

State Of W.B vs National Builders (Sahai, J) on 13 October, 1993

Equivalent citations: 1994 AIR 200, 1994 SCC (1) 235, AIR 1994 SUPREME COURT 200, 1994 (1) SCC 235, 1993 AIR SCW 3638, 1994 (1) BLJR 205, 1994 BLJR 1 205, 1994 (1) UJ (SC) 81, 1994 (1) ARBI LR 5, (1993) 6 JT 144 (SC), (1994) 1 ARBILR 5, (1994) 1 CIVLJ 486, (1993) 3 CURCC 612, (1993) 3 SCJ 634, (1993) 52 DLT 435, (1994) 1 RRR 299, (1994) 2 CALLT 39, (1993) 2 BANKCLR 563

Author: R.M. Sahai

Bench: R.M. Sahai, S.R. Pandian

PETITIONER:

STATE OF W.B.

Vs.

RESPONDENT:

NATIONAL BUILDERS (Sahai, J)

DATE OF JUDGMENT 13/10/1993

BENCH:

SAHAI, R.M. (J)

BENCH:

SAHAI, R.M. (J)

PANDIAN, S.R. (J)

ANAND, A.S. (J)

CITATION:

1994 AIR 200

1994 SCC (1) 235

JT 1993 (6) 144

1993 SCALE (4) 187

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by R.M. SAHAI, J.- The two questions of law that arise for consideration in this appeal are if the refusal of an arbitrator to resign while not accepting the joint

request of the parties to extend time for arbitration and leave it to them to decide their future course of action amounts to refusal to act by the arbitrator within the meaning of Section 8(1)(b) of the Arbitration Act (in brief 'the Act') and if it be so whether the power to appoint next arbitrator vests in the court or it has once again to be in accordance with the procedure provided in the agreement.

2. Dispute about settlement of claim in respect of construction of 250 bed hospital at Basudevnpura having arisen between the respondent (contractor) and the appellant (Public Works Department of the State of West Bengal) the Chief Engineer nominated a Superintending Engineer as arbitrator in accordance with Clause 25 of the agreement, the relevant part of which runs as under:

"Except where otherwise provided in the contract all questions and disputes ... shall be referred to the sole arbitration of the Chief Engineer of the department. Should the Chief Engineer be for any reason be 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."

3. When despite 59 sittings the proceedings did not come to an end and the arbitrator entertained certain applications of the appellant at a belated stage the respondent sought his resignation for legal misconduct. The application was decided by the arbitrator by a detailed order with following observations:

"I have given my opinion that there has been no misconduct on any of the grounds before me by the learned claimant, yet I am of the opinion justice delayed is justice denied and since in this case there has been delay and the process in which the learned Advocates of both the parties are leading and pleading the case, delay is inevitable, if the claimant suffers from loss of confidence and apprehends miscarriage of justice from the arbitrator whose award is vital to him I shall not intend to interfere in his way of pursuit for justice.

I, therefore, direct that further extension of time on consent of both the parties will not be allowed by me and the extended date of arbitration is being allowed to expire. As regards claimants' humble prayer to me that I would be pleased to resign from the office, I am restraining myself in issuing any order as it concerns interest of both the parties and I leave it to both the parties to decide."

With this order the respondent approached the Chief Engineer and sought for appointment of a retired Additional Chief Engineer named in the application as the sole arbitrator. The request was not accepted as according to the Chief Engineer the arbitrator appointed was still continuing. The respondent was however permitted to approach the court for extension of time. The respondent, instead of filing application for extension of time, approached the Court of Assistant District Judge under Section 12(2) of the Act for revoking authority of the sole arbitrator and filling the vacancy by appointing another arbitrator. The application was allowed as in the opinion of the court the arbitrator in the circumstances of the case had refused to act. The order was challenged by way of application under Article 227 of the Constitution. The application was dismissed as the inference

drawn by the trial court that the arbitrator refused to act was a plausible one. It is against this order that this appeal has been filed. It is not clear if during pendency of the application under Article 227 in the High Court the appellant had applied for any interim order for stay of further proceedings before the arbitrator. However even if it was prayed for then it presumably was not granted as, admittedly, during pendency of the application the arbitrator appointed by the Assistant District Judge started the proceedings in which the Executive Engineer appeared but expressed his inability to participate in absence of any instruction from the department and also because the department had decided to challenge the order of the trial court before the High Court. In any case it is not disputed that the arbitrator, since, has given the award which has not been challenged by the department. May be the department might have been advised, that the finality of the award could be subject to decision of this appeal as if the appointment of the next arbitrator is held to be invalid the proceedings consequent to it shall fall automatically.

