

(2003) 03 CAL CK 0051
In the Calcutta High Court
Case No : A.P. No. 50 of 1999

K.M. Construction

APPELLANT

Vs

The Eastern Railways

RESPONDENT

Date of Decision : 25-03-2003

Acts Referred:

Arbitration Act, 1940 — Section 11, 11(1), 12, 5, 8
Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2003) 3 CALLT 448 : 108 CWN 756

Hon'ble Judges : Asit Kumar Bisi, J

Bench : Single Bench

Advocate : Soumen Sen, for the Appellant; Biswanath Samaddar and D. Basu Mallick, for the Respondent

Judgement

A.K. Bisi, J.—The petitioner M/s. K.M. Construction has filed the instant application under Sections 5, 11 and 12 of the Arbitration Act, 1940 (hereinafter referred to as the Act) making following prayers:

"(a) Leave be granted to the petitioner to revoke the authority and/ or power of the said learned Joint Arbitrators Shri N.K. Sinha and Sri A. Bandhapadhyay.

(b) The said learned Joint Arbitrators Shri N.K. Sinha and Sri A. Bandhapadhyay be removed.

(c) Independent and impartial person/persons be appointed by this Hon''ble Court as Arbitrator/Arbitrators to adjudicate disputes and differences between the parties under the same terms and scope of reference pending before the said learned Joint Arbitrators Sri N.K. Sinha and Sri A. Bandhapadhyay.

(d) Directions be given to the Arbitrators appointed in terms of prayer (c) hereinabove to publish an award within four months from the date of entering into reference and/or within any time limit as this Hon''ble Court may deem fit and proper.

(e) Costs of this application be borne by the respondent.

(f) Such further and/or other order/orders as this Hon''ble Court may deem fit and proper."

2. Briefly stated the case of the petitioner is that pursuant to the notice issued by the respondent inviting tenders for design and construction of platform shed for new platform facilities the petitioner submitted tender which was duly accepted by the respondent for the aforesaid construction work whereupon a formal agreement was entered into by and between the parties and the provisions of the General Conditions of Contract and Standard Specification of Eastern Railways formed a part of the said agreement. The aforesaid agreement contained an arbitration clause being clause 63(1) of the General Conditions of Contract and Standard Specification of Eastern Railways. In spite of best efforts on the part of the petitioner, the aforesaid works could not be completed within the stipulated period by reason of various acts of neglect and/or laches and/or defaults on the part of the respondent. As disputes and differences arose between the parties the petitioner by its letter dated 22nd December, 1995 inter alia submitted its claim for Rs. 15,83,000/- and called upon the respondent to seek a reference to arbitration for settlement of the said disputes and claims as mentioned in the said letter. By the letter dated 2nd December, 1996 the respondent, inter alia, appointed Sri N.K. Sinha and Sri A. Bandhapadhyay as Joint Arbitrators and referred the disputes, claims, counter-claims to the said Joint Arbitrators for arbitration or publication of an award in terms and scope of the arbitration clause. By the order dated 25th April, 1997 passed in CAP No. 69 of 1996 (KM. Construction v. The General Manager and Anr.) this Court directed the said Joint Arbitrators to commence the proceedings and complete the same and publish the award within four months. By and under the cover of the letter dated 31st December, 1996 the petitioner submitted a copy of the petitioner's statement of facts and claims before the Joint Arbitrators and sent a copy of the same to the respondent. The Joint Arbitrators entered into reference on 8th May, 1997 and the said fact was communicated to the petitioner by a letter written on the same date. In spite of direction of the said Joint Arbitrators to the respondent to submit the counter-statement within 15 days from the receipt of the aforesaid letter the respondent caused undue delay and ultimately submitted its counter-statement of facts on 14th October, 1997. Thereafter the Joint Arbitrators scheduled the first hearing on 8th July, 1998 which was more than one year after having entered upon reference. The said fact of scheduling the first hearing on 8th July, 1998 was communicated to the petitioner by the Joint Arbitrators by the letter dated 17th June, 1998. On 8th July, 1998 though a formal hearing was held neither any direction was issued nor any minutes were recorded by the said Joint Arbitrators. Since 8th July, 1998 no further hearing has been held nor any date has been scheduled and/or fixed for hearing by the Joint Arbitrators. The said Joint Arbitrators failed to use all reasonable dispatch in entering upon reference and proceeding with the same and making an award as already more than one and half years passed since the Arbitrators entered upon reference.

