioning the name of a person may state the holder of an office to be the Arbitrator. Section 4 of the Act contemplates cases where the parties have agreed to have their disputes decided by an Arbitrator or Arbitrators to be appointed by a named person or by the holder of any office. Thus Section 4 deals with those cases where an Arbitrator or Arbitrators are to be appointed by a third party. The present arbitration clause may be construed partly as an arbitration agreement within the meaning of Section 4 of the Act. Section 4 applies to this clause insofar as the parties agreed that in certain contingencies the Chief Engineer or a third party may appoint his nominee as the Arbitrator. But, in the arbitration clause here it is provided that before an appointment by the Chief Engineer is made the disputes of the parties should be referred to the arbitration of the Chief Engineer first. This part of the agreement is not covered u/s 4 of the Act. In the premises, the Chief Engineer is the Arbitrator appointed by the parties and, therefore, he is the appointed Arbitrator within the meaning of Section 8(l)(b) of the Arbitration Act. Mr. Ghosh has, therefore, argued that the Chief Engineer has neglected or refused to act or is incapable of acting within the meaning of Section 8(l)(b) and, as such, the Petitioner is justified in serving the notice on the Respondent asking the latter to concur in the appointment of the said Mr. Tayebji. In my view, Mrs. Banerjee's contention that the present application is not maintainable u/s 8 read with Section 4 cannot, therefore, be accepted. Where the arbitration clause contemplates the appointment of an Arbitrator by the parties and also the appointment of an Arbitrator by third party, Section 4 cannot debar a party from making an application u/s 8(l)(b) if, of course, the other conditions of the said section are satisfied. In the facts of the present case, the Superintending Engineer, Western Circle, informed the agreed Arbitrator, that is, the Chief Engineer, Public Health, Engineering Department, by letter dated April 7, 1970, requesting him to act as the sole Arbitrator under the arbitration agreement. The Chief Engineer under the

agreement should have replied to the said letter stating his willingness or unwillingness or consent or inability to act as such Arbitrator. In the present case, the Chief Engineer has not replied to the said letter. It is not alleged that the Chief Engineer did not receive the letter of the Superintending Engineer, Western Circle. Under the arbitration clause, the Chief Engineer had the option of not consenting to act as the Arbitrator. But his failure to decide, whether he would be in a position to act as the Arbitrator or not can certainly be construed as neglect or refusal within the meaning of Section 8(l)(b) of the Act. I am unable to accept the contention of Mrs. Banerjee that until the Chief Engineer accepts in writing his appointment as the sole Arbitrator he cannot be said to have failed or to have neglected to act within the meaning of the said Sub-section. If such contention is accepted the appointed Arbitrator by his silence would cause unreasonable delay in the determination of the disputes between the parties. In the present case, by not replying to the letter appointing him as the sole Arbitrator, the Chief Engineer has impliedly by his conduct refused to proceed with the reference. The explanation to Section 9 reads as follows:

Explanation: The fact that an Arbitrator or Umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of Section 8 and this section.

5. Here the Chief Engineer was appointed the Arbitrator on or about April 7, 1970. The Petitioner waited till May 16, 1970, when the Petitioner served a notice on the Respondent to concur in the appointment of S. N. Tayebji. I, therefore, agree with Mr. Ghosh that this Court has jurisdiction to entertain this application and it cannot be dismissed for want of jurisdiction. But both Section 8(1) and the explanation to Section 9 have used the word "may" in the matter of appointment of an Arbitrator by the Court and, as such, there is an element of exercise of discretion in such appointment. It is well-settled that the discretion should be exercised judicially. In the present case, the discretion cannot be exercised in favour of the Petitioner on the following grounds:

Firstly, the appointment of Tayebji would only arise after a proper notice is served on the Respondent. If the arbitration clause would not have mentioned the appointment of an Arbitrator by the Chief Engineer the notice by the Petitioner dated May 16, 1970, could not be said to be irregular. But the arbitration clause also has provided that if the Chief Engineer is unwilling or unable to act as Arbitrator, he will have the right to appoint an Arbitrator to decide the disputes between the parties. It is true that the Chief Engineer has not exercised this power to appoint his nominee as Arbitrator until to-day. But, even then, the Petitioner should have written to the Respondent or the Chief Engineer that the latter should either express his decision to act as the Arbitrator himself or to nominate an Arbitrator as set out in the arbitration clause itself. In the present case, without giving such notice the

