

(2014) 03 TP CK 0016
In the Tripura High Court
Case No : ARB. P. No. 01 of 2013

**Bharatia Infra Projects Ltd. Vs The State of Tripura, Represented by the
Secretary to the Government of Tripura, The Chief Engineer, PWD (RandB)
and The Executive Engineer, PWD (RandB)**

Date of Decision : 28-03-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(8), 8, 8(1)(a)

Citation : (2014) 03 TP CK 0016

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Advocate : R. Hussain, Advocate for the Appellant; B.C. Das, Advocate General, Ms. N. Guha, Advocate for the Respondent

Judgement

Deepak Gupta, J.—The petitioner-company has filed this application for appointment of arbitrator in terms of section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act). The allegations of the petitioner are that the respondents floated a notice inviting tenders for construction of a permanent bridge over river Manu at Kanchanbari. The petitioner along with others participated in the tender. The quotation of the petitioner was the lowest and after negotiation, the work was awarded to him and the same was to be completed within 24 months of the work order. One of the terms of the agreement was that if any disputes touching the agreement or arising out of the agreement arises between the parties, then the same shall be referred to arbitration.

2. Clause 25 of the agreement reads as follows:-

CLAUSE 25. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and of workmanship or materials used on the work or as to any other question, claim, right matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawing, specifications, estimates, instructions orders or those, conditions or otherwise

concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he had expressed views on all or any of the matters in dispute or difference. The arbitration to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer or as aforesaid at the time of such transfer, vacation of office on inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such persons 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 Chief Engineer or as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000 (Rupees fifty thousand) and above, the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

It is also a term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Govt. that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Govt. shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

3. Undoubtedly, disputes have arisen between the parties and, therefore, the petitioner requested the State Government to appoint an arbitrator. The State Government did not appoint an arbitrator and hence, this petition.

4. The Apex Court in *Deep Trading Company Vs. Indian Oil Corporation and Others*, held that once the authority empowered to appoint an arbitrator, is called upon to appoint the arbitrator but fails to do so, it forfeits its right to appoint an arbitrator. Reference may be made to paragraphs 20 and 21 of the judgment, which read as follows:

20. If we apply the legal position expounded by this Court in *Datar Switchgears*

(supra), to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the Arbitrator. It is so for the reason that on 9.8.2004, the dealer called upon the Corporation to appoint the Arbitrator in accordance with terms of Clause 29 of the agreement but that was not done till the dealer had made application u/s 11(6) to the Chief Justice of the Allahabad High Court for appointment of the Arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings u/s 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the Arbitrator by the Chief Justice u/s 11(6). We answer the above questions accordingly.

21. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the Arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial Arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as Arbitrator once the Corporation has forfeited its right to appoint the Arbitrator under Clause 29 of the agreement.

5. In this case, another question has arisen. The question is whether in terms of the agreement if no person could be appointed as Arbitrator by the Chief Engineer, then would arbitration proceedings lie or would the petitioner have to file a civil suit. The answer to this question lies in the judgment of the Apex Court in *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, wherein the Apex Court held as follows:-

11. 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 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 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 within the stipulated period of 15 days enjoined u/s 8(1)(a), then the respondent has been given right under Clause 65.2 to avail the remedy u/s 8 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. In light of this judgment of the Apex Court, the matter has to be referred to

arbitrator. Therefore, this Court directs that the disputes which have arisen between the parties arising out of Contract No. 4/CE/EE/KD/2004-05 dated 05-05-2004 be referred to the sole arbitrator Sri Saktimoy Chakraborty, Sr. Advocate of this Court. The parties are directed to file claims and counter claims before him on or before 31-05-2014. Sri Chakraborty is requested to complete the arbitration proceedings as early as possible and shall make an endeavour to complete the proceedings latest by 31-12-2014. The arbitrator shall be at liberty to fix reasonable fees for conducting the arbitration.