
(2007) 04 OHC CK 0029
In the Orissa High Court

Indiana Conveyors Ltd.

APPELLANT

Vs

Indian Rare Earths Limited

RESPONDENT

Date of Decision : 26-04-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 2, 7, 8

Citation : AIR 2007 Ori 162 : (2007) 4 ARBLR 40 : (2007) 104 CLT 15 : (2007) 1 OLR 910 Supp

Hon'ble Judges : A.K. Ganguly, C.J

Bench : Single Bench

Judgement

A.K. Ganguly, C.J.—This is an application u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") for appointment of an Arbitrator to resolve the disputes and differences that have arisen between the parties in terms of the agreement dated 22.7.2001.

2. The case has a chequered history as would appear from the following facts:

A work Order dated 14.7.2001 was issued to the Petitioner by the sole Opposite Party, which is a Government of India Undertaking, in respect of design, supply, erection, testing and commissioning of dry feed system in its mineral separation plant. Clause 22 of the work order, inter alia, provides that general conditions of contract shall form and construe a part of the contract. Clause 12(3) of the general conditions of contract is as follows:

12.3. All disputes and differences of any kind whatsoever arising out of or in connection with the contract or carrying out of the works (whether during the course of work or after completion and whether before or after determination, abandonment or breach of Contract shall be referred to and settled by the Chief General Manager, OSCOM, who shall state his decision in writing. Such a decision may be in the form of a final certificate or otherwise within a period of thirty days from the date of receipt of such reference to him and shall be communicated to both parties to the dispute.

If the contractor is dissatisfied with the decision of the Chief General Manager, OSCOM, he may within thirty days of receipt of such decision by him send a written appeal to the Contractee, represented by their Chairman and Managing Director at their registered office, Sherbanoo, 6th Floor, 111 Maharshi Kerve Road, Mumbai-400 020. Such written appeals should however specify only those matters in dispute, which have been referred to Chief General Manager, OSCOM, but not satisfied and the reasons leading to his dissatisfaction. The Contractee thereupon shall communicate their final decision within thirty days on receipt of such appeal at their registered office.

If the Contractor is still dissatisfied with the decision of the Contractee even after considering his written appeal, he shall without prejudice to any Indian Law for the time being in force be at liberty to refer within thirty days of his receipt of the decision of the Contractee only those matters referred to in the said written appeal but about which he is still dissatisfied, for adjudication only by those Courts mentioned in Clause 15 of the Invitation to Tender.

If the period of thirty days has expired at any stage stipulated in the preceding paras without any response from the Contractor before such expiry, the Contractor is deemed to have communicated his satisfaction to the decision of the Contractee at the relevant stage, and all his rights of further appeal or as the case may be, adjudication are deemed to have been waived once and for all.

3. The Petitioner's contention is that the aforesaid clause contains the arbitration clause. The Opposite Party, however, disputes the same.

4. As disputes and differences arose between the parties, the Petitioner invoked Clause 12.3 of the said Contract by writing a letter dated 23.5.2002 to the Chief General Manager, Orissa Sand Complex, P.O. Matikhal, District Ganjam. As no response came from the Chief General Manager, OSCOM, the Petitioner sent a reminder to the Chief General Manager by its letter dated 18.6.2002. Ultimately on 21.6.2002 came a reply from D.G.M. of the Opposite Party, but not from the Chief General Manager, stating therein that there are alleged non-compliance with the agreement conditions by the Petitioner. So the actions taken by the Opposite Party are well within the purview of the terms of the contract and the same cannot be reckoned as a dispute. The said letter was received by the Petitioner on 26.6.2002. Thereafter on 22.7.2002 another letter was written by the Petitioner to the Chairman-cum-Managing Director of the Opposite Party stating therein that the Petitioner was dissatisfied with the decision and the Petitioner wanted a decision in terms of the Contract as provided for. The said letter of the Petitioner was received by the Opposite Party on 23.7.2002. In reply thereto, the Opposite Party gave two options to the Petitioner by its letter dated 10.10.2002. The said letter has some bearing for decision of the questions involved herein. As such, relevant part of the said letter is set out below:

...we have two options:

1. Notify you for termination of contract as per clause No. 10.1 (iv). and 10.2 of

GCOC and expel you from the contract and get the work done by any other party, at your risk and cost. Meanwhile refer the matter for arbitration; or

2. Close the contract at this stage, value the work done by you by joint measurement and value of materials supplied, etc., and settle your genuine payment and clear you from the contract.

