
(1999) 02 DEL CK 0062

In the Delhi High Court

Case No : OMP 183/97

ABB ABL Ltd.

APPELLANT

Vs

Cement Corporation of India and Others

RESPONDENT

Date of Decision : 01-02-1999

Acts Referred:

Arbitration Act, 1940 — Section 9(b)

Arbitration and Conciliation Act, 1996 — Section 85

Citation : (1999) 2 AD 1 : (1999) 78 DLT 132 : (1999) 49 DRJ 131

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Mr. R.P. Bhatt and Mr. Bharat Sangal, Advocat, for the Appellant; Dr. A.M. Singhvi, Mr. P.K. Bansal and Ms. Manjula Gupta, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Kapoor, J.—The above numbered OMP seeks: (i) quashing appointment of Shri A.K. Sinha, respondent No. 2 as the sole arbitrator by the Cement Corporation of India (CCI for short) by letter dated 24th June, 1997; (ii) quashing either the present arbitration proceedings; or in the alternative, to proceed with the arbitration along with Shri A.K. Oza, respondent No. 3 as duly appointed Arbitrator by the petitioner.

2. The relevant facts are as under :

2.1. The parties entered into a contract relating to supply of plant and machinery and erection and commissioning of the clinkerisation package for one million tonnes for its Tandur project in Andhra Pradesh on 14th March, 1985. This was awarded to the petitioner and in that connection the parties entered into an arbitration agreement in following terms:

"45.0 ARBITRATION

45.1 If any dispute or difference of any kind whatsoever arise between the Purchaser and Supplier arising out of Contract for the performance of the works,

whether during the progress of the works or after its completion or whether before or after the termination or breach of contract, and the Purchaser and Supplier fail to settle amicably, the dispute shall be referred to the Arbitrator - one Arbitrator nominated by each party and the Arbitrators in turn shall approach Indian Council of Arbitrators for appointment of an umpire within 30 (thirty) days of the appointment of last Arbitrator.

3. Some disputes arose between the parties on account of alleged nonpayment by respondent and consequently on 12th February, 1987 on account of the non-payment under the Agreement dated 14th March, 1985, the petitioner company invoked arbitration under the aforesaid clause 45 but ultimately abandoned for Arbitrators failed to appoint Umpire. The petitioner company encountered severe financial crunch. The company was declared sick. The petitioners rejuvenated the same and it ceased to be a sick industry in terms of order dated 7th February, 1997 passed by the BIFR. The petitioner company was trying to settle all the outstanding disputes as per BIFR scheme. The petitioner received from the Cement Corporation of India a letter invoking the arbitration clause 45 of the Agreement dated 14th March 1985, nominating Shri A.K. Sinha, Director, CCI as their arbitrator under the provisions of Arbitration Act, 1940. Another letter dated 31st May, 1997/2nd June, 1997 was received from the CCI stating that if the petitioner failed to appoint their arbitrator within 15 clear days from receipt of the said notice dated 28th April, 1997 then the arbitrator appointed by the respondent company would act as sole arbitrator in terms of Section 9 sub-clause (b) of Arbitration Act, 1940. By letter dated 24th June 1997 despite protests and request to give them more time to consider the appointment of arbitrator, the CCI appointed Shri A.K. Sinha as the sole arbitrator on the plea that the petitioner had not appointed any arbitrator on their behalf. He would enter upon reference and make the award as sole arbitrator under the provisions of clause (b) of Section 9 of the Arbitration Act, 1940. This appointment of Shri A.K. Sinha as the sole arbitrator is being challenged by the petitioner company on the ground that the Arbitration and Conciliation Act of 1996 came into force w.e.f. 16th August, 1997 and by virtue of Section 85, Arbitration Act 1940 stands repealed. The matter would not be governed by the Arbitration Act 1940 any more. It is further submitted that the new Act does not make any provision of the nature of the provisions of Section 9(b) of the Arbitration Act, 1940. In fact, in terms of sub-section (6) of Section 11 of the 1996 Act, in the event of failure to reach an agreement expected of them, the parties have to approach the Hon'ble Chief Justice or any person or institution designated by him for appointment of arbitrators. The petitioner appointed Shri A.K. Oza as their arbitrator. The petitioner claims that both the parties should be directed to appoint respective arbitrators in terms of clause 45 of the agreement and under the provisions of 1996 Act.

