
(2015) 09 RAJ CK 0038

In the Rajasthan High Court

Case No : Arbitration Application No. 92 of 2012

Giriraj Civil Developers Private Limited

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 11-09-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(8), 11(8)(a), 9

Citation : (2015) 09 RAJ CK 0038

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Advocate : P.C. Jain, for the Appellant; P.C. Sharma, Advocates for the Respondent

Final Decision : Allowed

Judgement

Bela M. Trivedi, J—The petitioner has filed the present arbitration petition seeking appointment of retired High Court Judge or retired Chief Engineer as the Arbitral Tribunal to resolve the disputes between the parties, under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the said Act").

2. The short facts are that the petitioner, which is the company incorporated under the Companies Act 1956, was awarded the contract pursuant to the tender dated 28.06.2011 for the construction of minor bridges, wing/return walls, earthwork in formation and all ancillary other works between Jaipur and Ringus stations of Jaipur-Ringus section, as per the letter dated 11.02.2011. It appears that on account of certain disputes having taken place between the parties, the said contract was terminated by the respondents. It also appears that some of the officers of the respondents were also trapped by the CBI on account of the FIR lodged by the petitioner. Since the respondents were likely to invoke the bank guarantee furnished by the petitioner, the petitioner had filed the proceedings under Section 9 of the said Act, and thereafter had also demanded settlement of disputes through Arbitrator by sending notice dated 19.10.2012 (Annexure/2), in view of General Conditions of Contract/Tender document. The

concerned respondent replied to the said notice vide the letter dated 06.11.2012 (Annexure/3) contending inter alia that as per the clause 64 of the GCC, the petitioner was required to submit the claims item-wise alongwith all relevant documents, and therefore the petitioner was advised to submit those documents. Since the respondents thereafter did not appoint the Arbitrator, the petitioner filed the present petition seeking appointment of an independent Arbitrator under Section 11 of the said Act. The petition has been resisted by the respondents by filing the reply contending inter alia that the petitioner could not pray for the appointment of retired High Court Judge as the Arbitrator, in view of the specific conditions of the agreement. It is also contended that the petitioner having not waited for the time period fixed under Clause 64, the present petition is premature and liable to be dismissed. The petitioner has filed the rejoinder to the said reply by contending that the respondent had refused to appoint the Arbitrator on flimsy ground on account of personal enmity with the petitioner, and therefore the officers of the respondents should not be appointed.

3. It is sought to be submitted by the learned counsel Dr. P.C. Jain for the petitioner that there being valid arbitration clause contained in the agreement and the respondents having failed to appoint the Arbitrator, despite the notice having been given by the petitioner, the petitioner was entitled to the appointment of the independent Arbitrator dehors the contract. He further submitted that it is not mandatory for the Court to appoint the Arbitrator named in the agreement. Relying upon the decision of the Apex court in cases of Union of India (UOI) Vs. Singh Builders Syndicate, (2009) 4 CompLJ 447 : (2009) 5 JT 456 : (2009) 4 SCALE 491 : (2009) 4 SCC 523 : (2009) 4 SCR 563 : (2009) AIRSCW 3374 and Reliance Industries Limited & Others Versus Union of India, 2014 (11) SCC 576, Mr. Jain submitted that the respondents having refused to appoint the Arbitrator on flimsy ground and keeping personal enmity with the petitioner, the petitioner was entitled to get the independent Arbitrator appointed under the said Act. However, the learned counsel Mr. P.C. Sharma for the respondents vehemently submitted that the petitioner was bound to follow the procedure as mentioned in the General Conditions of Contract specially contained in clause 64 to which the petitioner had failed to comply with. According to him, the demand for independent Arbitrator is not maintainable in view of clause 64 of the GCC. Mr. Sharma further submitted that as per Section 11(8)(a) of the said Act, the qualification of the Arbitrator has to be given due regard and accordingly the petitioner had also agreed to clause 64(3) of the GCC, in which officers having qualification of junior administrative grade have to be appointed as Arbitrators. Mr. Sharma has relied upon the decision of the Apex Court in case of Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., (2008) 3 ARBLR 349 : (2008) 4 CompLJ 39 : (2008) 11 SCALE 500 : (2008) 10 SCC 240 in this regard. Placing reliance upon the decision of the Supreme Court in case of Union of India Versus M.P. Gupta, 2004 (10) SCC 504 , he submitted that appointment of a retired Judge as sole arbitrator contrary to clause 64, which is requiring serving gazetted railway

