Nandyal Co-Op. Spinning Mills Ltd vs K.V. Mohan Rao on 5 March, 1993

Equivalent citations: 1993 SCR (2) 280, 1993 SCC (2) 654, 1993 AIR SCW 2260, 1993 (2) SCC 654, (1993) 2 SCJ 442, (1993) 2 SCR 280 (SC), 1993 BLJR 2 1179, (1994) 1 CIVLJ 409, (1993) 1 CURCC 667, (1993) 1 ARBILR 469

Author: K. Ramaswamy

Bench: K. Ramaswamy, R.M. Sahai

PETITIONER:
NANDYAL CO-OP. SPINNING MILLS LTD.

Vs.

RESPONDENT:
K.V. MOHAN RAO

DATE OF JUDGMENT05/03/1993

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
SAHAI, R.M. (J)

CITATION:
1993 SCR (2) 280 1993 SCC (2) 654
JT 1993 Supl. 89 1993 SCALE (2)8

ACT:
Arbitration Act, 1940
Section 8. Contract--Arbitration covenant--Agreement authorising a party to nominate Arbitrator--Nomination of Arbitrator--Right of other party to challenge nomination on the ground of biaa--Held by the convenant of arbitration in the agreement bias is not waived.
Power of Court to appoint Arbitrator--Agreement providing appointment of Arbitrator by a party--notice by other party to appoint Arbitrator--Authorised party not appointing Arbitrator within 15 days--Appointment of Arbitrator by Court held valid--Conditions for applicability of Section 8--Discussed.

HEADNOTE:

The respondent entered into a building-contract with the appellant-mill., Clause 65.1 of the contract provided "except where otherwise provided in the contract all disputes or questions relating to..... shall be referred to the sole Arbitration of the person appointed by the Administrative Head of owner. There will be no objection to any such appointment that the Arbitrator so appointed is the owner's representative, that he had to deal with the matters to which the contract relates and that in the course of his duties as owner's representative he had had expressed views. on all or any of the matters in dispute or differences".

Differences having arisen during the execution of the contract the respondent gave notice twice requesting the appellant to nominate an Arbitrator within 15 days. time but no action thereunder was taken except replying that the matter was under consideration. Thereafter the respondent riled a petition under Section 8 of the Arbitration Act, 1940 in the Court to appoint an Arbitrator. In the meantime, the appellant informed the respondent that a Superintending Engineer of B.H.E.L. Hyderabad was appointed as sole Arbitrator to which the respondent objected on the ground of bias. The Civil Court appointed a retired Judge of the High 280

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Court as Arbitrator. The appellant's revision petition "Us dismissed by the High Court.

In appeal to this Court it was contended on behalf of tile Appellant that (1) by the covenant of arbitration in the agreement the respondent had waived bias; (2) under the terms or the contract the respondent was to abide by the appointment of Arbitrator by the Administrative Head of the appellant and, therefore, the Civil Court lacked jurisdiction to appoint Arbitrator under Section 8(a) of the Act.

Dismissing the appeal, this Court,

HELD- 1. The appointment of the Arbitrator by the trial court as upheld by the High Court is perfectly legal and valid. [290A]

2. Under the contract all questions and disputes relating to the contract were to be referred to the sole arbitration of the person appointed by the Administrative Head of the appellant. The right to suit available under Section 9 of the Code of Civil Procedure has been contracted out. The waiver expressly engrafted was only of the Arbitrator appointed by the Administrative Head of the appellant one who was its representative who had had occasion to express views on all or any of the matters in dispute or difference, on which he had had earlier dealt with to which the contract related to. But there was noncontract to arbiter by named Arbitrator the

3. Justice must not only be done but seemingly appears to have been done. The Arbitrator must not only be impartial but also be objective circumspect and honest in rendering

his decision. 'Many a time the award is not a speaking Award which would inspire confidence for acceptance only when the above perspectives are. present. It is invalidity would be tested on grounds available in law. Admittedly the Arbitrator nominated, by the appellant acted on earlier occasions as appellant's Arbitrator. Therefore, the respondent rightly objected to the nomination of, Arbitrator. Such nomination, therefore, does not bind him. [286D-E]

Manak Lal v. Dr. Prem Chand, [1957] S.C.R. 575; C. Santa v. University of Lucknow & Ors.[1977] 1 S.C.R. 64 and V. Raghunadha Rao v. State of A.P., 1988 (1) A.L.T. 461, held inapplicable.

Judicial Review of Administrative Action by S.A. Desmith, 3rd Edn.

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p.223, referred to.

