
(2003) 03 OHC CK 0043
In the Orissa High Court
Case No : M.J.C. No. 8 of 2001

GRIDCO of Orissa Limited	Vs	APPELLANT
Electrical Manufacturing Company Limited and Another		RESPONDENT

Date of Decision : 05-03-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 7

Citation : (2003) 1 OLR 421

Hon'ble Judges : P.K. Balasubramanyan, C.J

Bench : Single Bench

Advocate : N.C. Panigrahi, S.C. Dash, G.S. Dash, P.K. Tripathy, D. Tripathy and S.R. Panigrahi, for the Appellant; P.K. Mishra and P. Mishra, for the Respondent

Final Decision : Allowed

Judgement

P.K. Balasubramanyan, C.J.—This is an application filed by. Grid Corporation of Orissa Limited (hereinafter referred to as "Gridco) u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"). On 9.10.1998. Gridco entered into a contract with the Electrical Manufacturing Company Limited, the opposite party herein, (hereinafter referred to as the "Contractor"), in connection with the drawing of a 132 KV overhead line. A formal contract was entered into between the parties. In the course of the work, certain disputes arose between Gridco and the Contractor. Clause 50.0 of the Contract provides for settlement of disputes. Clause 50.1 provided for an Adjudicator. Clause 50.1.1 provided that if any dispute of any kind whatsoever arose between the Employer Gridco and the Contractor in connection with or arising out of the contract, the parties were to seek a resolution of such dispute or difference by mutual consultation and failing that, the dispute was to be referred to. in writing by either party, to the Adjudicator with notice to the other party. The Adjudicator had to give his decision on the dispute in writing, to both the parties within twenty eight days of it being referred to him. This is provided for by Clause 50.1.2 of the Contract. The Clause further provides that if neither party notifies

the other of its disagreement with the decision of the Adjudicator within twenty eight days of the decision, the decision of the Adjudicator shall be final and binding. But. if within twenty eight days of the decision, either party notifies the other of its disagreement, the dispute was to be referred by either party to arbitration within twenty eight days. Clause 50.2 refers to Arbitration. Clause 50.2.1 provides that if the Adjudicator does not give a decision within twenty eight days of the dispute being referred to him or if the Employer or the Contractor notifies the other in terms of Clause 50.1.2 that it disagrees with the decision of the Adjudicator, then either the Employer, Gridco or the Contractor, may give written notice within twenty eight days to the other party of its intention to refer the dispute to arbitration.

2. In the case on hand, the dispute was referred to the Adjudicator, by letter Annexure-B to the counter affidavit, dated 17.8.2000. This letter was received by the Adjudicator on 19.8.2000. The Adjudicator called upon the parties to make their submissions. On receipt of that letter, the Adjudicator, by Annexure - C letter dated 4.9.2000, called upon Gridco to submit its written statement along with documents if any, to reach him on or before 9.9.2000, with a copy to the Contractor, along with the relevant documents and arrange for a hearing of the parties on 12.9.2000 at 11 A.M. In response to that letter, Gridco wrote Annexure-D letter dated 8.9.2000, seeking time till 25.9.2000 to file its written statement and inform the Adjudicator that he could have a hearing on 28.9.2000 or 29.9.2000. On his confirming the date, necessary accommodation would be made available to the Adjudicator. Objection was raised by the Contractor to that request. It issued Annexure - E letter dated 10.9.2000 informing Gridco that in terms of Clause 50.1.2, the Adjudicator had to give his decision in writing to both the parties within twenty eight days of the dispute being referred to him, and since the letter dated 17.8.2000 sent by Gridco seeking adjudicating was received on 19.8.2000, the Adjudicator had to pronounce his decision within twenty eight days thereof and the 28th day fell on 15.9.2000. Hence time as sought for by Gridco could not be granted. The Adjudicator in turn, wrote a letter dated 11.9.2000 inviting the attention of Gridco to the time limit prescribed in Clause 50.1.2 of the contract and informing Gridco that the maximum time that can be allowed to it was only upto 14.9.2000 for filing the written statement and the matter had to be heard on 15.9.2000. The Adjudicator suggested that unless the parties mutually agreed to extend the time, he will be constrained to give his decision within twenty eight days of the dispute being referred to him. Thereafter, the Adjudicator rendered his decision on 16.9.2000.

3. According to Gridco, the decision of the Adjudicator dated 16.9.2000 was received by it on 22.9.2000. By Annexure-4 letter dated 15.11.2000. Gridco invoked Clause 50.2 of the contract seeking an arbitration and informing the Contractor that Gridco did not agree with the decision of the Adjudicator. The Contractor informed Gridco that there could be no arbitration since the claim for arbitration was barred, arbitration not having been sought within twenty eight days of the decision of the Adjudicator and that Gridco was bound to accept the

decision of the Adjudicator. It is in the light of this stand adopted by the Contractor that Gridco invoked the jurisdiction of the Chief Justice u/s 11 of the Act. According to Gridco, a dispute has arisen between the parties in connection with the Contract, that though in terms of the contract an adjudication was sought, the Adjudicator's decision was not acceptable to it, and in terms of Clause 50.2, the dispute had to go for arbitration and since the opposite party had not agreed to the matter being arbitrated upon, Gridco is entitled to have an Arbitrator appointed by the Chief Justice in exercise of his power u/s 11(6) of the Act.