If you want to follow any of the" above two options, you may notify us within ten(10) days.

This letter was, however, written to the Petitioner by the Head of OSCOM, who is Chief General Manager. The said letter was received by the Petitioner on 16.10.2002. In response thereto immediately on 17.10.2002, the Petitioner wrote back to the Opposite Party communicating its willingness that it is agreeable to refer all the disputes for arbitration and also made it clear that such arbitration would be conducted in terms of the said Act. The venue of the arbitration was suggested at Mumbai and confirmation of the Opposite Party to that proposal of the Petitioner was sought. In the meantime, Opposite Party issued a notice of rescission of contract stating therein that the contract will be rescinded after one month from the date of receipt of the notice by the Petitioner. Thereafter the Opposite Party filed a suit being C.S. No. 75 of 2002 in the Court of Learned Civil Judge (Senior Division), Chatrapur, District Ganjam raising disputes and differences between the parties to the contract. The Petitioner in the meantime suggested the name of Hon"ble Justice Mrs K.K. Baam (retired) as the sole Arbitrator to decide the disputes and called upon the Opposite Party to confirm the said proposal of the Petitioner within thirty days from the date of receipt of the same. It was made clear that if no objection is received, it will be presumed that the Opposite Party has agreed to the appointment of Justice Mrs K.K. Baam (retired) as the sole Arbitrator. The Petitioner made it clear that the same may be treated as a notice u/s 11 of the said Act. The Opposite Party on the other hand by its letter dated 13.5.2003 indicated that there is no arbitration clause in the contract and as such, it was unable to accede to the Petitioner's request for arbitration in the matter. In the meantime, the Petitioner in view of the arbitration agreement between the parties moved on 24.4.2003 an application u/s 8 of the said Act in the suit filed before the Learned Civil Judge (Senior Division), Chatrapur, District Ganjam. The said application was dismissed on 14.5.2003 by the Learned Civil Judge (Senior Division), Chatrapur, District - Ganjam, inter alia, holding that there is no arbitration clause in the contract between the parties. The Petitioner, however, filed an application u/s 11 of the said Act in the High Court of Bombay on 16.12.2004. The Petitioner also filed a Revisional application against the Judgment dated 14.5.2003 whereby its application u/s 8 of the said Act was rejected by the Learned Civil Judge (Senior Division), Chatrapur, District Ganjam. The said Revisional application filed by the Petitioner was allowed on 18.3.2005 by the Learned Additional District Judge, Fast Track Court, Chatrapur in CRP No. 2 of 2004. While allowing the application, the Revisional Court was pleased to direct the Court below to peruse Clause 12.3

of the General Conditions of Contract and thereafter pass appropriate order on the Section 8 petition filed by the Petitioner. In the meantime, the Opposite Party filed an affidavit in the High Court of Bombay on the Section 11 petition filed by the Petitioner, challenging the territorial jurisdiction of Hon"ble Bombay Court on the ground that the entire work under the contract has been done in Orissa and the cause of action has arisen in Orissa and as such, the High Court of Bombay has no jurisdiction to try the application. In its affidavit which the Opposite Party filed before the High Court of Bombay, it of course denied the existence of any arbitration clause in the agreement. Ultimately, on 18.8.2005, the Petitioner withdrew from Bombay High Court, its application u/s 11 of the said Act and the Hon"ble Chief Justice of the Bombay High Court was pleased to pass the following order on 18.8.2005:

The Learned Counsel for the applicant craves leave of the Court to withdraw the application at this stage. The leave as prayed is granted. This application is dismissed as withdrawn. The applicant would be at liberty to revive this application, if so advised.