4. To decide if the court was justified in assuming jurisdiction to appoint another arbitrator as the arbitrator appointed by the Chief Engineer under Clause 25 refused to act, it is necessary to examine the scope of Section 8(1)(b) of the Arbitration Act which reads as under:

"8. (1) In any of the following cases(a)

(b) If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement, does not show that it was intended that the vacancy should not be supplied and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c)

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy." This provision vests the court with supervisory jurisdiction to interfere with relationship between the parties and the arbitrator if any of the situations as provided in this sub- section comes into being. What was claimed by the respondent, which has been accepted by the courts below, is that the sole arbitrator appointed by the Chief Engineer refused to act. The question, therefore, is what does this expression mean? Refusal to act in legal sense means denial to do something which one is obliged to do under law. Black's Law Dictionary explains it thus: 'The act of one who has, by law, a right and power of having or doing something of advantage, and declines it'. In private law, of which arbitration is a part with court's power to supervise and intervene in arbitral proceedings within statutory framework, an arbitrator who is appointed, with common consent of parties, may not proceed with arbitration for various reasons. The refusal to act may be express or implied. If an arbitrator resigns or informs the parties his inability to act it would be express refusal. And even the courts cannot force him to arbitrate. In *Shibcharan v. Ratiraman* when despite his refusal the Subordinate Judge directed the records to be sent back to the arbitrators to submit the award 1 ILR (1885) 7 All 20: 1884 AWN 212 within ten days who, thereafter, made the same it was set aside by the High Court and it was held:

"Expression has recently been given by this Court to the view, that one of the most essential principles of the law of arbitration is, that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties of arbitrating between the contending parties who have agreed to repose confidence in his judgment. Indeed, the finality of such award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them.

This essential characteristic of the effect of such adjudications is necessarily vitiated if compulsion is employed by the Court."

5. Refusal to act may be inferred as well. On what facts such an inference can be raised cannot be laid down with certainty. There can be no fixed principle for it. When an arbitrator has failed to discharge his obligation so as to give rise to an inference that he has refused to act it shall have to be decided by the court on facts and circumstances of each case. For instance in *Priyabrata Bose v. Phani Bhusan Ghose*² the High Court held that even when the arbitrator was not willing to proceed unless his fees were paid in advance, it was refusal to act. Inaction by the arbitrator or inordinate delay in rendering the award are yet some of other reasons due to which courts have raised an inference that the arbitrator refused to act. (See *Manohar Singh Sahay & Co. v. Jogendra Singh Kalra*³, *State of U.P. v. Sardul Singh Kulwant Singh*⁴ and *Gajanand Sita Ram v. Phul Chand Fateh Chand*⁵. The parties appoint an arbitrator by consent and he undertakes to decide the dispute out of his free will. He may withdraw his consent expressly or may act in a manner giving rise to inference that he was not willing to act any more. In either case the basic principle is that the arbitrator cannot be forced to act. But such an inference should not be readily raised. The court's primary concern should be to uphold the arbitration. But once the court is satisfied that the arbitrator has refused to discharge his obligations then it has statutory duty to intervene and act in accordance with Section 8(1)(b) of the Act. From the order of the arbitrator extracted earlier what is made out is that he felt that the respondent had lost confidence in him. With opinion, thus formed, he refused to accede to the request of the parties to extend the time for the award and directed parties to decide their future course of action. True that he did not resign. It is also true that the Chief Engineer insisted that the arbitrator was continuing. But where the arbitrator refused to extend time and brought arbitration to an end leaving it open to parties to decide their future course of action as one of the parties whose vital stakes were involved did not have confidence in him, the courts ² AIR 1937 Cal 523 ³ AIR 1984 Pat 3: 1983 BBCJ (HC) 606 ⁴ AIR 1985 All 67: 1985 All CJ 117 ⁵ AIR 1930 All 675: 1930 ALJ 1373 do not appear to have committed any error of law in drawing inference that the arbitrator had refused to act.

6. More important issue than this that was urged was that since Clause 25 of the agreement empowered the Chief Engineer to nominate any other person to act as arbitrator the intention was to fill the vacancy in the same manner as provided in the agreement. This raises an important issue as to whether the power of the Chief Engineer to arbitrate himself or to nominate any other person as arbitrator is exhausted or revived after the earlier arbitrator nominated by him refused to act. In other words does the power to appoint a sole arbitrator under the agreement come to an end with such appointment or every time an arbitrator refuses to act the parties are to take recourse to