4. This petition is being contested by the respondent CCI on various grounds. It is contended that Cabinet Committee on Economic Affairs of the Government of India in its meeting held on 17th February 1992 had decided that the answering

respondent should be directed to withdraw the demand of encashment of the bank guarantee against the petitioner and the matter should be referred to the Secretary under the Department of Public Enterprises to adjudicate dispute between the parties for arbitration to resolve the dispute as clearly as possible. The Chairman and Managing Director of the petitioner company was also apprised of this decision. Accordingly, the CCI submitted its claim for Rs.118.87 crores to the Secretary, Department of Public Enterprises with copies thereof, inter alia, to the petitioner company seeking also interim award for a sum of Rs. 5.9 crores. The petitioner avoided to take any interest in those proceedings. The entire set of supporting documents were sent and intimated to the petitioner company also by letter dated 1st/2nd August 1995 respectively. Thereafter, a communication was received from the Administrative Ministry (Ministry of Power) Government of India that the dispute may be got resolved through the existing arbitration clause in the agreement. Accordingly, the answering respondent vide its letter dated 29th April, 1997 informed the petitioner company about the decision taken and the appointment of Shri A.K. Sinha, respondent No. 2 and to appoint third co-arbitrator in terms of the provisions of clause 45.

5. In view of this factual position, the contention that the arbitration invoked by the answering respondent on 29th April, 1997, is absolutely false, wrong and incorrect. The new Act would not apply to the facts of the present case for the applicability of the 1948 or 1996 Act depends on the provisions of Section 85 of the new Act read with Section 21 which lays down the prescribed test. It is not the intention. The applicability of the new or the old Act could be decided only on that basis and letters of 1st and 2nd August, 1995 submitted along with the statement of claim which is the issue in this respect for that is the first time when the arbitration clause was sought to be invoked. It is contended that there is no pre-scribed form of request. Only two things are required: that there should be a request for referring the dispute to arbitrate and (ii) that request should be received by the opposite party. Since such a request was made on 1st/2nd August, 1995, it satisfies the requirement of Section 21 of the Arbitration Act 1996. The arbitral Tribunal is competent to decide and may rule on its own jurisdiction including the ruling on any objection with respect to existence or validity of the arbitration agreement. The Arbitral Tribunal may also decide the plea that it does not have jurisdiction and such a plea could be raised not later than the submission of the statement of defense. Necessary precaution which has been taken is that a party should not be precluded from raising such a plea merely because that he has appointed or participated in the appointment of an arbitrator. By virtue of sub-section (5) of Section 16 where the Arbitral Tribunal takes a decision rejecting the plea relating to its own jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award and a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34. As such, the contention is that the petition is premature.

6. I have heard the learned counsel for parties at length and gone through the

record. The first point which is required to be considered is whether 1940 Act would apply to the facts of the present case or the new Arbitration and Conciliation Act 1996 would apply. The applicability of the 1940 Act or that of the new Act depends on interpretation of Section 85 read with section 21 of the new Act. These two Sections read as under:

"85. Repeal and saving._(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal, _

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

21. Commencement of arbitral proceedings. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

7. It is required to be seen as to whether arbitration proceedings commenced on or after the new Act came into force. It may be appropriate to refer to letter dated 1st/2nd August, 1995 addressed to the Secretary, Government of India, Department of Public Enterprises. A copy of this letter was sent to Mr. N.K. Balasubramanian, CMD, ACC-Babcock Ltd., New Delhi House, New Delhi along with its annexures. It may further be mentioned that the very Annexure "A" filed by the petitioner also refers to their letter dated 1st/2nd August, 1995 addressed to Secretary, Government of India, Department of Public Enterprises with a copy to Mr. N.K. Balasubramanian, CMD, ACC-Babcock Ltd., New Delhi House, New Delhi along with its annexures in respect of dispute between CCI and M/s. ABB ABL Ltd. (formerly M/s. ACC-Babcock Limited) in respect of one million tonnes of clinkerisation package for its Tandur project. It is not the case of the petitioner that they did not receive the letter dated 1st and 2nd August, 1995 addressed to Secretary, Government of India, Department of Public Enterprises with a copy to Shri N.K. Balasubramanian, CMD, ACC-Babcock Ltd., New Delhi. Therefore, it is required to be seen whether this letter filed by the respondent dated 1st and 2nd August, 1995 at p. 20 of the reply satisfies the requirement of Section 21. This letter reads as under :

"Sir,

We invite your attention to D.O. letter No. II-35/94-IPC (Vol.III) dated 10.5.95

from Shri R. Vasudevan, Secretary, Ministry of Power addressed to Shri R.K. Ahuja, Secretary (Co-ordination), Cabinet Secretariat on the aforesaid matter. A copy of the said D.O. letter is enclosed as Annexure-A. In the said letter it has been informed that the Ministry of Finance has advised that the subject dispute may be treated similar to cases between two Government companies as the liability/benefit out of the Arbitration will be of the Government.

