A G. RAMACHANDRA REDDY AND CO.

v.

CHIEF ENGINEER, MADRAS ZONE, MILITARY ENGINEERING SERVICE

B APRIL 29, 1994

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

Arbitration Act, 1940: Sections 8(a) and 20.

C *Power of Court to appoint Arbitrator—Contract—Dispute—Notice to appoint Arbitrator in terms of contract—Failure of party to appoint Arbitrator—Held Court can appoint Arbitrator.*

The appellant Company's contract was terminated by the respondent. Exercising the option under clause 17 of the General Conditions of
D **Contract the appellant issued notice to the respondent to appoint arbitrator in terms of the contract for adjudicating the dispute which had arisen between them. On respondents' failure to do so the appellants filed a suit under Section 20 of the Arbitration Act, 1940 and a single Judge of the High Court appointed an arbitrator. On appeal a Division Bench of**
E **the High Court agreed with the Single Judge that despite appellant's notice to appoint an Arbitrator no action was taken by the respondent. Though High Court's suggestion that the respondent could agree for appointment of anyone 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**
F **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.**

In appeal to this court it was contended on behalf of the appellant
G **that (i) failure on the part of the respondent to appoint Arbitrator gave right to the appellant to invoke the jurisdiction of the Civil Court under Section 20(4) and the Court got jurisdiction to appoint the Arbitrator of its choice and (ii) the Division Bench committed a manifest error of law in interfering with appointment of Arbitrator under section 20(4).**

H **Allowing the appeal and setting aside the judgment of the Division**

Bench, this Court

HELD : 1. The single Judge rightly exercised the power under Section 20(4) of the Arbitration Act, 1940 and appointed the Arbitrator. 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 got jurisdiction and power to appoint an Arbitrator. [812-H, 813-A-C]

2. 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 its non-availment 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. [813-B]

3. The Division Bench was not right in holding that the respondent has by giving option to the appellant to agree for appointment of an arbitrator out of the five named persons had left it to the appellant to appoint an Arbitrator and allowed the appellant to appoint Arbitrator. [813-C]

4. The appointment of Arbitrator made by the single Judge must be deemed to have been approved by this Court. [813-D]

5. 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. In the absence of any such agreement, the Court gets jurisdiction and power to appoint an Arbitrator. [811-H, 812-A]

Union of India v. *Prafulla Kumar Sangal*, [1979] 3 S.C.C. 831, explained and held inapplicable.

Nandyal Co-op. Spinning Mill Ltd. v. *K.V. Mohan Rao,* [1993] 2 S.C.C. 654, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4378 of 1994.

From the Judgment and Order dated 5.1.93 of the Madras High Court in O.S.A. No. 281 of 1992.

A K. Parasaran, R. Murari and V. Balachandran for the Appellant.

A.S. Nambiar, T.V. Ratnam and Ms. A. Subhashini for the Respondents.

The following Order of the Court was delivered :

B

Leave granted.

This appeal arises from the judgment of the division bench of Madras High Court in O.S.A. No. 281/92 dated January 5, 1993.

C The appellants contract was terminated by the respondent and in consequence thereof, by notices dated July 23, 1991 and August 21, 1991, the appellants exercising the option under clause 17 of General Condition of Contract, called upon the Engineer in Chief of 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 appellants filed a D suit on March 4, 1992 under s.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 Sept. 23, 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 E 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 anyone 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 F 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 s.20. The appellant, feeling aggrieved against the judgment of the division bench, has filed the appeal.

Sri K. Parasaran, learned senior counsel for the appellant contended G 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 s.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 H jurisdiction under s.20(4) of the Act and appointed the arbitrator, the

division bench committed a manifest error of law in interfering with that appointment. Sri 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 Sangal,* [1979] 3 SCC 631, 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 s. 8(a) of the Act did not arise on the facts in the present case. Therefore, his contention was that though the appellant 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 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.

We find no force in the contentions of Sri Nambiar. This court interpreting s.20(4) of the Act, has, in *Prafulla Kumar's* case itself, specifically laid down that sub-s. (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 observation 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 s.20 of the Act. In the absence of any

A such agreement, the Court gets jurisdiction and power to appoint an arbitrator. In *Prafulla Kumar's* case no notice was given to the appellant to appoint as 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 Rao,* [1993] 2 SCC 654, 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:

> "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 s.8(i)(a). The contention 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 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 persons was not appointed, certainly the only remedy left to the contracting party was 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 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 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."

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 s.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-availment 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 s.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 s.20(4) of the Act and appointed the Arbitrator. The division bench, therefore, was not right in holding that the respondent has by giving option to the appellant to agree for appointment of an arbitrator out of the five named persons had left it to the respondent to appoint an arbitrator and allowed 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.

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.

T.N.A. Appeal allowed.