officers being appointed, was impermissible. Mr. Sharma has relied upon the decision in case of *The Iron and Steel Company Limited Vs. Tiwari Road Lines*, AIR 2007 SC 2064 : (2007) 2 ARBLR 270 : (2007) 5 CompLJ 1 : (2007) 6 JT 526 : (2007) 6 SCALE 682 : (2007) 5 SCC 703 : (2007) 6 SCR 156 : (2007) AIRSCW 3172 : (2007) 3 Supreme 1066 , to submit that when the parties have agreed on a procedure for appointing the Arbitrator as contemplated by sub-section 2 thereof, then the disputes between the parties has to be decided in accordance with the said procedure and the party can not take recourse to the Chief Justice or his designate straightway.

4. Having regard to the submissions made by the learned counsels for the parties, it appears that there is no dispute with regard to the parties having agreed to the terms and conditions of the agreement in question, and more particularly clause 64 of the GCC. There is also no dispute with regard to the correspondence that ensued between the parties. Now, it is to be noted that the legislative scheme of Section 11 of the said Act has been interpreted by the Supreme Court in catena of decisions to the effect that a party can approach the Chief Justice or his designate, when the parties have not agreed on a procedure for appointing the Arbitrator as contemplated by sub-section 2 of Section 11, or when various contingencies provided in sub-section 6 thereof have arisen. The moot question therefore that falls for consideration in the instant case is, whether the petitioner was entitled to approach this Court seeking appointment of Arbitrator under Section 11(6) of the said Act?

5. Though much emphasis was laid by Mr. Sharma for the respondent on the decision of Supreme Court in case of *U.O.I. v. M.P. Gupta* (supra) to submit that appointment of a retired Judge as a sole arbitrator contrary to Clause 64 was impermissible, it is required to be noted that the said decision was in respect of the matter arising out of the old Arbitration Act. The Apex Court distinguishing the said decision, in case of *Northern Railway Admn. Versus Patel Engineering Co. Ltd.* (supra), has been held inter alia that the appointment of arbitrator(s) named in the arbitration agreement is not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered to and/or given effect, as closely as possible. It is also held that where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, the Chief Justice or his designate is not powerless to make appropriate alternative arrangement to give effect to the provision for arbitration.

6. The Supreme Court in the recent case of *North Eastern Railway Vs. Tripple Engineering Works*, (2014) AIRSCW 4669 : (2014) 9 SCALE 351 : (2014) 9 SCC 288 , while dealing with the said Arbitration Clause 64(3) of the GCC, has also considered various earlier decisions of the Supreme Court with regard to the powers of the High Court under Section 11 of the said Act, and held that:--

"6. The "classical notion" that the High Court while exercising its power Under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short

"the Act") must appoint the arbitrator as per the contract between the parties saw a significant erosion in *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd.* wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.* wherein following a three-Judge Bench decision in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* it was held that once an aggrieved party files an application Under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in *ACE Pipeline* and *Bharat Battery Mfg. Co. (P) Ltd.* was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn. v. Patel Engg. Co. Ltd.* wherein the jurisdiction of the High Court Under Section 11(6) of the Act was sought to be emphasized by taking into account the expression "to take the necessary measure" appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read alongwith the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corporation Limited and Ors. V. Raja Transport Pvt. Ltd.* Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) herein below.

"48. (vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

8. The above discussion will not be complete without reference to the view of this Court expressed in *Union of India v. Singh Builders Syndicate* wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not been concluded for over a decade, making a mockery of the process. In fact, in para 25 of the Report in *Singh Builders Syndicate* this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in *Deep Trading Co. v. Indian Oil Corporation and Ors.* followed the legal position laid down in *Punj Lloyd Ltd.* which in turn had

followed a two-Judge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction Under Section 11(6) of the Act.

10. In the present case Clauses 64(3)(a)(ii) and (iii) of the general conditions of contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be Railway Officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting Under Section 11(6), in an appropriate case to depart therefrom..... "

7. The aforesaid decision has been followed by the Apex Court in another recent decision in case of Union of India (UOI) Vs. U.P. State Bridge Corporation Ltd. for upholding the appointment of Arbitrator made by the High Court on its own, contrary to the arbitration clause. It was held in para 21 as under:--

"21. The appointment of arbitrator by the Court, of its own choice, departing from the arbitration clause, is therefore not unknown and has become an acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Reasons for debating such a course of action are not far to seek and already taken note of above."

