(1993) 03 CAL CK 0038

Calcutta High Court

Case No: Suit No. 124 of 1992

Ranjeet Singh		APPELLANT
	Vs	
Union of India (UOI)		RESPONDENT

Date of Decision: March 29, 1993

Acts Referred:

- Arbitration Act, 1940 - Section 20, 20(4)

Citation: (1993) 1 ILR (Cal) 495

Hon'ble Judges: Ajoy Nath Ray, J

Bench: Single Bench

Advocate: B. Mitra, for the Appellant;D. Basu and B. Debnath, for the Respondent

Judgement

Ajoy Nath Ray, J.
This is an application for filing of an agreement in Court and for an order of reference u/s 20 of the Arbitration Act.

2. Under the arbitration clause which is set out at p. 11 of the annexures to the petition, the claim in the instant case being above the value of Rs. 5 lac, two arbitrators would have to be appointed. The usual Railway machinery for sending of a panel is also laid down therein.

3. A question has arisen, rather at the instance of the Court than at the instance of the parties, as to what is the correct legal order to be passed u/s 20 in these circumstances. Section 20, Sub-section (4) is set out below:

20(4). W.here no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

4. It is well-known that there is an alternative given to the claimant either to proceed under Chap. II or to apply u/s 20 which comprises Chap. III of the Arbitration Act. In

case the claimant wishes to go by the strict machinery of the arbitration clause provided in the agreement, then the claimant has the liberty to proceed under Chap. II. That chapter contains various sections whereby the nomination of two arbitrators can be secured either without intervention of Court or by making of application to Court. Certain consequences follow in case one part who is to nominate an arbitrator does not so nominate. That procedure and those consequences do not concern us here.

5. According to the wording of Sub-section (4) of Section 20 it is quite clear that the Court has no discretion in the matter of ordering a reference unless sufficient cause is shown why the arbitration agreement should not at all be filed. If no such cause is shown the Court must make an order for filing of the arbitration agreement and cannot direct the. party to proceed alternatively under Chap. II. In other words, the choice of the party to proceed under Chap. II or under Chap. III is the party''s own choice and cannot be determined or modified by the Court.

6. Once the choice is made and an application u/s 20 is filed, the Court is again bound to make a reference not in any and every manner, but only as indicated by the words of Sub-section (4), i.e. either to the arbitrator appointed aleady by the parties or where the parties cannot agree upon an arbitrator to an arbitrator appointed by the Court.

7. If the parties have aleady chosen a named arbitrator in the agreement, then the Court must make an order of reference to the named arbitrator. It would be improper in such a case for the Court to choose a different arbitrator of its own by passing such named arbitrator. The decision in the case S. Rajan Vs. State of Kerala and another, is an authority for the said proposition and Mr. Basu corectly relied in this regard upon paras. 4 and 12 of the said judgment.

8. If the parties have named two arbitrators in the arbitration clause, then also I would be willing to hold, upon general principles, that the Court in that case also must make an order of reference to the said two named arbitrators. This is because an expression in the singular includes an expression in the plural unless the context points to he contrary.

9. But, as here, whee no arbitrator is agreed upon either in the agreement or at any time upto the passing of the order on the application u/s 20, then and in that event the last part of Sub-section (4) comes into operation and a reference has to be made to an arbitrator to be appointed by the Court.

10. In the matter of such an appointment, of course, the arbitration clause would be deviated from. The machinery of appointment in the agreement might be by exercise of choice of an arbitrator by a named office holder. For example, the President of the Union of India, or the General Manager of a particular Railway might be the nominating authority for selecting an arbitrator. But such specific mention of a nominating authority is not the same thing as nomination of an agreed

arbitrator in the arbitration agreement. Sub-section (4) of Section 20 does not anywhere either say or imply that in case the nominating authority is specified, then also the Court must make an order of reference by directing the said nominating authority to nominate an arbitrator. Were the Sub-section so worded, then three would be much less material difference in proceeding under Chap. II than under Chap. III.