3.1.It is of the first importance that judicial tribunals should be honest, impartial and disinterested. This rule applies in full force to arbital tribunals, subject only to this exception, that parties who are free to choose their own tribunal may, provided they act with full knowledge, choose dishonest partial or interested Arbitrators (though this exception is in its turn subject to a statutory exception which gives parties who have so choosen a locus poenitentiae in certain circumstances). Apart from this exception, arbitrators who are in all other respects suitably qualified are disqualified by dishonesty, partiality or interest. [285C-D]

Russell's Arbitration, 19th Edn. p.116, referred to.

4. The application for appointment of an Arbitrator is not maintainable when an Arbitrator has already been appointed and the applicant has been informed of the said facts before the expiry of 15 days as envisaged under Section 8(1)(a). [287E]

4.1.Admittedly the respondent did gave notice twice requesting the appellant to nominate an Arbitrator within 15 day's time but no action thereunder had been taken. If no Arbitrator had been appointed in terms of the contract within 15 days from the date of the receipt of the notice, the Administrative Head of the appellant had abdicated himself of the power to appoint Arbitrator under the contract. Therefore, the Court had jurisdiction to appoint an Arbitrator in place of the contract by operation of Section 8(1)(a). The contention, therefore, that since the agreement postulated preference to Arbitrator appointed by the Administrative Head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. Had the contract provided for appointment of a named Arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit But that is not the case on hand. Therefore, the order of

the High Court needs no interference. [287G, 288E-G, 283D]
Union of India v. Prafulla Kumar Sanyal, [1979] 1 S.C.C. 631, relied on.
Chander Bhan Harbhajan Lal v. State of Punjab, [1977] 3 S.C.R. 38; M/s Boriah Basavish & Sons v. Indian Telephone Industries Ltd., A.I.R. 1973
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Mysore 309; V.K Construction Works (P) Ltd. v. Food Corporation of India, A.I.R. 1987 Pb. & Haryana 97 and Union of India v. Ajit Mehta & Associates, A.I.R. 1990 Bombay 45, held inapplicable.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil appeal No. 938 of 1993. From the Judgment and Order dated 12.10.92 of the Andhra Pradesh High Court in C.R.P. No.1381 of 1991. P.P. Rao and Mrs. Sarla Chandra for the Appellant. K. Madhava Reddy and G. Prabhakar for the Respondent. The Judgment of the Court was delivered by K. RAMASWAMY, J. Leave granted.

Having heard the learned Senior counsel M/s. P.P. Rao and K. Madhava Reddy on either side and having given our anxious consideration to their contentions, we find in final analysis that the order of the High Court needs no interference. The facts lie in a short compass, are as stated under The respondent concluded a contract with the appellant on February 11, 1986 to construct a building at a cost of Rs.1.00 Crore. During its execution since differences had arisen the respondent by his letter dated July 27, 1987 requested the Administrative Head of the appellant to appoint an Arbitrator within 15 days from the date of its receipt. On August 8 and 18, 1987 the respondent was informed that the matter was under consideration. His renewed request in letter on August 17, 1987 evoked no action. Finding it futile to await, on July 27, 1988, the respondent filed O.P. No.167 of 1988 in the Court of the Subordinate Judge, at Nandyal to appoint an Arbitrator. The notice was issued to the appellant therein. By letter dated July 27, 1988 the respondent was informed of the appointment of Sri Yethiraj, Superintending Engineer of B.H.E.L., Hyderabad as sole Arbitrator. After giving opportunity to both sides by Order dated March 12, 1991, the Civil Court appointed Sri Justice C. Sriramulu, a retired Judge of the High Court as Arbitrator. The High Court dismissed C.R.P. No.1381 of 1991 on October 25, 1992.

Sri P.P. Rao, learned Senior counsel conteded that the concurrent finding that Sri Yethiraj had bias against the respondent as he had acted on earlier occasions as an Arbitrator of the appellant is vitiated by legal error since bias can always be waived. By the covenant of arbitration in the agreement, the respondent had waived bias, Secondly, it is confended that Sri Yethiraj had no personal bias against the respondent and the contract postulated of appointment of an Arbitrator, the contract cannot be nul- lified on the plea of bias, as the endeavour of the court would be to give effect to the contract. We find no force in the contentions. Clause 65.1 of the Contract reads thus:

> "Except where otherwise provided in the contract ail disputes or questions relating to.....shall referred to the sole Arbitration of the person appointed by the ad-

> ministrative Head of onwer. There will be no objection to any such appointment that the Arbitrator so appointed is the owner's representative, that he had to deal with the matters to which the contract relates and that in the course of his duties as owner's representative he had had expressed views on all or any of the matters in dispute or differences.....
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> It is also a term of this contract that no person other than a person appointed by such Administrative Head as aforesaid should act as Arbitrator and if for any reason it is not possible the matter is not referred to the arbitration at all.....
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> Clause 65.2. Subject to as aforesaid the provisions of the Arbitration Act, 1940 (for short 'the Act' added) or any statutory modication or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings 'under this cluase."