appoint another arbitrator as provided in the agreement itself. Settlement of dispute between the parties through medium of an independent person in whom both parties repose confidence is the basic foundation on which the entire law of arbitration is founded. When the agreement provides that dispute between parties shall be referred to the person named in an agreement it is an appointment by consent. But where the arbitrator so appointed refuses to act the next appointment could again be made either as agreed between the parties and provided for in the arbitration clause or by consensus. But where either is absent no party to the arbitration agreement can be forced to undergo same procedure, for the simple reason that the arbitrator having refused to act he cannot be asked to arbitrate again. In law the result of such refusal is that the agreement clause cannot operate. It, therefore, follows that in a case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act then the agreement clause stands exhausted. And it is for the court to intervene and appoint another arbitrator under Section 8(1)(b), 'if arbitration agreement does not show that it was intended that the vacancy should not be supplied'. That is, the agreement should not debar any further arbitration. If it is provided in the agreement that if the arbitrator appointed in accordance with the agreement refuses to act then the dispute shall be resolved by another arbitrator, there is an end of the matter. But if the agreement does not show this then the next arbitrator can be appointed by the court only. The expression used in the subsection is clear indication that the court is precluded from exercising its power only if the parties intended that the vacancy should not be filled. In other words the court shall exercise jurisdiction to appoint another arbitrator except where it is specifically debarred from doing so. The word 'show' used in the clause appears to be significant. It in fact furnishes the key to the construction of the expression. Mere neglect or refusal to act alone is not sufficient to empower the court to intervene. The agreement must not further show that the parties intended that the vacancy shall not be supplied. To put it affirmatively in absence of clear words or explicit language to the contrary the court may appoint another arbitrator. The true effect of the word is that it extends jurisdiction of the court to exercise power, if the agreement does not specifically debar it from doing so. To put it simply the court's power to interfere and appoint an arbitrator comes into operation if the arbitrator refuses to act and the agreement does not show that the parties did not intend that the vacancy shall not be supplied. In *Prabhat General Agencies v. Union of India*⁶ it was held by this Court: (SCC p. 82, para 4) "... that the language of the provision is not 'that the parties intended to supply the vacancy' but on the other hand it is that 'the party did not intend to supply the vacancy'. In other words if the agreement is silent as regards supplying the vacancy the law presumes that the parties intended to supply the vacancy. To take the case out of Section 8(1)(b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy."

In *Chander Bhan Harbhajan Lal v. State of Punjab*⁷ it was held that where a committee of arbitrators nominated by the Government becomes incapable of acting as such "it was within the competency of the Court to proceed to appoint a new committee". In *Union of India v. R.B. Ch. Raghunath Singh & Co.*⁸ the arbitration clause provided for settlement of dispute and differences by the Chief Commissioner/Director of Storage, Ministry of Food, Government of India and his decision was to be final and binding. The post of Director of Storage was abolished and the Chief Commissioner refused to act. The question arose whether the Court could appoint an arbitrator in exercise of power under Section 8(1)(b). It was claimed on behalf of the Union of India that where there was a named arbitrator even though he was named by office, it was not open to the Court to

supply the vacancy in his place under Section 8(1)(b) of the Act. The contention was repelled and it was held that the argument was without any substance as: "the Court had no power to supply the vacancy under Section 8(1)(b) only if the arbitration agreement did show that the parties did not intend to supply the vacancy. If no such intention could be culled from the arbitration clause, the court could supply the vacancy." (SCC p. 22, para 4) It is thus settled that even where an authority is named by office to be the sole arbitrator but he refuses to act then the jurisdiction to appoint another arbitrator vests in the court. Since Clause 25 of the agreement extracted earlier does not indicate that the parties did not intend to supply the vacancy the court in our opinion rightly assumed jurisdiction under Section 8(1)(b) to appoint another arbitrator.

7. Basis for assuming such jurisdiction, as stated earlier, is that the clause is rendered inoperative. Where the agreement provides for appointment of a specific person either by name or by designation and that person refuses to act then the question of appointing him again cannot arise. Refusal by such a person results in the agreement clause ceasing to operate. When two parties agree for appointment of A or B by name or designation and the person so named refuses to act then the agreement shall be deemed to have exhausted itself. The person so named having refused to act, he 6 (1971) 1 SCC 79 7 (1977) 2 SCC 715 8 (1979) 4 SCC 21 cannot be asked again to arbitrate. That would be contrary to the very basis of arbitration that no one can be forced to act against his free will. It would also be contrary to the agreement and if there is no agreement to appoint another person, the only remedy is to approach the court to exercise its statutory power and appoint another arbitrator. Same result follows where the arbitration clause empowers the sole arbitrator either to arbitrate himself or to nominate anyone else. It was urged that the principle of agreement clause coming to an end cannot apply where the sole arbitrator has been given power to nominate another person. According to the learned counsel once the nominee refused to act the Chief Engineer was again empowered to nominate another person in his place. In our opinion the submission is not well founded in law. A person nominated by the sole arbitrator stands substituted in his place. He does not have any independent personality. The power and authority exercised by him is the same as the authority which nominated him. Therefore, once the nominee refuses to act it shall be deemed that the arbitrator mentioned in the arbitration clause has refused to act and therefore, the clause would cease to operate in the same manner as the Chief Engineer himself has refused to act. The appointment of next arbitrator could, only be in accordance with Section 8(1)(b) of the Act.

8. For these reasons the appeal fails and is dismissed with costs.