

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) 108/2007**

% **Date of Decision : 12.02.2009**

HINDUSTAN PREFAB LTD. Appellant
Through: Mr. Anil Seth with Mr. A Johar,
Advocate.

versus

D.D.A. Respondent
Through: MS. Sangeeta Chandra,
Advocate.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

% **JUDGMENT (Oral)**

MUKUL MUDGAL, J.

1. This case is a typical example of how public money is wasted by Public Sector Undertakings litigating frivolously on utterly technical issues. To avoid the wastage of public funds the Hon'ble Supreme Court has stressed for resolution of disputes through a mechanism of Committee of Secretaries in a judgment titled as **ONGC v. CCE** 1995 Supp. (4) SCC 541. On 20.11.2008,

this Court had directed the consideration for early resolution of disputes involved in the present case by the Committee of Secretaries. Today when we asked the learned counsel for the appellant to tell us the date on which the matter was referred to the Committee of Secretaries, the counsel was not able to convey the date. Accordingly, taking into account the fact that the dispute involved in the case is narrow, as it involves the interpretation of the arbitration agreement between the parties, we decided to take up the matter rather than adjourning it as the matter is pending in this Court for more than two years.

2. Hindustan Prefab Limited, i.e. the appellant, entered into contract with DDA for construction of residential flats and disputes arose over the contract. The material part of the arbitration Clause contained in the agreement reads as follows:

“Clause 25: Except where otherwise provided in the contract all questions and disputes..... shall be referred to the sole arbitration of the person appointed by the Engineer Member Delhi Development Authority at the time of dispute. It will be no objection to any such appointment that the arbitrator as appointed is a Delhi Development Authority employee that he had to deal with the matters to which the contract relates and that in the course of his duties as Delhi Development Authority employees he had expressed view on all or any of the matters in dispute of difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Engineer/Member, Delhi Development Authority as aforesaid at the time of such

transfer, vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Engineer Member Delhi Development Authority as aforesaid should act as Arbitrator and, if for any reasons that is not possible, the matter is not to be referred to arbitration at all."

3. It is not in dispute that on 01.06.1993 an order was passed by the Engineer-Member of DDA noting that Sh. A.L. Garg who was earlier appointed as Sole Arbitrator had resigned on 16.04.1993 and under Clause 25, the Engineer-Member, therefore, appointed S.E. Arbitration -I as the Sole Arbitrator to determine the disputes referred to the aforesaid Arbitrator in accordance with Clause 25. This communication reads as follows:

"Whereas Shri A.L. Garg, was appointed as sole Arbitrator vide this office letter No. EM2(31)91/Arbn./13707-11 dated 14.10.91 in the above matter and whereas the aforesaid arbitrator has resigned as an Arbitrator vide his letter No. SE(Arbn.)I/91/18/43-44 dt. 16.4.93. I, M.D. Sharma, Engineer Member, DDA in exercise of the powers conferred upon me under clause-25 of the agreement appoint SE(Arbn.)I, as sole Arbitrator to determine the disputes referred to aforesaid arbitrator in accordance with the said clause-25 of the aforesaid agreement.

S.E. (Arbn.)I may start the proceedings from the stage at which the aforesaid left off. The arbitrator shall give reasons for the award.

This reference is without prejudice to the defence that may be raised by the respondents

regarding the tenability of the claims on all necessary and available grounds including those of limitation.

Encl: 1. File No. SE(ARBN.)I/91/18
Containing pages 1 to 159.

2. Agmt. No. 19/EE/WD5/DDA/88-89
containing pages 1 to 195.
(Attested copy).

(H.D. SHARMA)
ENGINEER MEMBER"

4. The submission of the Ld. Counsel for the appellant is that Clause 25 postulates the appointment of a named person i.e. a specific individual as the Arbitrator, and does not permit the appointment of an office as the Arbitrator by designation. In support of this submission Ld. Counsel for the appellant relies on ***A. Mohammad Yunus (Dead) by LRs Versus Food Corporation of India & Anr.*** 2000 (2) Arb. LR 2 (SC).

