

(2024) 02 GAU CK 0031
In the Gauhati High Court
Case No : Arbitration Petition No. 36 Of 2023

ATW (India), Pvt. Ltd.

APPELLANT

Vs

Union Of India And Anr

RESPONDENT

Date of Decision : 20-02-2024

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(6A), 16

Citation : (2024) 02 GAU CK 0031

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : R. Hussain, H. Gupta

Final Decision : Dismissed

Judgement

1. Heard Mr. R. Hussain, learned counsel for the petitioner. Also heard Mr. H. Gupta, learned CGC appearing for all the respondents.

2. The present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), is for a reference of the dispute between the parties before a sole Arbitrator to be appointed by this Court. The petitioner's case is that the respondent no.4 had floated Tender No.CE/CON/S-L/EMB/2005/64 for "Construction of Br. O.99 (New) span (1x4.0m RCC Arch Box) at Chainage 49.335 km and earthwork in filling in layers to form embankment at the approaches of the bridge including other ancillary work between station Dihakho-Mupa on permanent diversion in connection with Lumding-Silchar Gauge conversion project."

3. The petitioner was selected for the contract work and accordingly, a contract agreement dated 02.03.2007 was executed between the parties at a total cost of Rs.4,30,95,325/-. The time for completion of the contract work was 18 months, i.e., on or before 21.09.2007. The petitioner's further case is that he successfully completed the contract work on 27.03.2012, after being granted various extensions by the respondents. The dispute arose between the parties, as

settlement and finalisation of the Final Bill of the petitioner was not being made by the respondents. The petitioner thereafter lodged his final claim dated 09.05.2022, claiming Rs.3,25,79,502/-. However, the same has not been paid to the petitioner.

4. The petitioner's counsel submits that as per the contract agreement dated 02.03.2007 executed between the parties, an Arbitration Clause for settlement of disputes through arbitration is present in Clause No. 10.0 of the agreement, which incorporates the relevant Clause 63 & 64 of the General Conditions of Contract (GCC). Clause 63 & 64 of the GCC provides that the disputes between the parties, arising out of the contract, should be decided by way of Arbitration. The petitioner's counsel submits that though the petitioner has invoked the Arbitration Clause by issuing notice dated 22.11.2022, the respondents have failed to act on the application made by the petitioner, while disputing the claim of the petitioner. The petitioner has thus approached this Court for appointment of an Arbitrator.

5. The petitioner's counsel submits that Clause 10.1 of the contract agreement, which provides that claims or disputes beyond 20% of the contract value will not attract Clause 63 & 64 of the GCC, is a void clause. He submits that Sub-Section 6A of Section 11 of the 1996 Act provides that the Supreme Court or the High Court, while considering any application under Section 11(6A) of the 1996 Act, would have to confine its examination with regard to whether an Arbitrator is to be appointed, only by considering whether an Arbitration Clause existed in the contract agreement. He submits that the issue whether the Arbitrator could or could not decide the claims made by the petitioner in terms of Clause 10.1 of the contract agreement, including the validity of Clause 10.1 of the contract agreement, would have to be decided by the Arbitrator, so appointed by the Court, in terms of Section 16 of the 1996 Act. In this regard he has relied upon the Constitution Bench judgment of the Supreme Court in the case of *Re-Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899* (supra). The petitioner's counsel thus submits that this Court should appoint an Arbitrator in terms of Section 11(6A) of the 1996 Act.

6. Mr. H. Gupta, learned CGC for the respondents submits that in terms of Clause 10.1 of the contract agreement, which has to be read along with Clause 10.0, which incorporates Clause 63 & 64 of the General Conditions of Contract (GCC), shows that the provisions of Clause 63 & 64 of the GCC would be applicable only for settlement of claims/disputes between the parties, for a value less than or equal to 20% of the contract value. Claims beyond 20% of the contract value would not attract Clause 63 & 64 of the GCC. He accordingly submits that the petitioner's application should be dismissed.

7. Mr. H. Gupta, learned CGC has relied upon the judgment of the Supreme Court in the case of *NTPC Limited vs. SPML Infra Limited*, reported in (2023) 9 SCC 385, the Delhi High Court judgment in the case of *M/s BCC-Monalisha (JV) vs.*

Container Corporation of India Limited, (ARB.P. 933/2022 & I.A. 5219/2023) and judgment and order dated 26.10.2021 in Globe India Enterprise vs. Union of India & Others (Arb.P. 28/2020), in support of his submissions.