Thereafter on 9.12.2005, the instant application u/s 11 of the said Act was filed by the Petitioner before this High Court.

5. The Learned Counsel for the Opposite Party accepting the most of the facts stated above has strongly contended that the suit filed by the Opposite Party in the Civil Court is maintainable and the only remedy available to the parties is to approach the Civil Court and submitted that in the instant case, the Opposite Party has filed the suit for a declaration that its action in rescinding the contract is just and proper. It was also pointed out that in the said suit, an application has been filed by the Petitioner for amendment of its written statement and therein it has introduced its counterclaim. So it is clear that the applicant has surrendered to the jurisdiction of the Civil Court and as such the present petition for appointment of Arbitrator is not maintainable. The Learned Counsel further submits that Clause 12.3 does not contain an arbitration clause having regard to Section 7 of the said Act.

6. In support of their respective contentions, Learned Counsel for both parties have cited several Judgments.

Therefore, the questions which fall to be decided by this Court are whether there is an arbitration clause in the agreement between the parties, whether any case has been made out by the applicant in terms of the said clause for referring the disputes for arbitration. Along with those questions is involved another question namely whether the Petitioner has given up its claim for arbitration in view of the steps taken by it in the pending suit.

7. In the meantime on 12.5.2006, Learned Civil Judge (Senior Division), Chatrapur rejected the application filed by the Petitioner u/s 8 of the said Act and against the said order, a Revisional application has been filed by the Petitioner being C.R.P. No. 15 of 2006 and the same is still pending.

8. In the amendment application which was filed by the Petitioner, it was made clear that the same was filed without prejudice to its rights and contentions and that the suit is not maintainable and the parties should be referred to arbitration specifically stating therein pendency of its application u/s 8. It was made clear in the said amendment petition that as the adjudication in connection with the application u/s 8 of the said Act will take time, Petitioner's right to file a counter claim may be barred. That is why it filed the amendment petition raising counter claim.

9. On the controversy, namely, whether the hearing of application u/s 11 of the said Act should be suspended pending the hearing of the Section 8 proceeding, the Division Bench Judgment of Calcutta High Court in the case of Modi Korea Telecommunication Ltd. v. Appcon Consultants Pvt. Ltd. reported in 2000 (Suppl.) ALR 618 will throw some light. The issue in Modi Korea (supra) was whether hearing of an application u/s 11 of the said Act can be made subject to the disposal of an application filed u/s 8 of the said Act.

10. Speaking for the Division Bench, Justice Ruma Pal (as the Learned Judge then was) held "the Court before which an application is made for appointment of an Arbitrator u/s 11 must proceed to decide the same. The fact that an application has been filed u/s 8(1) has by statute and for the purpose of Section 11, been made an immaterial consideration".

11. In paragraphs 32 and 33 of the same Judgment, this aspect has been made explicit by the Learned Judge and which I quote:

32. The Learned Single Judge therefore could not have adjourned the Section 11 application for appointment of an Arbitrator because of the pendency of the application u/s 8(1) and make the exercise of power u/s 11(5) dependent upon the disposal of the application u/s 8(1) by the Munsif.

33. In making the Appellant's right to have an Arbitrator appointed in terms of Section 11(5) subject to the outcome of the application u/s 8(1), the Learned Judge has acted in a manner which is not envisaged under the 1996 Act. The order is not one which is referable to Section 11(5) or any other provision of the Act.

This Court is in respectful agreement with the aforesaid declaration of law in Modi Korea. This Court proceeds to hear this application u/s 11 irrespective of the pendency of the controversy arising out of the proceeding u/s 8 of the said Act.