Petitioner straightway appointed Tayebji as the sole Arbitrator. Under the arbitration clause the Petitioner is bound by the arbitration not only of the Chief Engineer but also by his nominee. If the Petitioner could have satisfied the Court that the Chief Engineer has not only failed and neglected to act as the Arbitrator but has also refused to nominate the Arbitrator, the Court might have decided in a different way. On the contrary, it appears from para. 8 of the affidavit filed on behalf of the Respondent that the Chief Engineer could not enter into the reference due to heavy pressure of work. It is also stated in the said paragraph that the Chief Engineer approached Sri S. Chatterjee, the Chief Engineer, C.M.P.O. and Sri B. Bhattacharya, Chief Engineer, Construction Board, to ascertain their views whether any of them would be able to act as the sole Arbitrator in this matter. In fact, it is stated that both of them expressed their willingness to act as the sole Arbitrator. Thus, it is obvious that the Chief Engineer not only expressed his inability to act as the Arbitrator but also has taken steps in appointing his nominee. This is not a case where the appointed Arbitrator or the appointing authority has refused to act as the Arbitrator himself or to nominate an Arbitrator in terms of the arbitration clause in spite of repeated requests.

Secondly, Section 8(l)(b) has no application in the present case inasmuch as the Arbitrator, in fact, has not yet been appointed and, therefore, there is no question of neglect or refusal to act by an "appointed Arbitrator" within the meaning of Section 8(l)(b). The Chief Engineer is certainly the appointed Arbitrator; but the Chief Engineer under the arbitration agreement has been given power to appoint an Arbitrator if the Chief Engineer is unable or unwilling to be the Arbitrator. The distinguishing feature in the present case is that no appointment has been made by the Chief Engineer and thus the person to be appointed by the Chief Engineer as the Arbitrator cannot be made guilty of neglect or refusal to act.. Default, if at all, has arisen on the failure of the Chief Engineer as the appointed Arbitrator to enter on or to proceed with the reference. But the Chief Engineer, as the appointing authority, has not been asked by the Petitioner to nominate a person as the Arbitrator and, as such; the question of neglect or refusal of the appointing authority or his nominee does not arise.

6. Relying upon [Surendranath Paul Vs. Union of India \(UOI\)](#), and my own judgment in [East India Construction Co. \(P\) Ltd. Vs. Union of India \(UOI\)](#), Mr. Ghosh has argued that the appointment of the Chief Engineer or his nominee as the Arbitrator has been agreed upon by the parties in the arbitration clause and, as such, the Chief Engineer" or his nominee is the appointed Arbitrator within the meaning of Section 8(l)(b). The Chief Engineer has neglected to enter on and proceed with the reference within one month after the request was made to him and, therefore, the Chief Engineer"s conduct amounts to a neglect or refusal to act within the meaning of Section 8. It is true that the Chief Engineer has failed to act within one month from the request made to him. It is also true that the Chief Engineer by not nominating or appointing an Arbitrator of his own choice is virtually not allowing the. reference to

proceed. But, in my view, the Chief Engineer's failure to appoint an Arbitrator within one month after the request was made to him to act as the Arbitrator cannot be construed as the failure of the appointed Arbitrator to proceed with the reference. Request was made by the Petitioner to the Chief Engineer for acting as the Arbitrator. As stated above, no request to him had been "made by the Petitioner to nominate or appoint an Arbitrator. If after such nomination or appointment of an Arbitrator by the Chief. Engineer, the said nominated or appointed Arbitrator does not enter on or proceed with the reference such act on the part of such nominee would amount to a neglect or refusal within the meaning of Section 8(l)(b). In any event, the period, of one month mentioned in Explanation to Section 9 cannot be construed as a period of limitation on the expiry of which, the remedy of the Respondent is barred. Mrs. Banerjee has relied upon Union of India v. New India Constructors, Delhi, and Ors. in this connection. It should be remembered that in all these three cases the agreed Arbitrator or the appointing authority has exercised their option to appoint an. Arbitrator and, as such, there has been an "appointed Arbitrator" Within the meaning of Section 8(l)(b). Both in Surendra Nath Paul v. Union of India (Supra) and [Union of India \(UOI\) Vs. New India Constructors, Delhi and Others](#), the question was whether the power of the named Arbitrator to appoint another Arbitrator is exhausted after he has exercised his power once to nominate an Arbitrator. " Mr. Ghosh has argued that those two decisions support his contention that the appointment by the Chief Engineer is the result of consent of the parties themselves and, as such, the nominee of the Chief Engineer is also an "appointed Arbitrator. As stated earlier, there is no doubt that the parties have consented to the appointment of the Chief Engineer and also to the appointment of an Arbitrator by the Chief Engineer. The power to appoint Arbitrator by the Chief Engineer or the machinery or procedure to appoint an Arbitrator in the event of the . Chief Engineer's inability or unwillingness to act as the Arbitrator has certainly been the result of the consent of the parties. But, in order to attract Section 8(l)(b) the Petitioner must satisfy the Court that the appointed Arbitrator, "in this case, the Chief Engineer, has failed or neglected or expressed his -inability to act, which term includes his inability to nominate. In the Division Bench case, the Secretary, Ministry of Works, Housing and Supplies, and in the. second case, the General Manager as the third party or the appointed Arbitrator did, in fact, exercise their power to appoint an Arbitrator and, as such, there has been art appointed Arbitrator within the meaning of Section 8(l)(b).

