
(2002) 05 DEL CK 0059

In the Delhi High Court

Case No : AA No. 100/98

Earnest Builders

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-05-2002

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11, 13, 16

Citation : (2002) 6 AD 308 : (2002) 2 ARBLR 548 : (2002) 98 DLT 71 : (2002) 64 DRJ 521

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : R.D. Sah, for the Appellant; Ashok Bhasin and Chetan Dutt, for the Respondent

Judgement

D.K. Jain, J.—This is an application u/s 11 of the Arbitration and Conciliation Act, 1996 (for short the Act) seeking appointment of an arbitrator for adjudication of some of the disputes, which have not been referred to the arbitrator nominate by the persona designate namely, the Chief Engineer (Air Force) (WAC), respondent No. 2 herein, on 23 October 1997.

2. Brief facts are that the applicant was awarded some construction work in terms of the contract agreement dated 17 July 1993. The work was scheduled to be completed on 2 May 1994 but was in fact completed on 29 October 1994, after an extension was granted by the respondents on 29 July 1994. According to the applicant, the delay in the completion of the work awarded occurred on account of the delay in handing over of the site. The applicant submitted his final bill, which, inter alia, included damages on account of prolongation of the contract period. However, various amounts claimed by the applicant were objected to by the respondents.

3. Thus, disputed having arisen between the parties, the applicant, vide his letter dated 3 July 1996, invoked the arbitration clause and requested the Chief

Engineer, Air Force, (WAC) respondent No. 2 herein, to appoint an arbitrator in terms of Clause 70 of the agreement. It appears that on receipt of the aforementioned letter, invoking arbitration clause, the respondents made some payment to the applicant on 31 October 1996. Whereupon, vide his letter dated 27 January 1997 the application raised an additional claim (No. 9) and requested respondent No. 2 to refer the same also to the arbitrator for adjudication.

4. Vide letter dated 23 October 1997, the persona designata nominated Col. B.B. Bali to act as the sole arbitrator, saying :

"Now, Therefore, by virtue of the aforesaid, I hereby appoint you as sole arbitrator and request you to enter in the reference and publish your findings and award in respect of the disputes, as Appendix "A" to this letter so far as these are referable to arbitration in according with the said agreement."

5. Since applicant's claims No. 3 & 9 did not form part of the appendix referred to above, the applicant filed this application.

6. The application is resisted by the respondents only on the ground that claim No. 3, being an excepted matter, was not referable to arbitration in terms of para-I of Condition No. 70 of the MES, General Conditions of Contract. As regards claim No. 9 it is stated that the same could not be referred as it was made after submission of the final bill.

7. I have heard learned counsel for the parties.

8. Mr. Sah, learned counsel for the applicant, has submitted that since the delay in handling over the site stands admitted by the respondents, neither clause (A) nor clauses (B) of Condition No. 11 of the General Conditions of Contract was applicable and consequently, the claim, made by the applicant as damages for delay in the execution, did not fall in the category of excepted matters as specified in clause (C) of the said Condition. It is also urged that in view of the fact that existence of the arbitration agreement and the disputes between the parties is not being questioned by the respondents, the appointing authority was not justified in restricting the scope of arbitration by the nominated arbitrator. In support, reliance is placed on the three bench decision of the Supreme Court in *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.,* . Mr. Ashok Bhasin, learned counsel for the respondents, on the other hand, while justifying the action of the respondents, has vehemently contended that since the extension of time for completion of the work, vide respondents' letter dated 20 July 1994, had been granted under Condition No. 11(A) (vii), claim in respect of compensation, arising as a result of the said extension, was specifically barred under clause (C) of the said Condition. In support of the proposition that the excepted matters in terms of the contract between the parties could not be referred to arbitration, learned counsel has placed reliance on a recent decision of the Apex Court in *General Manager, Northern Railway and Anr. v. Sarvesh Chopra*, M 2002 (1) ALR 506.

9. Thus, there is a serious dispute between the parties whether claims No. 3 & 9, raised by the Claimant, are arbitrable or not and the persona designata has failed to refer these to the arbitrator nominated by him, which tantamounts to failure on his part to appoint an arbitrator qua the said claims.