3. It has been alleged by the petitioner that the said Joint Arbitrators have misconducted themselves or the proceedings. Under the above circumstances the petitioner seeks leave of the Court to revoke the authority of the said Joint Arbitrators Sri N. K, Sinha and Sri A. Bandhapadhyay and prays for appointment of independent Arbitrator/Arbitrators to adjudicate upon the disputes and differences between the parties.

4. The application under Sections 5, 11 and 12 of the Act has been opposed by the respondent the Eastern Railways by filing the affidavit-in-opposition and the supplementary affidavit-in-opposition as well. In the affidavit-in-opposition the respondent has averred inter alia that the application under Sections 5, 11 and 12 of the Act is not maintainable in view of the fact that the Arbitrators sought to be removed were appointed by the General Manager of Eastern Railway Administration pursuant to an order passed by this Court on 25th April, 1997 in G.A. No. 1269 of 1997 with A.P. No. 69 of 1996 under the Arbitration and Conciliation Ordinance, 1996. In the supplementary affidavit affirmed on behalf of the respondent it has been alleged that the petitioner had committed breach of contract by not completing the work within the stipulated period and therefore the action was taken as per the relevant provisions laid down in the agreement as well as the General Conditions of Contract, 1969 which are binding on the parties. It has been further alleged by the respondent that the Arbitrators were appointed prior to passing of the order by this Court on 25-4-1997 and the petitioner had accepted such appointment of the Arbitrators by submitting their statement of claims before the Arbitrators on December 31, 1996. The Arbitrators were busy with some urgent work of public interest for which fixing of the date was somewhat delayed but since the Arbitrators fixed the date of hearing subsequently, their alleged negligence cannot be proved and therefore their authority is not liable to be revoked only on this ground. The next date of hearing was fixed on 8.3.99 on which date the petitioner did not attend the arbitration proceeding. In the supplementary affidavit it has been submitted on behalf of the respondent that the General Manager of the respondent Railway Administration may be directed by this Court to act in terms of General Conditions of Contract with regard to the appointment of new Joint Arbitrators.

5. The point to be decided is whether or not there are justifiable grounds for allowing the application under Sections 5, 11 and 12 of the Act filed by the petitioner for removal of the Joint Arbitrators and appointment of independent arbitrator to adjudicate upon the disputes and differences between the parties under the same terms and scope of reference.

6. Mr. Biswanath Samaddar the learned advocate appearing for the respondent has challenged maintainability of the application under Sections 5, 11 and 12 of the Act filed by the petitioner contending that the Joint Arbitrators sought to be removed by the petitioner were appointed by the General Manager of Eastern Railways Administration pursuant to an order passed by the Hon'ble Mr. Samir Kumar Mookherjee, Acting Chief Justice (as His Lordships then was) on

25.4.1997 in G.A. No. 1269 of 1997 with A.P. No. 69 of 1996 on an application u/s 11 of the Arbitration and Conciliation Ordinance, 1996. He has drawn my attention to xerox copy of the aforesaid order dated 25.4.97 and xerox copy of the application u/s 11 of the Arbitration and Conciliation Ordinance, 1996 filed by the petitioner which have been marked annexures "A" and "B" respectively to the affidavit-in-opposition filed by the respondent.