7. Mrs. Banerjee has relied upon Union of India v. New India Constructors, Delhi and Ors. (Supra) in support of her contention that in the present case the Chief Engineer has not failed or neglected to act inasmuch as the Chief Engineer has not expressed his unwillingness to act as the Arbitrator. According to her, the failure to act would only arise when the Chief Engineer has accepted his appointment as the Arbitrator. Admittedly in the present case, although the Chief Engineer was requested by the Petitioner to act as the Arbitrator on April 7, 1970, the Petitioner waited for more

than a month for getting an intimation from him and on May 16, 1970, suggested the name of Mr. Tayebji as the Arbitrator for the consent of the Respondent. It is not denied that the Chief Engineer received the said letter in due course and it must be construed that the Chief Engineer by his conduct has expressed his unwillingness to act as the Arbitrator. I am not willing to accept the contention that unless and until the Chief Engineer expresses his inability or unwillingness to act in writing, he cannot be blamed for neglect, refusal or inability to act as the Arbitrator. It may be added here that in the Punjab case although the learned Judges have indicated that Section 8(l)(b) has no application in the facts of that case and yet, in fact, they did appoint an Arbitrator.

8. Lastly, it has been argued by Mr. Ghosh that this application is also maintainable u/s 8(l)(a). Relying upon Surendra Nath. Pant v. Union of India (Supra) and East India Construction Co. Pvt. Ltd. v. Union of India (Supra) he has reiterated his argument that in the present case the Chief Engineer or his nominee has been appointed by consent. of the parties, and as there is no concurrence in such appointment and as the arbitration proceedings could not commence on account of want of concurrence in the appointment the Court, should appoint an Arbitrator. u/s 8(l)(a) an Arbitrator is to be appointed by consent of the parties. If, however, such appointment by consent is not possible any party may serve the other party with a written notice to concur in the appointment of a person of his choice as the proposed Arbitrator. As stated earlier, the machinery or the procedure to appoint an Arbitrator has been agreed upon by the parties. But, there must be a proposal of a particular person from one side in whose appointment the other party has not concurred. In the instant case, the Chief Engineer has not appointed or proposed a person as the Arbitrator. Therefore, no situation has arisen where the Petitioner has not concurred in the appointment of an Arbitrator. Section 8(l)(a) arises only when an Arbitrator or Arbitrators are to be appointed by consent of the parties; it cannot contemplate cases where a particular person or his nominee is agreed to be the Arbitrator and there is no option for one party or the other to suggest or to agree to an Arbitrator. Reference may be made to my observation on this point in East India Construction Co, Pvt. Ltd. v. Union of India (Supra). It should be remembered that the question of neglect or refusal to act as the Arbitrator is not contemplated. in Section 8(l)(a) of the Act The Petitioner's case is that the Chief Engineer has failed or neglected to take steps in the commencement of the reference and not that the person to be appointed by the parties has not been agreed upon by the Petitioner.

9. For all the reasons stated above this application must be dismissed. But there will be no order as to costs. It may be stated, however, that the Respondent has expressed in para. 8 of the affidavit affirmed by Satyabrata Kundu on behalf of the Respondent that the Chief Engineer already approached two persons to "ascertain their views if they would be willing to act as the sole Arbitrator in this matter. Be that as it may, the Chief Engineer is directed to appoint an Arbitrator in accordance with the arbitration agreement within three weeks from to-day so that disputes between

the parties may be determined without further delay.