In compliance of the aforesaid directions of the Secretary, Ministry of Power, we hereby submit our claim for Rs.118.87 crores, on account of non-completion of erection and commissioning of contracts; non-fulfilment of performance guarantee; supply of defective equipments; delay in execution of the job and non-performance of the plant in accordance with the contract. (Annexure-B).

M/s. ACC-Babcock Limited had abandoned the work without carrying out its responsibility in terms of the contract and as a result CCI is suffering recurring heavy losses. To provide interim relief to this Corporation we pray that an interim award permitting us to encash the Bank Guarantee amounting to Rs. 5.95 crores may kindly be passed. It is also prayed that all the claims of this Corporation may be admitted at the earliest so as to compensate the heavy losses suffered by this Corporation on account of non-performance of the plant as per the contract and total failure of M/s. ACC-Babcock Limited to carry out its contractual obligations.

Thanking you.

Yours faithfully,

sd/-

(P.V. JOSHI)

MANAGER (LEGAL).

Encls.:-

(1) Annexure-A

(2) Annexure-B

(Claim with supporting documents consisting of 10+987 pages - Vol. I & II)

(3) Annexure-I. (Copy of Contract between ABL & CCI)

C.C.:-1. The Secretary,

Deptt. of Heavy Industry,

Ministry of Industry,

Govt. of India

NEW DELHI.

2. Shri N.K. Balasubramanian,
CMD, ACC-Babcock Ltd.
New Delhi House,
NEW DELHI-110 001.

3. The Secretary
(Coordination),
Cabinet Secretariat,
New Delhi.

4. The Secretary,
Ministry of Power,
Shram Shakti Bhawan,
NEW DELHI.

sd/-

MANAGER (LEGAL)"

8. This definitely indicates that there is a request to the Secretary, Government of India, Department of Public Enterprises for entering on the reference and a copy thereof has been sent to the CMD, ACC-Babcock Limited. In effect, it is a request for reference of the dispute between the parties to arbitration and the same had obviously been received by the CMD, ACC-Babcock Limited. However, it appears that the Secretary declined to enter upon the reference and advised subsequently that with reference to letter dated 1st and 2nd August 1995, the letter dated 29th April, 1997 was sent and the subsequent letter Annexure "C" dated 31st May, 1997/2nd June, 1997 filed by the petitioner also indicated that that letter was written with reference to letter dated 29th April, 1997 on dispute between ACC and M/s ABB and ABL Limited (formerly M/s. ACC-Babcock Limited) sent by FAX/Regd. post. The subsequent correspondence also gives the same indication. It is thus apparent that a request for ref dispute was made as far back as on 1st/2nd August, 1995.

9. However, one aspect is required to be seen and that aspect is that the matter was referred to arbitration of the aforesaid Secretary, Government of India, Department of Public Enterprises. The fact that the letter and the claim was communicated to the CMD of the ACC-Babcock Limited certainly meant a request for reference of dispute to the arbitration in the light of the previous conduct of the parties, as is apparent from the correspondence exchanged between the parties and Ministry of Public Enterprises and Ministry of Power of the Government of India. The fact that the letter was not addressed to M/s. ACC Babcock Ltd., the predecessor-in-interest of the present petitioner, does not

appear to be of any consequence in the light of the previous conduct of the parties including the conduct of the petitioner who sought to refer the matter to the arbitration way back in 1985 and subsequent events mentioned in the reply of the respondent.

10. It may further be mentioned that Section 21 does not require that request should be made expressly in writing. This was a request by conduct of the parties and it has to be understood in that manner. Had it been essential that request should be in writing to the petitioner, then the word "written" should have found place in Section 21 before the word "request". The moment it is held that the arbitration proceedings commenced in terms of Section 21 as far back as 1st/2nd August, 1995, the Arbitration Act, 1996 which is to be deemed to have come into force on 25th January, 1996 shall become inapplicable and the matter could proceed only in terms of Arbitration Act, 1940.

11. The next point to be considered is whether Mr. A.K. Sinha could proceed as the sole Arbitrator of the matter without there being any appointment of co-arbitrator by the petitioner company. It is evident that the petitioners have dilly-dallied in appointment of their own arbitrator till 11th September, 1997 after the appointment of Shri A.K. Sinha on 29th April, 1997 till 27th June, 1997. In this connection, Section 9 of the 1940 Act is relevant and it is reproduced as under :

"9. Power to party to appoint new arbitrators, or, in certain cases, a sole arbitrator. Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement, _

(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation. The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request, may constitute a neglect or refusal to act within the meaning of Section 8 and this section".

12. It is evident that in terms of clause (b), the petitioners have failed to appoint their own arbitrator after service of letter dated 29th April, 1997. Consequently, the respondent CCI could appoint Shri A.K. Sinha, the appointed Arbitrator to act as the sole arbitrator in reference and his award should be binding on both the parties as if he had been appointed by consent.