5. It is well settled that the appointment of an arbitrator can be made by appointing an office by designation and it is not necessary that the appointment has to be made of an individual person only (See AIR 1958 Punjab 19, AIR 1964 Punjab 230, AIR 1980 Delhi 244). The expression "person" used in Clause 25 is capable of interpretation to mean not only a natural person, but also including a juristic entity. After all, the nominated "office" would be manned by a natural living person only. The agreement does not specify a particular qualification or disqualification for being appointed as an arbitrator. Therefore,

instead of nominating an individual arbitrator on each occasion a vacancy arises, the appointing authority may nominate by designation the office so that incumbent of the office may act as the arbitrator from time to time. We may also refer to the observations of the Supreme Court in **Govt. of A.P. vs. N. Choudhary** 1993 (2) APLJ 430 (SC) in para 56, which reads as follows:

“For all the reasons mentioned above, we are of the opinion that even assuming that the panel of arbitrators is vague, it would be proper for the Court to refer the dispute/disputes to a panel but not to a sole arbitrator. The panel may consist of the incumbents satisfying the designations mentioned in the agreement. If for any reason, it is not feasible to do so, it is open to the court to refer the disputes to a panel consisting of serving senior officials having technical and accounts experience. Such a reference will be in conformity with the intention of the parties as reflected in the arbitration clause.

.....
Where the panel of arbitrators comprises of three designated officials and if there is more than one incumbent conforming to that designation, the panel cannot be said to be vague and it can be made certain by referring the dispute to anyone of the persons who are holding the post of specified designation.

Even if it is held that the panel is vague and uncertain, having regard to the fact that there is more than one incumbent in anyone or two or even all of the designated offices, it would be proper for the court to refer the dispute/disputes to a panel but not to a sole arbitrator. The panel may consist of the incumbents satisfying the designations mentioned in the agreement. If for any reason, it is not feasible to do so, it is open to the Court

to refer the disputes to a panel consisting of serving senior officials having technical and accounts experience. Such a reference will be in conformity with the intention of the parties as reflected in the arbitration clause."

6. It is evident from the letter dated 01.06.1983 that the appointment of S.E. (Arbitration) I as the Arbitrator was by designation. Pursuant to the letter of 01.06.1983 one Sh. M. Kuppuswamy functioned as the Arbitrator being the then S.E. (Arbitration). It appears that no objection was taken to the functioning of Mr. M. Kuppuswamy as the Arbitrator on account of his designation. But when pursuant to the change of incumbency in the office of S.E. (Arbitration) I Sh. Suresh Mehta started functioning as the Arbitrator vide letter dated 15.01.1996, the appellant took up the objection on 29.01.1996 that under Clause 25 the Arbitrator could only be appointed by name, and not by designation. This objection was rejected by the Ld. Arbitrator on 06.02.1996.

7. The Learned Single Judge summarized the pleas of the appellant as follows:

"Objections are that Sh. Suresh Mehta had no jurisdiction to act as an arbitrator inasmuch as the competent authority to appoint the arbitrator was Engineer Member, DDA. Next objection raised is that the learned arbitrator misconducted the proceedings inasmuch as he gave no hearing and was not conversant with the documents filed. Next objection taken is that evidence has been ignored."

8. The Learned Single Judge has held that the letter of 01.06.1983 clearly shows that the Arbitrator was appointed as designation being S.E. (Arbitration) I. The erstwhile changed Arbitrator Sh. M. Kuppuswamy continued as Arbitrator and no objections were raised. It is only when Sh. Suresh Mehta took over the arbitration proceedings, objections were raised by the appellant. Even thereafter, the appellant participated in the proceedings on 16.02.1996 and 27.03.1996. The appellant also gave formal extension of time to Shri Suresh Mehta the S.E. (Arbitration) I to publish his award. The Learned Single Judge held that the appellant had indeed acquiesced in the incumbent Shri Suresh Mehta the S.E. (Arbitration) I acting as the Sole Arbitrator and was, therefore, precluded from resiling from its stand after having taken a chance, merely because an adverse award has been rendered by the Arbitrator. Accordingly, we find no merit in this appeal. The same is dismissed.

9. We have noticed the fact that two public sector undertakings have been litigating since 1993, when the appointment of the arbitrator was made. Both the public sector undertakings would have incurred considerable expense to pursue the present litigation. One of the causes for arrear of cases in Courts is avoidable litigation on behalf of Government Authorities. The present case squarely fell within the scope of the Hon'ble Supreme Court's concern expressed in

ONGC v. CCE referred to above.

10. We are, therefore of the view that this is a matter which the concerned authorities should look into, so that such an exercise is not undertaken frivolously. We are also of the view that to put some deterrence on such futile misadventures. Costs should be imposed upon the appellant. We have also been informed that the appellant is a sick company and is pending reconstruction. Considering the aforesaid, we direct the appellant to pay token costs of Rs. 10,000/- to the Prime Minister's Relief Fund. A copy of this order be also sent to Cabinet Secretary. The amount deposited by the appellant in this Court is permitted to be withdrawn by the respondent DDA. The same shall be released by the registry within four weeks of the application being made by the DDA.

Appeal stands disposed off.

MUKUL MUDGAL, J.

VIPIN SANGHI, J.

FEBRUARY 12, 2009
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