8. I have heard the learned counsels for the parties.

9. Clause 10.0 and 10.1 of the contract agreement states as follows:

"10.0 Settlement of Disputes & Indian Railway's Arbitration Rules. Arbitration and settlement of disputes shall be governed vide clause 63 & 64 of General Conditions of Contract, N.F. Railway, 1998 edition which are reproduced below subject to any correction made prior to the opening of his tender.

"10.1 The Provision of Clauses 63 and 64 to the General Conditions of Contractors will be applicable only for settlement of claims or disputes between the parties for values less than or equal to 20% of the value of the contract and when claims of disputes are of value more than 20% of the value of the contract, provisions of Clauses 63 and 64 and other relevant clauses of the General Conditions of Contract will not be applicable and arbitration will not be a remedy for settlement of such disputes."

Clause 63 & 64 of the GCC, which provides for resolution of disputes through Arbitral Tribunal is also a part of Clause 10.0 of the contract agreement executed between the parties and Clause 63 and Clause 64(1)(i) are reproduced below as follows:-

"63. Matters finally determined by the Railway- All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii)(B) of General Conditions of Contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' and decisions of the Railway authority, thereon shall be final and binding on the contractor provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration.

64(1)(i) Demand for Arbitration.

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in clause 63 of these conditions, the contractor, after 120 days but

within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.”

10. The provisions of Clause 63 & 64(1)(i) of the GCC clearly provide for resolution of a claim or dispute through arbitration and as such, in terms of Clause 10.0 of the contract agreement made between the parties, which incorporates Clause 63 & 64 of the GCC, the dispute raised by the petitioner would have to be decided through arbitration. However, Clause 10.1 of the contract agreement puts a rider on Clause 10.0 and thus, on the application of Clause 63 & 64 of the GCC, wherein it provides that when the claim or dispute value is more than 20% of the value of the contract work, the provisions of Clause 63 & 64 of the GCC would not be attracted.

11. The petitioner in this case has made a claim for Rs.3,25,79,502/- and the total contract value as per contract agreement, is Rs.4,30,95,325/-. The claim made by the petitioner against the respondent is thus approximately 75% of the contract value.

12. On a conjoint reading of Clause 10.0 and 10.1 of the contract agreement, it is clear that Clause 63 & 64 of the GCC are not attracted to the case in hand, for resolving the dispute between the parties.

13. The above being said, the petitioner has stated that Clause 10.1 of the contract agreement is void. At the outset, it is noticed that there is no challenge made to Clause 10.1 of the contract agreement by the petitioner.

14. In the case of *Duro Felguera, S.A. v. Gangavaram Port Limited*, reported in (2017) 9 SCC 729, the Supreme Court noted that as per the 2015 Amendment, the jurisdiction of the Court under Section 11(6) of the 1996 Act was limited to examining whether an arbitration arrangement exists between the parties- “nothing more, nothing less”.

15. In the case of *Re-Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*, the Supreme Court referred to a decision of a Three Judges Bench, i.e. *Mayavati Trading (P) Limited -vs- Pradyut Deb Burman*, reported in (2019) 8 SCC 714, wherein it observed that the examination under Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense. In the case of *Vidya Drolia -vs-Durga Trading Corporation*, reported in (2021) 2 SC 1), the three Judges Bench of the Hon’ble Supreme Court held that “omission of Sub-Section (6A) by the Act of 33 of 2019 was with the specific object and purpose and was relatable to by substitution of Sub-Sections (12) (13) and (14) of Section 11 of the Arbitration Act by Act 33 of 2019, which, vide Sub-Section (3-A) stipulates that the High Court and this Court shall have the power to designate the arbitral institution, which have been so graded by the Council under Section 43-I, provided where a graded arbitral institution is not available, the High Court concerned shall maintain a panel of arbitrators for institution for reference to the Arbitral Tribunal.”