11. In the case of Union of India v. Prafulla Kumar, (1983) 1 LLJ 304 the President of the Union of India was the nominating authority. It is true that in the concluding portion of that case it is recorded that both parties expressed their desire that the President should be asked to appoint an Abitrator and the Court passed an order in that regard. What the Supreme Court does in one particular case is a matter within the province of the Supreme Court itself. What the Supreme Court lays down as a matter of principle, however, concerns not merely the Supreme Court itself, but all other subordinate Courts like mine, which are bound by the authority of that superior pacedent. In the judgment it was said as follows in para. 3, refering to the above Sub-section of Section 20:

The Sub-section requires that the Court shall make an order of reference to the arbitrator appointed by the parties whether in the agreement or otherwise. If no such arbitrator had been appointed, the Court may proceed to appoint an arbitrator by itself. Thus if an arbitrator had been appointed whether in the agreement or otherwise, the Court shall make an order of reference to him. In this case every dispute shall be referred to the sole arbitration of the person appointed by the President of India An arbitrator, in fact, has not been appointed by the President though the provision has been made for such appointment. Considering strictly the words of Sub-section (4) the Court is not bound to make an order of reference to the person that is to be appointed by the President of India.

12. Thus the Supreme Court recognised clearly the mandate of Sub-section (4) not extending to those cases where the arbitrator is not named but only the nominating authority is named.

13. In the instant case the claimant has prayed for arbitration in accordance with arbitral machinery set out in the agreement and that is prayer (d) of the application. The letter damanding arbitration dated June 8, 1992, is also to that effect. Learned Counsel appearing for the claimant has also said that he would be willing to the sole reference of the General Manager, South Eastern Railway. Such an agreement upon the single personnel of the General Manager is however left at the stage of submission of Learned Counsel for the claimant and has not formed the subject of any written compromise which could bind parties for all subsequent times. Moreover, the arbitration agreement itself provides to the effect that the General Manager alone is not the designated sole authority for arbitration in matters above the claim for Rs. 5 lac.

14. Under these circumstances, I am unable to come to the conclusion that the General Manager, South Eastern Railway, is a person agreed upon by the parties as the sole arbitrator within the meaning of Sub-section (4) of Section 20.

15. Mr. Basu referred me to the decision of a learned Single Judge of the Patna High Court in the case of M/s. Ruby Construction v. State of Bihar AIR 1993 Pat. 17 It is true that from the extracts appearing in the head note of the said judgment as well as from the portion of the judgment marked para. 12, the learned Judge had said that the Court would ordinarily respect, in making a reference u/s 20, Sub-section (4), not only the naming of a particular arbitrator but also the machinery for appointment of arbitrator, even if the agreement provides only such a specified machinery and does not go so far as to provide the actual name of an agreed arbitrator.

16. With the greatest of respect to the said learned Single Judge, on the basis of the express wording of Sub-section (4) and on the authority of the case of Profulla Kumar Sanyal (Supra) I am unable to agree that Section 20, Sub-section (4) is applicable where merely the machinery of appointment is provided but the arbitrator himself has not been named as agreed between the parties.

17. I have said before that the difference arises between the Court''s appointment of a sole arbitrator, and the following of the machinery of arbitration as provided in the agreement, because of the choice made initially by the claimant himself. As soon as the claimant chooses to proceed under Chap. III the claimant calls for a procedure which is somewhat more expeditious than the procedure under Chap. II even though, at least in theory, the arbitral procedure is supposed to be expeditious in all cases.

18. Under these circumstances, the arbitration agreement shall be filed in Court. Mr. Ranajit Kumar Mitra, Barrister, is appointed sole arbitrator for the purpoe of arbitrating upon the disputes and differences which have arisen between the parties until date. Mr. Mitra would be entitled to fees of 100 G. Ms, per sitting of any duration to be brone by the parties equally. He would make and publish his award within four months of entering upon reference. He would be entitled to proceed in a summary way and need not follow the strict procedure of calling of witnesses, recording of oral evidence, or formal discovery and inspection of documents. The claimant shall file the statement of claim before the arbitrator within such time as the arbitrator might direct and the Respondent shall file the defence thereto again within such time as the arbitrator might direct. Thereafter, the procedure shall be as controlled by the learned arbitrator.

19. Stay of operation of the order is asked for but the same is refused.

20. All parties, others concerned and the arbitrator to act on a signed copy of this dictated order on the usual undertaking.