4. This request of Gridco is opposed by the Contractor on the ground that on the scheme of the contract with particular reference to Clause 50.1 and 50.2. the decision given by the Adjudicator has attained finality, Gridco not having intimated the decision of non-acceptance of the decision of the Adjudicator within the time stipulated in the contract and not having invoked the arbitration clause within the time provided. It is submitted that in this case there is no occasion for the Chief Justice or his nominee for exercising power or jurisdiction or for performing the duty u/s 11(6) of the Act. These arguments are sought to be met on behalf of Gridco by pointing out that the Adjudicator himself had not rendered his decision within twenty eight days as stipulated in Clause 50. 1 . 1 and hence there was no valid decision by the Adjudicator. It is further contended that in terms of Section 28 of the Contract Act. as substituted by Amendment Act 1 of 1997, the stipulation regarding the time within which the arbitration clause has to be invoked and the provision for any extinguishment of right for non-exercise of that right within the time stipulated, was invalid and the Chief Justice could and ought to appoint an Arbitrator since it is clear that a dispute has arisen between the parties touching the contract. It is further contended that in any event, this is a question that has to be decided by the Arbitrator in the light of the decision of the Supreme Court in *M/s Konkan Railways Corporation Limited v. M/s Rani Construction Private Limited* : AIR 2000 SC 778, and not by the Chief Justice at this stage, since the Chief Justice is only performing an administrative function in appointing an arbitrator. The question sought to be raised by the Contractor based on Clauses 50.1 and 50.2 of the contract and the extinguishment of the right of Gridco, is a question that has to be agitated before the Arbitrator. It is therefore, submitted that this is a fit case for appointment of an Arbitrator by the Chief Justice.

5. In *Konkan Railways Corporation's* case, the Supreme Court has held that there was nothing in Section 11 of the Act which required the Chief Justice to decide any question. Section 11 of the Act did not contemplate a decision by the Chief Justice or his designate on any controversy that may be raised by the other party to the contract even in regard to its failure to appoint an Arbitrator within the period prescribed by the contract. It was further held that the decision to nominate an Arbitrator was not adjudicatory. In fact, their Lordships held that the function of the Chief Justice under the Act is an administrative function. The Supreme Court has indicated that it may not even be necessary to hear the other

party to the agreement when an application u/s 11(6) of the Act is made before the Chief Justice by one of the contracting parties.

6. Whether administrative or quasi-judicial, the Chief Justice or his nominee is called upon to exercise a power or perform a duty u/s 11(6) of the Act. Whether it is the exercise of a power or the performance of a duty, it is the performance of a statutory power or a statutory duty. When an authority is called upon to perform a statutory duty or exercise a statutory power under the circumstances provided in the Act or on conditions enumerated in the Act. the concerned authority has necessarily to satisfy himself whether the jurisdictional facts which would enable him to exercise that statutory power or perform that statutory duty exist in the given case. Only if the authority concerned, here the Chief Justice, finds the existence of the jurisdictional facts enabling him or empowering him to exercise his power or perform his duty u/s 11(6) of the Act, he could exercise that power or perform that duty. Therefore, notwithstanding that there is no adjudication involved, as laid down by the Supreme Court and notwithstanding the fact that what the Chief Justice is performing is only an administrative function, it appears to me that the Chief Justice can perform that duty or function only after satisfying himself of the existence of the facts justifying performance of that duty. In terms of the Act. he has to satisfy himself that there exists an arbitration agreement as defined in Section 7 of the Act, and that the condition for exercise of power in terms of Section 11(6) of the Act have come into existence. Therefore, though left to myself, I am not inclined to accept the argument that because Gridco has made a request, the Chief Justice is bound to appoint an Arbitrator and leave it to the Arbitrator to decide all questions including the question whether the right to Gridco to seek an arbitration remains alive or not on the terms of the contract. Exercise of any statutory power or performance any statutory duty on the existence of certain facts conferring jurisdiction or calling for the performance of that duty, has necessarily to be done by the Chief Justice only on his finding on the existence of those facts. Therefore, the Chief Justice is bound to consider the argument of the opposite party that in terms of the relevant clauses in the contract, the right of Gridco, the petitioner, to seek the appointment of an arbitrator has been lost. Whether the arbitrator should be, appointed in a given case or the request is to be turned down has necessarily to be decided by the Chief Justice before he appoints or refuses to appoint an arbitrator and that function cannot be left to the Arbitrator to be discharged. But in view of the binding decision of the Supreme Court in M/s Konkan Railways Corporation's case, I am not in a position to accept the argument in that behalf raised by counsel for the opposite parties and in spite of the aspects referred to above. In that situation, I think that the questions argued have to be left for the decision of the Arbitrator who is to be appointed.

7. I find that one of the contracting parties has sought appointment of Arbitrator. There is an arbitration agreement. The questions sought to be raised by the opposite parties could be raised before the Arbitrator to be appointed and the Arbitrator would be bound to decide those questions as well. I, therefore, appoint

Mr. P.V. Ramdas, Advocate as Arbitrator to decide the dispute between the parties. The Arbitrator will be free to fix his terms in consultation with the parties. The Arbitrator will try to complete the arbitration within one year of entering upon the arbitration.

The application is allowed in the above manner.