8. The High Court of Kerala also in the case of Coastal Engineering Vs. Southern Railway, (2014) 4 ARBLR 207 : (2014) 3 ILR (Ker) 890 : (2014) 3 KLJ 358 : (2014) 3 KLT 447 , following decisions of the Supreme Court in case of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, (2000) 2 JT 226 Supp : (2000) 7 SCALE 204 : (2000) 8 SCC 151 : (2001) 1 UJ 349 : (2000) AIRSCW 3925 : (2000) 7 Supreme 145 , Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., (2008) 3 ARBLR 349 : (2008) 4 CompLJ 39 : (2008) 11 SCALE 500 : (2008) 10 SCC 240 , Punj Lloyd Ltd.'s case, (2006) 2 SCC 638 , Bharat Sanchar Nigam Ltd. and Another Vs. Dhanurdhar Champatiray, (2009) 15 JT 310 : (2009) 14 SCALE 545 : (2010) 1 SCC 673 : (2009) 16 SCR 398 and Deep Trading Company Vs. Indian Oil Corporation and Others, (2013) 4 AD 281 : AIR 2013 SC 1479 : (2013) 2 ARBLR 105 : (2013) 114 CLA 18 : (2013) 177 CompCas 475 : (2013) 2 CompLJ 271 : (2013) 2 CTC 888 : (2013) 8 JT 159 : (2013) 171 PLR 675 : (2013) 2 RCR(Civil) 953 : (2013) 5 SCALE 96 : (2013) 4 SCC 35 : (2013) AIRSCW 1891 : (2013) 3 Supreme 487 , held as under:--

"..... Therefore, it is now settled law that in cases arising under Section 11(6), if

the opposite party has not made an appointment within 30 days, the right to make appointment is not forfeited but continues but an appointment has to be made before the former files an application under Section 11 seeking appointment of an arbitrator and only then the right of the opposite party ceases. The said view is binding on us. The conclusion therefore is that even though there is a waiting period covered by Clause 64(1)(i) of the General Conditions of Agreement, the right of the party to move the arbitration request is protected and if the appointment is made after the party moves the court, the same cannot survive."

9. In the light of aforesaid legal position, if the undisputed facts of this case are appreciated, it appears that after the termination of the contract by the respondent on 14.05.2012, the petitioner had approached the High Court by filing the writ petition and then approached the concerned court at Jaipur for interim measures under Section 9 of the said Act. During the pendency of the said proceedings, the petitioner also invoked the Arbitration clause 64 by giving a legal notice to the respondent on 19.10.2012 and demanded for appointment of Arbitral Tribunal. The said notice was received on 25.10.2012. Though the petitioner had annexed to the said notice, the details of financial loss suffered by the petitioner, the respondent vide the letter dated 06.11.2012 asked the petitioner to submit amount of claims item-wise. It is pertinent to note that as per Clause 64(1)(ii)(a) of GCC, the arbitration proceedings are assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway. Since the arbitration proceedings had assumed to have commenced on 25.10.2012 when the respondent had received the written and valid demand from the petitioner for the appointment of arbitral tribunal, and since no arbitrator was appointed by the respondent within 30 days of the invocation of the arbitration clause by the petitioner, it did not lie in the mouth of the respondent to say that the petitioner was not entitled to approach this Court under Section 11 of the said Act. On the contrary, the respondent having failed to appoint arbitrator after receiving the valid demand from the petitioner to appoint the arbitrator, till the present application was filed, the right of the respondent to appoint arbitral tribunal as per the terms of the agreement had stood forfeited. Since some of the officers of the respondents were trapped by the CBI on the basis of the FIR lodged by the petitioner, the apprehension of the petitioner that he would not get justice from the designated arbitrators in the agreement and his prayer for appointment of independent arbitrator appears to be genuine.

10. In that view of the matter, the present petition deserves to be allowed, and is accordingly allowed. Hon'ble Mr. Justice A.C. Goyal (Retired), resident of D-19-B, "Seema Sadan", Meera Marg, Bani Park Jaipur, is hereby appointed as the sole Arbitrator to resolve the disputes between the parties. The cost of arbitration proceedings and the arbitration fees shall be as per the Rajasthan High Court Arbitration Manual. A copy of this order be sent to Hon'ble Mr. Justice A.C. Goyal (Retired) resident of D-19-B, "Seema Sadan" Meera Marg, Bani Park Jaipur.