7. Mr. Soumen Sen the learned advocate for the petitioner has contended, on the other hand, that the Arbitration and Conciliation Act, 1996 came into force on 26.1.96 and if request for referring the dispute for arbitration was made prior to that date then the proceedings would be governed by the old Act i.e. Arbitration Act, 1940 and if request was made subsequent thereto the proceedings would be governed by the new Act which is Arbitration and Conciliation Act, 1996. He has cited the case of Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, in support of his contention. In view of ratio of the judgment of the Supreme Court in Shetty's Constructions Co. Put. Ltd. (supra) it can well be held that if the request for referring the dispute for arbitration was made before 26.1.1996 which was the date of coming into force of the new Act i.e. Arbitration and Conciliation Act, 1996, the old Act, i.e. Arbitration Act, 1940 would apply for adjudicating upon the disputes. Admittedly in the instant case the disputes were referred by the petitioner for arbitration in accordance with the provisions of clause 63 of the General Conditions of Contract by the letter dated 22.12.95 written by the petitioner to the respondent copy of which is marked as annexure "B" to the application. From the said factual matrix it becomes obvious that the demand for referring the dispute for arbitration was made by the petitioner prior to 26.1.96. So in view of the judgment of the Supreme Court in Shetty's Construction Co. Pvt. Ltd. (supra) the old Act, i.e. Arbitration Act, 1940 will apply in the instant case for adjudicating upon the disputes between the parties. So the contention raised by the Mr. Samaddar the learned advocate for the respondent challenging maintainability of the instant application under Sections 5, 11 and 12 of the Act fails.

8. Mr. Sen the learned advocate for the petitioner has argued that in the instant case there is failure on the part of the Joint Arbitrators to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and as such in view of Sub-section (1) of Section 11 of the Act the Court will have to exercise power to remove the Joint Arbitrators. No doubt Sub-section (1) of Section 11 of the Act empowers the Court to remove an Arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. It has been further argued by Mr. Sen that under Clause 3 of the first scheduled to the Act the Arbitrator shall make their award within four months after entering on the reference. He has pointed out that by the aforesaid order dated 25.4.97 passed by the then Hon'ble Acting Chief Justice, the Arbitrators were directed to enter upon the reference within three weeks from the date of the communication of the order and complete the reference within 4 months from the said date. Copy of the said order has been

marked as annexure "D" to the application. It is the grievance of the petitioner that no step was taken by the Joint Arbitrators to enter reference or to proceed with the matter in terms of their letter of appointment dated 2nd December, 1996 or in terms of the aforesaid order passed by the then Hon"ble Chief Justice on 25.4.97. Mr. Sen has cited Full Bench decision of this Court in the case of Ramanath Agarwalla Vs. Goenka and Co. and Others, wherein at page 258 (para 35) It was held as follows:

"An Arbitrator does not enter on the reference as soon as he assumes the office of an Arbitrator. An Arbitrator does not necessarily enter on the reference when he actually commences the decision of the matter in the presence of both parties or ex-parte. An Arbitrator enters on a reference when he first applies his mind to the dispute or controversy before him depending on the facts and circumstances of each case."

9. In Food Corporation of India Vs. Hari Prasad Kanoria and others, the Division Bench of this Court followed the same principle enunciated by the Full Bench of this Court in the case of Ramanath Agarwalla (supra) and made the observation at page 350 (para 16) which is quoted hereunder:

"Mr. Sinha, appearing for the Corporation, placed reliance on the judgment of a learned Judge of this Court in the case of Bright Wire and Steel Industry Vs. Union of India (UOI), in support of his contention that 25th June, 1985 should be taken as the date of entering upon the reference because on that date the Arbitrator, while granting time to one of the parties to file replication and documents, had exercised a judicial function in furtherance of his work of arbitration. Even in that decision it has been impressed that an Arbitrator will be deemed to have entered upon the reference only when he does something in furtherance and execution of the work of the arbitration. It will include any judicial function discharged by the Arbitrator for conducting the arbitration proceeding for determination of the dispute and/or controversy referred to him. It is true that some of the observations made by the learned Judge in the aforesaid case helps the appellant Corporation. But in view of the Full Bench judgment referred to above, it is not possible for me to hold that the Arbitrator entered upon the reference on 25th June 1985 when he passed an order saying that the contractor had submitted his rejoinder to the counter-statement and counter-claim filed on behalf of the Corporation and as such the pleadings and the documents were more or less complete, a date of hearing can be fixed at Calcutta where the parties may lead evidence and make submissions. There is nothing in the orders dated 16th March 1985 and 25th June 1985 from which It can be Inferred that the Arbitrator had applied his judicial mind to the dispute referred to him."

10. In view of the authorities cited above it has become settled principle of law that an Arbitrator enters on a reference when for the first time he applies his mind to the dispute or controversy before him. From the materials on record it emerges that Sri N.K. Sinha and Sri S. Bandyopadhyay were appointed as Joint

Arbitrators on 2.12.96. As mentioned hereinbefore, by the order dated 25.4.97 passed by the then Hon"ble Acting Chief Justice of this Court in A.P. No. 69 of 1996 the Arbitrators so appointed were directed to enter upon reference within three weeks from the date of communication of that order and complete the reference not beyond four months from the said date. From the letter dated 8.5.97 issued to the parties copy of which is marked as annexure "F" to the application, the Joint Arbitrators informed the parties that they entered into the reference on 8th May, 1997 and asked the respondent to submit the counter-statement of facts within 15 days on receipt of the said letter. It appears that the petitioner being the claimant already submitted the statement of facts vide letter No. KMC/MBB/ARB/ 12F/96 dated 31.12.96 addressed to the Joint Arbitrators. This fact is borne out by copy of the said letter marked annexure "E" to the application and copy of the letter dated 8.5.97 issued by the Joint Arbitrators which is marked annexure "F" to the application. It has been pointed out by Mr. Sen the learned advocate appearing for the petitioner that first hearing of the proceeding was held on 8th July, 1998 though no minutes were recorded. Copy of the notice of intimation of such hearing issued by the Joint Arbitrators to the parties has been marked as annexure "G" to the application. The materials on record make it quite evident that the Joint Arbitrators never applied their mind to the dispute or controversy referred to them and, as already indicated, after 8th July, 1998 no further hearing took place nor any direction was given by the Joint Arbitrators. No minutes of first hearing of the proceeding which is reported to have been held on 8th July, 1999 appear to have been recorded by the Joint Arbitrators. The instant application under Sections 5, 11 and 12 of the Act was filed by the petitioner in the month of February, 1999. It is curious to note that after filing of the said application by the petitioner in the month of February, 1999 the Joint Arbitrators issued notice dated 1.3.99 to the parties fixing the date of hearing on 8th March, 1999. Copy of the said notice has been marked as annexure "A" to the supplementary affidavit filed by the respondent on 24.9.2002. Thus it is quite clear from the materials on record that since after their appointment on 2.12.96 the Joint Arbitrators in fact did not apply their mind to the dispute or controversy before them and that being so, in the light of the Full Bench decision of this Court in Ramaniah Agarwalla (supra) followed by the decision of the Division Bench of this Court in the case of Food Corporation of India (supra) it can well be held that the Joint Arbitrators did not enter on the reference. Mr. Samaddar the learned advocate appearing for the respondent has drawn my attention to para 12 of the application wherein the petitioner has specifically alleged that the Joint Arbitrators entered into reference on 8th May, 1997 and the said fact was communicated to the petitioner by way of a letter written on the same date. But such words "entered into reference" cannot override the legal import of the expression "entering on the reference" by the Arbitrators as laid down in the above noted Full Bench decision and the subsequent decision of the Division Bench of this Court.

