

Supreme Court of India

G. Ramachandra Reddy vs Chief Engineer on 29 April, 1994

Equivalent citations: 1994 AIR 2381, 1994 SCC (5) 142

Author: K Ramaswamy

Bench: Ramaswamy, K.

PETITIONER:

G. RAMACHANDRA REDDY

Vs.

RESPONDENT:

CHIEF ENGINEER

DATE OF JUDGMENT 29/04/1994

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

VENKATACHALA N. (J)

CITATION:

1994 AIR 2381

1994 SCC (5) 142

JT 1994 (4) 181

1994 SCALE (2) 1057

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1. Leave granted.

2. This appeal arises from the judgment of the Division Bench of Madras High Court in OSA No. 281 of 1992 dated 5-1-1993.

3. The appellant's contract was terminated by the respondent and in consequence thereof, by notices dated 23-7-1991 and 21-8-1991, the appellants exercising the option under clause 17 of General Condition of Contract, called upon the Engineer-in-Chief to appoint sole Arbitrator, in terms of the contract, to adjudicate the dispute that had arisen between them. Since no action was taken by the respondents, the appellant filed a suit on 4-3-1992 under Section 20 of the Arbitration Act, 1940 for short 'the Act', requesting the Court to appoint an arbitrator. Learned Single Judge of the High

Court by his judgment dated 23-9-1992 appointed Justice M.A. Sattar Syeed, a retired Judge of the High Court as sole Arbitrator. On appeal, a Division Bench of that High Court agreed with the Single Judge that despite the issue of notice calling upon the respondent to appoint the Arbitrator in terms of the contract, no action was taken by the respondent. Its suggestion that the respondent could agree for appointment of any one of the five arbitrators named in the list given by the appellant did not find favour with the respondent. Yet, the Division Bench directed the respondent to appoint an arbitrator within 15 days from that date and declared that in case the respondent failed to do so, the arbitrator appointed by the Single Judge would be deemed to have been appointed under Section 20. The appellant, feeling aggrieved against the judgment of the Division Bench, has filed the appeal.

4. Shri K. Parasaran, learned Senior Counsel for the appellant contended that once the appellant had issued notice to the respondent calling upon him to appoint an arbitrator in terms of the contract, the failure to do so had given right to the appellant to invoke the jurisdiction of the civil court under Section 20(4) of the Act and that court got jurisdiction to appoint the Arbitrator of its choice. When the learned Single Judge had exercised its jurisdiction under Section 20(4) of the Act and appointed the arbitrator, the Division Bench committed a manifest error of law in interfering with that appointment. Shri A.S. Nambiar, the learned Senior Counsel for the respondent, sought to support the Division Bench judgment relying upon the judgment of this Court in *Union of India v. Prafulla Kumar Sanyal*¹ wherein this Court had observed that before appointing an arbitrator by the court itself "it is desirable that the court should consider the feasibility of appointing an arbitrator according to the terms of the contract" and the issuance of the notice giving 15 days' time as contemplated under Section 8(a) of the Act did not arise on the facts in the present case. Therefore, his contention was that though the appellant (sic respondent) had not appointed the arbitrator before the expiry of 15 days' notice before the matter was decided by the Division Bench the appellant was given an option to accept 1 (1979) 3 SCC 631 anyone among the five named persons to be a sole Arbitrator and having failed to accept anyone, it is not open to the appellant to impugn the correctness of legality of the appointment of the Arbitrator by the Division Bench, in terms of the contract,

5. We find no force in the contentions of Shri Nambiar. This Court interpreting Section 20(4) of the Act, has, in *Prafulla Kumar case*¹ itself, specifically laid down that sub-section (4) requires "that the court shall make an order of reference to the arbitrator appointed by the parties under the agreement or otherwise if such arbitrator had not been appointed when the parties cannot agree to appoint an arbitrator, the Court may proceed to appoint an arbitrator by itself". In that case, the parties agreed before this Court, expressing their desire that the President should be asked to appoint an arbitrator as contemplated under clause 29 within two months from the date of the order passed by this Court. In that backdrop this Court had expressed the desirability or the feasibility to appoint an arbitrator in terms of the contract. Those observations of this Court cannot be understood or torn out of context and read in isolation. The court should endeavour that the contract should always be given effect to, though the contracting party had failed to act according to contract. It is to be seen, whether the contract provided for the appointment of a named arbitrator, and if so, the parties normally would be bound by the terms of contract and the court would not be justified to appoint any arbitrator unless the arbitrator refused or neglected to enter upon the

reference, etc. In the absence of any named arbitrator it would be open to the contracting parties to agree for an appointment of an arbitrator by agreement even after the proceedings were laid in the Court under Section 20 of the Act. In the absence of any such agreement, the Court gets jurisdiction and power to appoint an arbitrator. In Prafulla Kumar case' no notice was given to the appellant to appoint an arbitrator in terms of the contract before the suit was filed and no action was taken pending suit except contending that the matter was under active consideration. In that context, it was held that in the absence of any agreement, the court gets jurisdiction. In Nandyal Co-op. Spinning Mills Ltd. v. K. V. Mohan Rao² 15 days' notice was given to the respondent to act upon the terms of the contract to appoint an arbitrator, but it was not done, although it was stated that the matter was under consideration, It was, therefore, held thus: (SCC pp. 660-6 1, para II) "It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant 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 Section 8(1)(a). The contentions of Shri 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 2 (1993) 2 SCC 654 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 right 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 Section 8(1)(a), then the respondent has been given right under clause 65.2 to avail the remedy under Section 8(1)(a) and request the court to appoint an arbitrator. If the contention of Shri Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself."

6. Thus when the notice was given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract. When no agreement was reached, even in the court between the parties, the court gets jurisdiction and power to appoint an arbitrator. Even if Section 8(a) per se does not apply, notice was an intimation to the opposite contracting party to act upon the terms of the contract and his/its non-availing entails the forfeiture of the power to appoint an arbitrator in terms of the contract and gives right to the other party to invoke the court's jurisdiction under Section 20. In the instant case the respondent did not appoint an arbitrator, after the notice was received. The respondent averred in the written statement that it was under consideration. Even before the learned Single Judge he did not even state that he was willing to appoint an arbitrator. The learned Single Judge rightly exercised the power under Section 20(4) of the Act and appointed the Arbitrator. The Division Bench, therefore, was not right in holding that the appellant has by giving option to the respondent to agree for appointment of an arbitrator out of the five named persons had left it to the respondent to appoint an arbitrator and allowing respondent to appoint an arbitrator. On the other hand, the appointment of an arbitrator made by the learned Single Judge must be deemed to have been approved by us.

7.The appeal is accordingly allowed. The judgment of the Division Bench is set aside and that of the learned Single Judge is restored. In the circumstances, parties are directed to bear their own costs.