It would thus be clear that all questions and disputes relating to the contract shall be referred to the sole arbitration of the person appointed by the Administrative Head of the appellant. The right to suit available under Sec.9 of the Code of Civil Procedure has been contracted out. The waiver expressly engrafted was only of the Arbitrator appointed by the Administrative Head of the appellant one who was its representative who had had occasion to express views on all or any of the matters in dispute or differences on which he had had earlier dealt with to which the contract related to. There is no contract to arbiter by a named Arbitrator the dispute or differences that had arisen under the Contract. Justice must not only be done but seemingly appears to have been done. Contracting parties agreed to abide by the Arbitrator, i.e. chosen forum. Russell's Arbitration, 19th Edition at p.116 stated that there is universal agreement amongst jurists of all countries that it is of the first importance that judicial tribunals should be honest, impartial and disinterested. This rule applies in full force to arbital tribunals, subject only to this exception, that parties who are free to choose their own tribunal may, provided they act with full knowledge, choose dishonest, partial or interested arbitrators (emphasis supplied) (though this exception is in its turn subject to a statutory exception which gives parties who have so choosen a locus poenitentiae in certian circumstances). Apart from this exception, arbitrators who are in all other respects suitably qualified are disqualified by dishonesty, partiality or interest.

When the arbitration tribunal was chosen by the contracting parties, undoubtedly they had chosen to avail of the adjudiction by the Tribunal and to abide by the decision. Having so chosen and taken a decision it would no loger be open to turn around and contend that the tribunal was biased against the party. This was the view laid by this court in Manak Lai v. Dr. Prem Chand [1957] SCR 575 at 589 thus:

> "It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

This ratio was followed in G. Sama v. University of Lucknow & Ors., [1977] I SCR 64 at pp. 69-70. The above ratio bears no relevance since the contract was not to appoint Sri Yethiraj as arbitrator nor the respondent stood by any award being made by him. Only an officer, representative of the appellant who had had an occassion to deal with the matter or expressed an opinion on the matter in dispute or difference, if appointed later, such an appointment (though open to debate but needs no occasion to decide) cannot be questioned as the respondent had contracted to waive that objection. The decition relied on by the High Court in V. Raghunatha Rao v.State of A.P., (1988) 1 ALT 461 was in relation to the appointment of an Engineer of the Department, the party to the contract. In the dotted lines contract it was held that the consensus ad idem was absent and the element of bias would be inherent from the facts situation. It bears no relevance to the facts of the case. In Judicial Review of Administrative Action by S.A. DeSmith (3rd Edition) at p.223 it is stated that "In a private law an independent commercial arbitrator must observe strictly judicial standards". At p.229 he further stated that "It is open to a party to lead evidence to prove that an independent arbitrator has shown altered bias. in favour of the other party or that an arbitrator who is an employee of the other party has prejudged the issue." Admittedly Yethiraj acted on earlier occasions as appellant's arbitrator. Justice must not only be done but seemingly appears to have been done. The arbitrator must not only be impartial but also be objective, circumspect and honest in rendering his decision. Many a time the award is not a speaking award which would inspire confidence for acceptance only when the above perspectives are present. Its invalidity would be tested on grounds available in law. Therefore, the respondent rightly objected to the nomination of Yethiraj. Such nomination, therefore, does not bind him. We find force in the stand taken by the respondent supported by Sri K. Madhava Reddy. It is next contended by Sri Rao that s.8(1)(a) of the Arbitration Act does not apply to the facts of this case as the contract abstracted hereinbefore makes the respondent to abide by the appointment of an arbitrator by the Administrative Head of the appellant. It he had an objection to the nomination of Yethiraj, he would have had requested for another arbitrator. The Civil Court lacked jurisdiction. The exercise of the jurisdiction by Civil Court under s.8(1)(a), is hedged with existence of the contract. Section 8(1)(a) of the Arbitration Act reads thus:

> "where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties and all the parties do not, after diferences have arisen, concur in the appointment or appointments;or.....
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> Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointments or in supplying the vacancy."

For its applicability, the following conditions must be fulfilled.

