

(2000) 06 CAL CK 0007

Calcutta High Court**Case No:** A.P. No. 323 of 1998, A.P.O.T. No. 450 of 2000 and G.A. No. 2127 of 2000National Buildings Construction
Corporation Limited

APPELLANT

Vs

Evergreen Construction

RESPONDENT

Date of Decision: June 21, 2000**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 14(1)(a), 15(2)

Citation: 104 CWN 1034 : (2000) 2 ILR (Cal) 394**Hon'ble Judges:** Vinod Kumar Gupta, J; Arunava Barua, J**Bench:** Division Bench**Final Decision:** Allowed

Judgement

Vinod Kumar Gupta, J.

There will be an order in terms of prayer (a) of the petition. The order under appeal passed on April 20, 2000, by the learned Single Judge Comprises of two parts. In the first part the Learned Single Judge after making some observations has held that the Sole Arbitrator, Mr. D.J. Biswas has become functus officio. In the second part he has directed that the matter be placed before the Hon'ble Chief Justice for naming a new Arbitrator.

2. The Petitioner, Respondent No. 1, M/s. Evergreen Construction had approached the learned Trial Judge for directions with regard to the termination of the authority of the Arbitrator. The learned Trial Court has referred to various stages of the case, to indicate that the Arbitrator, the Respondent No. 2 has not been conducting himself with reasonable despatch and despite the expiry of more than two years he has not completed the arbitration proceedings. Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 clearly provides for the termination of the mandate of an Arbitrator if he is unable to perform his function without undue delay or reasonably fails to act without such undue delay. The facts narrated in the order under appeal

do clearly suggest that the Respondent No. 2, the Sole Arbitrator did not perform conclude the arbitration proceedings within a reasonable time. He also failed to act without delay. Therefore, his mandate was rightly terminated by the learned Trial Judge vide the order under appeal.

3. After the mandate of the Respondent No. 2 had stood terminated, the natural consequence would be the appointment of a new Arbitrator. The Arbitration Agreement between the parties clearly stipulates that the Arbitrator has to be appointed by the Chairman-cum-Managing Director of the Appellant Corporation. Sub-Section (2) of Section 15 of the said Act clearly says that "where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the ruled that were applicable to the appointment of the Arbitrator being replaced".

4. The appointment of a substitute Arbitrator is a natural follow up, a necessary corollary to the termination of the mandate of the outgoing Arbitrator. Sub-Section (2) of Section 15 of the Act clearly suggests that the appointment of the substitute Arbitrator, being natural, has to be in accordance with the rules of arbitration that were applicable to the appointment of the outgoing Arbitrator. If the rules of arbitration, the arbitration agreement in our case, clearly provide that the Chairman-cum-Managing Director of the Corporation shall appoint the Arbitrator, there was no occasion or cause for the learned Trial Judge to refer the matter to the Hon"ble Chief Justice for appointment of the new Arbitrator. As is well-known, it is only under Sub-Section (6) of Section 11 of the Act that in a situation like the present one the Chief Justice has the jurisdiction to appoint an Arbitrator. Sub-Section (6) reads thus:

(6) Where, under an appointment procedure agreed upon by the Parties,-

(a) a party fails to act as required under that procedure: or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure Provides other means for securing the appointment.

5. Since a reference is made to Sub-Section (2), we may as well reproduce herein below Sub-Section (2) of Section 11 of the Said Act which reads thus:

(2) Subject to Sub-Section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

6. A combined reading of Sub-Sections (2) and (6) of Section 11 of the Act clearly suggests that it is only if and when a party fails to act as required under the procedure formulated in the Arbitration Agreement as per the requirement

contained in Sub-Section (2), the other party may request the Chief Justice to take necessary measures for securing the appointment of the Arbitrator. The occasion or the cause for a party in the present case to approach the Chief Justice would thus arise only if, despite the agreement between the parties, the Chairman-cum-Managing director of the Corporation should have failed to nominate a substitute Arbitrator.

7. That being the case here, in our considered opinion the learned Trial Judge erred in law in straightaway referring the matter to the Hon"ble Chief Justice for appointment of the substitute Arbitrator. The learned Trial Judge should have left that function to be performed by the Chairman-cum-Managing Director himself and only if the Chairman-cum-Managing Director would have neglected or failed to perform such function, was it open to the Respondent No. 1 to have approached the Chief Justice in terms of Sub-Section (6) of Section 11 of the said Act for taking necessary measures for securing the appointment of the new Arbitrator.

8. We are, therefore very sure that the second part of the order under appeal is outside the scope of the Arbitration and Conciliation Act, 1996 and this part being appealable under Clause 15 of the said Act, we allow this appeal and set aside the second part of the judgment under appeal.

9. Mr. Basu, learned Advocate appearing for the Appellant has stated before us that the Chairman-cum-Managing Director of the Appellant-Corporation shall appoint the substitute Arbitrator within two weeks from today. We record this undertaking.

10. The first part of the order, therefore, is upheld. The second part of the order relating to the direction that the matter be placed before the Hon"ble Chief Justice for appointment of the substitute Arbitrator is set aside.

11. The appeal and the application for stay, both being treated as on day's list are disposed of accordingly. All undertakings given in that behalf shall stand discharged.

12. All parties are to act on a signed xerox copy of this dictated order on the usual undertaking.

Arunava Barua, J.

I agree.

Appeal allowed in part.