11. Mr. Sen the learned advocate appearing for the petitioner has contended that

no step was taken by the Joint Arbitrators to enter upon reference or to proceed with the matter either in terms of their letter of appointment dated 2.12.96 or in terms of the order passed by the then Hon'ble Acting Chief Justice of this Court on 25.4.97 and it was only after the order was passed by this Court on 22.2.99 on the application for setting aside the award the Arbitrators issued a notice dated 1st March, 1999. It has been argued by Mr. Sen that since the Joint Arbitrators have failed to enter on the reference and proceeding with the reference, the Court is required to exercise its statutory power under Sections 11 and 12 of the Act to appoint an independent Arbitrator after revoking the authority of the Joint Arbitrators and removing them. Mr. Sen has cited the case of Fertiliser Corporation of India Ltd. Vs. Ravi Kumar Ohri, wherein at page 24 it has been held that after the Arbitrator is removed, the matter remains with the Court and u/s 12 of the Act, either the Court can appoint a new Arbitrator or supersede the reference itself. He has also cited Mohinder Singh & Co. v. Union of India and Ors., AIR 1972 Jammu & Kashmir 63 in this regard.

12. Mr. Samaddar the learned advocate for the respondent, on the other hand, has drawn my attention to the specific clause being Clause 63(3)(c) in the arbitration agreement which is set out hereinafter:

"63(3)(c)--If the sole Arbitrator appointed under Sub-clause (a)(i) or one or both of the Arbitrators appointed under Sub-clause (b) above resigns his appointment/ resign their appointments or vacate his office/ vacate their offices or is/are unable or unwilling to act for any reason whatsoever or dies/die the General Manager may appoint a new Arbitrator/Arbitrators to act in his/their place in accordance with the provisions of Sub-clause (a)(i) or Sub-clause (b) above as the case may be. Such Arbitrator/Arbitrators, as the case may be, shall be entitled to proceed with the reference from the stage at which it was left by the previous Arbitrator/Arbitrators."

Mr. Samaddar has laid emphasis on the said specific clause in the arbitration agreement and argued that no order can be passed by this Court for appointment of an independent Arbitrator in view of the said specific clause into the arbitration agreement and in case the Joint Arbitrators are unable or unwilling to act for any reason whatsoever, the General Manager concerned may appoint an Arbitrator/Arbitrators to act in place of the said Joint Arbitrators. He has cited Arbn Hindusthan Steel Vs. Appejay Pr. Ltd., , wherein it has been held that if the Arbitrator has become functus officio by reason of the expiry of four months in terms of Rule 3 of Schedule 1 of the Act the question of revocation of authority of the Arbitrator cannot arise. He has further cited the case of Council of Scientific and Industrial Research and Another Vs. Ganga Construction Corporation, wherein at page 49 (para 8) it has been held by the Division Bench that in a case where the agreed nominated Arbitrator refuses to act as such it is the Court which can appoint his successor provided the arbitration agreement between the parties does not provide otherwise for filling the vacancy and any procedure to substitute an Arbitrator in place of an Arbitrator who has resigned