12. The next question which is to be considered here is whether there is an arbitration agreement between the parties. It is well known that under the said Act, Section 2(b) provides that an arbitration agreement means an arbitration agreement referred to in Section 7. The expression "arbitration agreement" as has been used in Section 7 of the said Act is in some details and the Section 7 runs as follows:

7.(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain dispute which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of a arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in -

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(d) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

13. It is well settled that in order to become an arbitration agreement it is not required that in the agreement between the parties the word "arbitration" should be mentioned. In the instant case, Clause 12(3) has been set out hereinabove. If we recount the facts of the case, it transpires that invoking the said clause, the Petitioner had written a letter dated 23.5.2002 to the Opposite Party asking for settlement of the disputes and differences. A reminder was also sent on 18.6.2002. A reply to that effect was sent to the Petitioner not by the Chief General Manager, OSCOM, but by the General Manager, OSCOM. Thereafter, the Petitioner received on 16.10.2002 a reply dated 10.10.2002 in which there is a clear stand taken by the Head of OSCOM, who is the Chief General Manager that the matter may be referred to arbitration. That was one of the options given to the Petitioner. The Petitioner immediately on 17.10.2002 agreed to the proposal for referring the matter to the arbitration in accordance with the said Act of 1996 and proposed the venue to be in Mumbai. Thereafter the Petitioner sent another communication dated 21.4.2003 further reiterating the proposal for referring the dispute under the said work order to arbitration and the Petitioner suggested the name of Justice Mrs. K.K. Baam (Retd.) as the sole Arbitrator and requested the Opposite Party to confirm the same within thirty days. The Opposite Party vide its letter dated 13.5.2003 replied by saying that the suggestion of appointing Justice Mrs. K. Baam as the sole Arbitrator is not acceptable to it. In the aforesaid sequence of events, this Court is of the opinion that there is provision for arbitration in Clause 12.3 and the Opposite Party has admitted the existence of the same by its letter dated 10.10.2002.

14. Learned Counsel for the Opposite Party on the other hand submitted that the

admission of Opposite Party about existence of arbitration clause in the letter dated 10.10.2002 is not correct. In other words, it was stated that the letter dated 10.10.2002 should be construed by taking the document as a whole. In support of such submission, Learned Counsel for the Opposite Party has referred to a Judgment of the Supreme Court in the case of Ramkishore Lal Vs. Kamal Narain, .

15. Even if we consider the letter dated 10.10.2002 as a whole, it is difficult for this Court to come to a conclusion that in the said letter the Opposite Party has not accepted the existence of arbitration clause in the agreement. In the said letter, the Opposite Party has allegedly denied existence of a dispute, but it has not denied the existence of the provision for arbitration. One of the two options which were given in the said letter was an option for arbitration. Therefore, applying the provision of Section 7(4)(c) of the said Act, this Court comes to the conclusion that there is existence of arbitration agreement.

16. It is well settled that when a Court has to interpret whether a contract contains an arbitration clause or not, such interpretation has to be done on a slightly different basis. A contract that provides for arbitration is a commercial agreement inter-parties and has to be interpreted in such a manner as to give an efficacy to the agreement rather than to invalidate it. So for interpreting, such an agreement strict rules of construction which are applicable to interpret any conveyance or such other formal documents should not be applied. The meaning of such an agreement must be gathered by commonsense and such construction must not be defeated by any pedantic and rule of strict interpretation. (See The Union of India (UOI) Vs. D.N. Revri and Co. and Others, (paragraph 7).