10. The Arbitration Act, 1940, applying on the dated of agreement, stands repealed by virtue of Section 85 of Act. The 1996 Act is deemed to have come into force on the 25th day of January, 1996 and applies to all disputes raised thereafter. In the instant case, the arbitration clause having been invoked on 3 July 1996, the the provisions contained in the Act are applicable. Section 11 lays down the procedure for appointment of arbitrators by the parties. Sub-section (6) thereof, inter alia, provides that in case of failure of a party to act as required under the appointment procedure agreed upon by the parties, a party may request the chief Justice or any person designated by him to take the necessary measures for securing the appointment of arbitrator. The scope and ambit of Section 11 of the Act has been Succinctly explained by the Apex Court in the case of Konkan Railway Corporation Limited case (supra), as follows:

"..... When the matter is placed before the Chief Justice or his nominee u/s 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that question with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same."

It was further observed:

"Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under the 1996 Act indicated the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues at that state, by a party objecting to the appointment of an arbitrator....."

11. Affirming the decision of the three Judges Bench in the aforementioned case, the Constitution Bench of the Supreme Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., , inter alia, observed that there is nothing in Section 11 which contemplates a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. The only function of the Chief Justice or his designate under the said Section is to fill the

gap left by a party to the arbitration agreement.

12. Therefore, in the light of the aforementioned decisions, it is clear that u/s 11 of the Act the Chief Justice or his designate, while exercising his power under the said provisions, cannot entertain or decide the issues like existence of arbitration agreement. Its validity or scope or the jurisdiction of the arbitrator to decide the disputes that are sought to be referred to his arbitration. All that the Chief Justice or his designate is required to do is to nominate an arbitrator or arbitrators, as the case may be, if a party to an arbitration agreement has failed to do so, within the specified time after a request to do so had been made and in so doing, regard must be had to the qualifications that are required of an arbitrator by the agreement of the parties. All other issues are to be left to the decision of the arbitrator/arbitrators. This is so because of the jurisdiction of the Arbitral Tribunal u/s 16 of the Act is very wide. It is not confined to the width of its jurisdiction at all to deal with the matter before it.

13. However, in the present case, the persona designate having nominated Col. B.B. Bali as the arbitrator, paradoxically enough, himself proceeded to act as an arbitrator to decide that some claims fell within the excepted category and were not arbitrable. In My opinion, the said exercise undertaken by the appointing authority was beyond the scope of his jurisdiction to refer the parties to arbitration. Under the scheme of the Act, it is for the arbitrator to decide whether he could adjudicate upon a particular claim in the light of the contract between the parties or not. Similarly, while exercising power u/s 11 of the Act, it is equally not permissible for this Court to go into the aforementioned objections raised by the respondents.

14. The decision of the Supreme Court in Sarvesh Chopra's case (supra) heavily relied upon by learned counsel is of no avail to the respondents. From a bare reading of the said decision it is clear that the Apex Court was dealing with a case arising u/s 20 of the Arbitration Act, 1940. When dealing with a petition u/s 20 of the said Act the Court was required to look at the nature of the claim as preferred and decide whether it fell within the category of excepted matters and, Therefore, not referable for arbitration in terms of the contract between the parties, which is not the case while dealing with an application u/s 11 of the Act.

15. The question that now remains to be considered is whether the presented application u/s 11 is maintainable when the appointing authority has already nominated an arbitrator. As noted above. The applicant, vide his letter dated 3 July 1996, invoking the arbitration clause, had requested the respondents to appoint an arbitrator, to resolve the disputes, spelt out in the application. Respondents undertaking an exercise to segregate the claims made by the applicant and then refer some of these to the nominated arbitrator, in my view, amounts to the respondents' failure to act as required under the appointment procedure and, Therefore, the applicant is justified in approaching this Court u/s 11(6) of the Act.

16. However, since Col. B.B. Bali has already been appointed as the sole arbitrator, he is competent to decide as to which of the disputes are not arbitrable in terms of the agreement between the parties. Withholding of any Claim by the persona designata from the domain of the nominated arbitrator, being in excess of his authority. The applicant would be at liberty to raise the aforementioned claims before the nominated arbitrator namely, Col. B.B. Bali. Without prejudice, it will be open to the respondents to raise all objections, with respect to the claims made by the applicant before the arbitrator, including the objection that the same are beyond the scope of arbitration being excepted matters.

17. The application is disposed of accordingly.