or refused to act as such. Mr. Samaddar has drawn my attention to Section 8 which deals with power of the Court to appoint an Arbitrator or umpire. He has submitted that the Court has power to appoint an Arbitrator or umpire if any appointed Arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, in case the arbitration agreement does not indicate any intention to fill up the vacancy. He has placed reliance again on the specific Clause 63(3) (c) in the arbitration agreement, as quoted hereinabove, which provides inter alia that if the Arbitrators are unable or unwilling to act for any reason whatsoever the General Manager can appoint an Arbitrator/Arbitrators to act in their place in accordance with the terms of the agreement. He has contended that since it was never intended that the vacancy could not be supplied the General Manager concerned can appoint a new Arbitrator/Arbitrators in place of the Joint Arbitrators already appointed and in view of Section 8(b) of the Act and the specific Clause 63(3)(c) in the arbitration agreement no independent Arbitrator can be appointed by the Court. It is further submitted by Mr. Samaddar that if the Court is of the view that new Arbitrator/Arbitrators should be appointed in place of the Joint Arbitrators who were already appointed, direction can be given to the General Manager concerned to supply the vacancy. Mr. Samaddar has cited the case of M/s. Harbans Singh Tuli and Sons Builders Pvt. Ltd. Vs. Union of India, and City and City and Industrial Development Corporation of Maharashtra Ltd. Vs. Motiram Budharmal and Others, in support of his contention. But in my view none of the two decisions of the Supreme Court cited by Mr. Samaddar renders any assistance to the case of his client. It is to be borne in mind that Section 8 of the Act provides a machinery for initial appointment of an Arbitrator In M/s. Hanbans Singh Tuli and Sons Builders Put. Ltd. (supra) conditions for applicability of Section 8(1)(b) of the Act were not satisfied and it is in the facts and circumstances of the said case the Supreme Court has held that the trial Court ought not to have appointed the Arbitrator. In City and Industrial Development Corporation of Maharashtra Ltd. (supra) the facts disclosed remissness on the part of respondent No. 1 of that case and in the context of unexplained delay of the said respondent No. 1 it was held by the Supreme Court that the delay on the part of the Arbitrator was not such as to warrant his removal nor was there a lack of dispatch on his part warranting removal and hence Section 11 of the Act was not attracted. The facts and circumstances of the above noted cases as cited by Mr. Samaddar are not at all applicable to the facts and circumstances of the case I am seized of.

13, In the instant case I find that the Joint Arbitrators who were appointed did not enter on the reference for the reasons set out earlier. Since the Joint Arbitrators have failed to use all reasonable dispatch in entering on an proceeding with the reference and making the award, they are liable to be removed by the Court in exercise of its power u/s 11(1) of the Act and independent Arbitrator is required to be appointed in their place in view of the provisions embodied in Section 12 of the Act. Section 8 of the Act on which Mr. Samaddar the learned advocate for the respondent relies has got no manner of

application to the facts and circumstances of the case for the plain reason that Section 8 deals with initial appointment of the Arbitrator and the facts and circumstances emerging from the materials on record do not justify applicability of Section 8 of the Act to the case in hand. It is significant to note in this context that in such case of removal of the Arbitrator, the new Arbitrator can only be appointed by the Court and if any clause in the agreement gives such power to any person, the said agreement is contrary to the provisions of Section 12 of the Act and as such the same cannot be enforced.

14. For the foregoing reasons I find that the contentions raised by Mr. Sen in support of the application under Sections 5, 11 and 12 of the Act are quite justifiable on the face of the materials on record. The rival contentions raised by Mr. Samaddar the learned advocate for the respondent have got no force at all.

15. The application under Sections 5, 11 and 12 of the Act filed by the petitioner M/s. K.M. Construction is accordingly allowed. Leave in terms of prayer(s) of the application to revoke the authority of the Joint Arbitrators Sri N.K. Sinha and Sri A. Bandyopadhyay is granted. The said Joint Arbitrators Sri N.K. Sinha and Sri A. Bandyopadhyay be removed. Sri Dilip Kumar Basu, Retired Chief Judge, Small Causes Court, Calcutta, be appointed as sole Arbitrator to adjudicate upon the disputes and differences between the parties under the same terms and scope of reference which was pending before the said Joint Arbitrators since removed. The learned Arbitrator will enter on the reference within three weeks from the date of communication of this order and make and publish the award within four months thereafter. The learned Arbitrator will be entitled to the remuneration of 200 GMs for each effective sitting which will be borne equally by the parties. He will be entitled to appoint a stenographer whose remuneration will be fixed by him in consultation with the parties at the first sitting of the reference and the said remuneration will likewise be borne equally by the parties.

Prayer for stay of operation of the order made by Mr. Samaddar learned advocate for the respondent is considered and rejected.

The learned Arbitrator and all parties concerned are to act on signed xerox copy of this dictated order on the usual undertaking.