(1) There must be an arbitration agreement. (2) The agreement must provide that in case of difference one or more arbitrators to be appointed by consent of parties and did not concur in the appointment of the arbitrator/arbitrators.

(3) Disputes have arisen to which the agreement applies. (4) The parties had been consented in the appointment or appointments.

(5) The appointment is not made within 15 clear days of the srevice of the written notice to do so-, and (6) The application is made to the court by any party to the agreement.

The application for appointment of an arbitrator is not maintainable when an arbitrator has already been appointed and the applicant has been informed of the said facts before the expiry of 15 days as envisaged under s.8(1)(a). We have seen the arbitral agreement in Clause 65.1, and of applicability of the Act in Clause 65.2 thereof. The agreement provided that after the disputes had arisen and notice given by either party, power has been given to the Administrative Head of the appellant to appoint an arbitrator. Admittedly the respondent did gave notice twice requesting the appellant to nominate an arbitrator and within 15 day's time no action thereunder had been taken. The replies thereto were only that the matter was under con- sideration. After the expiry of the period prescribed the Administrative Head denuded his power under clause 65.1 of the contract to appoint the arbitrator. Long after the expiry of 15 day's time the respondent had invoked the jurisdiction of the trial court which is competent to deal with the matter.

It had given an opportunity to the appellant to contest the claim. Appellant had intimated the appointment of Yethiraj only long after the expiry of the period. In Union of India v. Prafulla Kumar Sanyal, [1979] 1 SCC 631 construing s.20(4) of the Act this court held in paragraph 4 thus:

> "If no such arbitrator had been appointed and when the parties cannot agree upon an arbitrator itself, the court shall make an order of reference to him. In this case, clause 29 of the Agreement provides that every dispute shall be referred to the sole Arbitration of the person appointed by the President of India or if he is unwilling to act to the person appointed by the arbitrator. An arbitrator, in fact, has not been appointed by the President of India though provisions has been made for such ap-
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> pointment.....
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> If an arbitrator had not been appointed, the court is to find whether the parties could agree upon an arbitrator. If the parties agree, the court has to appoint the person agreed as an arbitrator. If there is no such agreement, the court will have to appoint arbitrator of its choice."

It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of the receipt of the notice, the Administrative Head of the appointment had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of s.8(1)(a). The contention of Sri Rao, therefore, that since the agreement postulated preference to arbitrator appointed by the Administrative Head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the rights to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given

to the Administrative Head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under s.8(1)(a), then the respondent has been given right under clause 65.2 to avail the remedy under s.8(1)(a) and request the court to appoint an arbitrator. If the contention of Sri Rao is given acceptance, it amounts to put a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself. The ratio in Chander Bhan Harbhajan Lal v. State of Punjab, [1977] 3 SCR 38 at 41E & D relied on by Sri Rao is not applicable to the facts of this case. Therein no bar was created in the contract to appoint a fresh Committee for going into the dispute as stipulated in the condition. The appellant who had applied to the Govt. to nominate a Settlement Committee the Govt. moved the court for appointment of the Committee. Thus the Govt. itself was entitled to have the committee appointed under the agreement and instead had taken recourse to s.8(1)(a). The ratio in M/s. Boriah Basavish & Sons v. Indian Telephone lndustries Ltd., AIR 1973 Mysore 309 is also inapplicable to the facts in this case. Therein the contract expressly provided for appointment of an arbitrator by consent of parties. Since the parties did not agree, it was held that s.20(4) and not s.8 that would be applicable. The case of VK Construction Works (P) Ltd. v. Food Corporation of India, AIR 1987 Pb. & Haryana 97 is equally inapplicable. Therein the terms of the contract was that no person other than a person appointed by the Managing Director or Administrative Head of the Corporation should act as an Arbitrator. If for any reason it is not possible, the matter is not to be referred to the arbitration at all. In terms of that contract the invocation power of the court under s.8 was taken.

The case of Union of India v. Ajit Mehta & Associates, AIR 1990 Bombay 45 renders little assistance. Clause 70 of the contract therein provided an arbitration clause which postulated that all disputes between the parties to the contract shall, after written notice given by either parties to the contract to either of them, will be referred to the sole arbitration of an Engineering Officer to be appointed by the authority mentioned in the tender documents. Engineer-in-Chief was the authority concerned. On those facts it was held that the contract excluded the invocation of the jurisdiction of the court under s.8 of the Act and the arbitration award made pursuant thereto was held to be a nullity. Thus we hold that the appointment of the arbitrator by the trial court as upheld by the High Court is perfectly legal and valid warranting no interference. The appeal is accordingly dismissed, but without costs. T.N.A. Appeal dismissed.