17. The decision which has been cited by the Learned Counsel for the Opposite Party in Ramkishore Lal was about construction of an award embodying a partition that took place between the members of Joint Hindu Family where the question was whether there is an absolute dedication of a village made in favour of the temple or whether the village was given in full proprietorship to one R with only a charge on it to meet the expenses of the temple. It is obvious from what has been stated above that the construction of such a deed stands on a totally different footing other than the construction of a commercial agreement. Therefore, the decision in the case of Ramkishore Lal is not attracted to the facts of this case. In the said Judgment, the Learned Judges noticed that there was a conflict between two parts of the award and when there is a conflict in such a case only there can be a question of harmonious construction. But in the instant case, in the letter dated 10.10.2002 there is no conflict on the question of provision for arbitration. Therefore, in the absence of conflict the question of harmonious construction does not arise. (See the Judgment of Bombay Court in the case of Economic Development Corporation of Goa v. Sunivas Builders: 1996 Supp. Arbitration Law Reports 152, at 156, para 5 of the report.

18. Therefore, I hold that there is existence of an arbitration clause between the parties and the Opposite Party gave the Petitioner the option to go for

arbitration. Pursuant to such option, the Petitioner applied for appointment of Arbitrator which was received by the Opposite Party but it declined to appoint any Arbitrator. The Petitioner has, therefore, come before this Court and filed a petition u/s 11 of the said Act.

19. Learned Counsel for the Opposite Party has also relied on two other decisions of this High Court in support of the fact that there is no arbitration clause. The first Judgment was rendered in the case of Binayak Samal v. Orissa Industrial Infrastructure Development Corporation and Ors. reported in 90 (2000) CLT 465. In paragraph 3 of the said Judgment the Learned Judge referring to Article 5 of the Formal Contract found that Article 5 made it clear that any dispute relating to this agreement was barred from arbitration. The Learned Judge held since Article 5 of the agreement specifically bars any arbitration, it must be held that the parties did not contemplate any arbitration. But in the instant case, there is no specific exclusion. Therefore, the decision in the case of Binayak Samal does not apply to the facts of this case. The other Judgment which was rendered by a Learned Single Judge in the case of Banalata Sahoo Vs. State of Orissa and Others, also records in paragraph 3 at page 139 of the report that arbitration clause was specifically deleted. But as noted above, the factual position in this case is not the same. Therefore, both the decisions have no application to the facts of this case.

20. So far as the other point, namely, whether the Petitioner has given up his rights u/s 11 in view of its filing of the written statement in the civil suit including its amendment is concerned, this Court finds that prior to filing the written statement the Petitioner has filed its application u/s 8 of the said Act for referring the disputes for arbitration. The application for amendment to the written statement was filed on 16.12.2005. Prior thereto, the application u/s 8 was filed on 24.4.2003 and the same is pursued. Then application u/s 11 of the Act was filed on 16.12.2004 before the Bombay High Court which was withdrawn in view of objection of territorial jurisdiction of the said Court by the Opposite Party with the leave of the Bombay High Court to revive the said petition and thereafter this application u/s 11 of the said Act was again filed before this Court on 9.12.2005. All these steps were taken by the Petitioner before the application for amendment to the written statement was filed. The application for amendment was filed by the Petitioner without prejudice to its rights and contentions that the suit is not maintainable and the parties may be referred to arbitration specifically mentioning therein about existence of an application u/s 8 of the said Act.

21. In view of the aforesaid stand of the Petitioner, it cannot be said that the Petitioner has given up its right u/s 11. Reference in this connection may be made to the Judgment of the Supreme Court in the case of Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, (paragraph 36).

22. For the reasons aforesaid, we are of the view that this petition u/s 11 of the said Act is maintainable before this Court.

23. This Court holds that there is a valid arbitration clause and there are disputes between the parties and the Petitioner's request for arbitration was turned down by the Opposite Party. This Court therefore appoints Mr. Justice Pradyumna Kumar Mohanty, a retired Judge of the Orissa High Court as the sole Arbitrator in this case to decide the disputes between the parties. The Arbitrator will immediately enter upon the reference within a period of four weeks from the date of service of this order upon him and thereafter he will take up all steps to decide the disputes between the parties and pass an award within a period of six months from the date of entering upon the reference. The question of remuneration of the Arbitrator and other costs and fees-are left to be decided by the Arbitrator.

The ARBP is accordingly disposed of.