13. But this court is supposed to take into consideration the proviso to Section 9 also. It may be noted that the first reference which was sought to be made to the Secretary, Department of Public Enterprises was not in terms of clause 45 of the agreement. One could also not be oblivious to the fact that by letter dated 31st May, 1997, a request was made by General Manager (Arbitration) of the respondent CCI "to appoint your co-arbitrator immediately failing which the arbitrator appointed by the CCI will act as the sole arbitrator without any reference to you". This letter was replied to on 5th June 1997. The Ministry of Power was approached by ABB vide Annexure "E" letter dated June, 10, 1997. It may further be mentioned that vide Annexure "F" Ministry of Power informed Mr. K. Venkatesh, General Manager (Finance) that the ABB was advised to appoint co-arbitrator vide DO letter dated 6th November 1996 and to keep them apprised of the arbitration proceedings from time to time. However, from Annexure "G", it appears that Shri Rakesh Kackar requested Shri D.C. Samant, Joint Secretary, Deptt. of Heavy Industry, Ministry of Industry informing him that ABB and ABL advised to appoint co-arbitrator but the Joint Secretary should impress M/s. CCI to give at least 30 days time to revert on further proceedings in this matter. Despite the advice received from the Ministry vide letter dated 6th November, 1996 and has referred to in letter dated 12th June, 1997 Annexure "F" no action was taken till 24th June 1997. Though, it is also apparent that on 27th June 1997 after the receipt of the fax notice dated 27th June, 1997 that they agreed to appoint Shri A.K. Oza and that he will be contacting Mr. Sinha, the Arbitrator appointed by the respondent CCI for the purpose of proceeding further in the matter, there is no correspondence or fax message or any other thing to indicate that Shri Oza ever contacted Mr. Sinha. In the absence of any affidavit, correspondence of any such message of Shri A.K. Oza, the contention of the petitioner has to be rejected.

14. In the aforesaid circumstances, it is required to be seen whether sufficient cause has been shown by the petitioner to allow further time to the petitioner to appoint an Arbitrator or for such orders as it thinks fit. It may be mentioned that proviso to clause (b) of Section 9 though does not talk of limitation but when it enables that defaulting party to seek remedy occasioned on account of his failure to make the appointment within 15 days which the legislature has allowed him for appointing Arbitrator after the receipt of the notice but proviso really enables the court to condone delay on the analogy of Section 5 of Limitation Act. While setting aside the appointment of sole arbitrator, this court is supposed to see whether there is any justification for setting aside the appointment on equitable grounds to promote the cause of justice, equity and good conscience. The appointment of the sole arbitrator should ordinarily be set aside in case of delays

of few weeks if this court is satisfied that the defaulting party had not been obstructive or evasive and had acted with due diligence, and further that undue hardship would be caused if the extension is not granted.

15. One could also not be oblivious to the fact that a suggestion was made to give 30 days time to appoint the arbitrator by Annexure "G" letter dated 12th June, 1997 of Mr. Rakesh Kacker with a copy to the Managing Director, CCI, New Delhi. The CCI acted on 24th June 1997. In this case, Shri A.K. Sinha was appointed on 29th April, 1997 and request was also made to the petitioner company to appoint their arbitrator in terms of the contract so that further step to appoint an arbitrator could be taken in terms of clause 45(2). It is apparent that even the Government advised ABBL to appoint co-arbitrator way back on 6th November, 1996 vide Annexure "F" and no heed was paid to Annexure "H" letter dated 11th June, 1997 requesting to appoint the co-arbitrator. In such circumstances, if the CCI appointed Shri A.K. Sinha as the sole arbitrator vide Annexure "J", they were not unjustified. If the petitioner were seriously wanted to act, they would have seen to it that Shri A.K. Oza contacted Shri A.K. Sinha in appropriate manner by sending a letter either through speed post, or through courier or through fax message and copy thereof might have satisfied this court about their intention. There is neither any letter appointing Shri A.K. Oza, nor any consent of Shri A.K. Oza accepting to be the arbitrator on behalf of the petitioner company on record. Instead, Solicitors reply dated 27th June, 1997 is sent. From Annexure-N addressed by the counsel to Shri A.K. Sinha, Arbitrator appointed by the respondent as sole Arbitrator, it appears that even letter appointing Shri A.K. Oza was not sent to Shri A.K. Oza till 27th July 1997 for it refers to letter dated 27th July, 1997. In such circumstances, it appears that the letter Annexure "K" was just an eye-wash to further delay in the arbitration. Consequently, it is felt that no sufficient cause has been shown to allow further time to the petitioner to appoint an arbitrator. The petition is accordingly dismissed, with costs.