16. In *Vidya Drolia* (supra), the Supreme Court had laid down the principle with respect to the pre-referral jurisdiction of the court under Section 11(6) of the 1996 Act. The relevant paragraph 153 is reproduced below as follows:-

"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the dispute including the question of jurisdiction and non-arbitrability."

17. However, in *Re-Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899* (supra), the Constitution Bench of the Supreme Court held that the presumption made by the three Judges Bench in *Vidya Drolia* (supra) was erroneous as it proceeded on the presumption that Section 11(6A) was omitted from the statute books by the 2019 Amendment Act. The Constitution Bench held that omission of Section 11(6A) of 1996 Act had not been notified and therefore Section 11(6A) of the 1996 Act was in full force and continued to remain in force, pending notification of the Central Government.

18. In the case of *NTPC Limited* (supra), the Supreme Court held that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The first enquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said application. The secondary inquiry that may arise at the reference stage itself, is with respect to the non-arbitrability of the dispute. It further held that as a general rule and principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. However, as an exception to the rule, the Referral Court may reject claims, which are manifestly and ex-facie non-arbitrable. The Supreme Court further held in *NTPC Limited* (supra) that the standard of scrutiny to examine the non-arbitrability of a claim is only prima facie and the prima facie scrutiny of the case must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. The Supreme Court in para 28 had held as follows:-

"28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in *Vidya Drolia* (supra), if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a

High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in *DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd.*”

19. In the case of *M/S BCC-Monalisha (JV)*, the Delhi High Court had considered a similar provision to Clause Point No. 10.1, i.e. Clause 34 of the Special Conditions of Contract (SCC). The Delhi High Court held that the petitioner therein had not contested the fact that the aggregate value of the claims exceeded 20% of the contract value of the contract work and the petitioner’s only submission was that the Arbitral Tribunal would determine whether the claims were non-arbitrable. The Delhi High Court, on considering Clause 34 of the SCC, which provided for arbitration if the value of the claim was less than or equal to 20% of the contract value, held that the Court, even within the limited jurisdiction under Section 11 of the 1996 Act, could conduct a preliminary enquiry to find out if the claims are ex-facie arbitrable. It further held that the Court is not relegated to a post office, to be completely oblivious to the obvious legal infirmities, in the request for appointment of an arbitrator. It further stated that it is not enough for the petitioner to say that the Arbitrator should decide all jurisdictional issues, the petitioner must cross the minimum threshold that is required in law, before the Court can act upon the request for appointment of an Arbitrator.

20. In the case of *Globe India Enterprise (supra)*, this Court, on considering Clause 47 of the arbitration agreement, which provided for arbitration in respect of a claim of an amount of less than 20% of the contract value and which provided that arbitration would not be applicable on claims above 20% of the contract value, held that an Arbitrator would have to be appointed in terms of the contract agreement, provided that the claim amount was lowered to less than 20% of the contract value, as the petitioner therein had volunteered to lower his claim amount to less than 20% of the contract value.

21. As can be seen from the judgment of the Supreme Court in the case of *Re-Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899 (supra)*, Section 11(6A) of the 1996 Act is still in force. Section 11(6A) states as follows:-

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under Sub-Section (4) or Sub-Section (5) or Sub-Section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.”

22. The Supreme Court in the above case has not gone into the question, as to whether the High Court can make a secondary enquiry with respect to the non-arbitrability of the dispute, after having made the preliminary enquiry, with regard to the validity of an arbitration clause in the contract agreement. The law has been clearly settled by the judgment of the Supreme Court in *NTPC Limited*

(supra), where it has held that the referral Court may reject a claim, which is manifestly and ex-facie non-arbitrable.

23. In the present case, there is no dispute with the fact that the petitioner has made a claim that is approximately 75% of the contract value and as such, on a prima facie scrutiny of facts, this Court finds that the petitioner has not been able to cross the minimum threshold that is required for deciding the dispute between the parties, by way of arbitration, in terms of Clause 10.1. To appoint an Arbitrator, even though there is no doubt in the view of this Court that the present dispute is not arbitrable, would lead to wastage of resources, besides being a sheer waste of time. In view of Clause 10.1 of the Contract Agreement having barred the resolution of the dispute between the parties through arbitration, the present petition is dismissed. The parties are free to avail other jurisdictional remedies for adjudication of their dispute.

24. The petition is accordingly dismissed.