
(2015) 10 RAJ CK 0066

In the Rajasthan High Court

Case No : . Arbitration Application No. 40/2015

Maharaja Shree Umaid Mills Limited

APPELLANT

Vs

V.S. Lignite Power Pvt. Ltd.

RESPONDENT

Date of Decision : 15-10-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 16, 34, 8

Citation : (2015) 10 RAJ CK 0066

Hon'ble Judges : Bela M. Trivedi, J.

Bench : Single Bench

Advocate : Virendra Lodha, Sr. Counsel assisted by Sharad Purohit, for the Appellant; Shankar Narayan assisted by Shashank Sharma, for the Respondent

Final Decision : Allowed

Judgement

Bela M. Trivedi, J.—The present arbitration application has been filed seeking appointment of an arbitrator under the provisions contained in Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act").

2. The short facts necessary to decide the present application are that the applicant is a limited company incorporated under the Companies Act, and is the share holder of the respondent-company. The respondent had entered into an agreement with the applicant, namely, Power Delivery Agreement (PDA) as per Annexure-1. According to the terms of the said PDA, the respondent was obliged to supply certain fixed quantity of power to the applicant out of the power generated at the Power Plant, in proportion to the investment made by the applicant in the equity/preference share capital of the respondent. The said PDA also stipulated the extent of "Minimum Guaranteed Power" (MGP) and the firm tariff at which the power would be supplied from the Power Plant to the applicant. The clause 15.3 of the said PDA contained the arbitration clause which reads as under:-

"15.3 Arbitration

Where any Dispute is not resolved as provided for in Clause 15.2, and then the following provisions shall apply:

- (a) The Dispute shall be submitted to arbitration at the request of either Party upon written notice to that effect to the other Party (a "Notice of Reference") in accordance with the provisions of the Arbitration & Conciliation Act, 1996.
- (b) The place of arbitration shall be Jaipur, India.
- (c) The Parties agree that the arbitration award shall be final and binding on both parties."

3. It is the case of the applicant that the Government of Rajasthan vide the Government Order dated 22/5/2008 had sanctioned a mining lease in favour of the respondent for the mineral Lignite, near Village Gurha, Tehsil Kolayat, District Bikaner for an area of 1241.25 hectares, for a period of 30 years from the date of registration of the mining lease agreement. It was stated therein that the said allocation of Lignite block to the respondent was to meet the Lignite requirements for a 1 x 135 MW power project near Raneri in Rajasthan. The respondent, while seeking allocation of the mine, had submitted an affidavit to the effect that power generated from the proposed power plant will be delivered to the HT Level Investor Consumers within the State of Rajasthan. The copy of the mining lease agreement dated 25/8/2008 executed in favour of the respondent is on record at Annexure-4. It appears that the respondent thereafter wrote a letter dated 16/1/2015 (Annexure-5) informing the applicant that the State Government of Rajasthan has sought to impose a special condition in the mining lease granted to the respondent, pursuant to which the respondent would be obligated to enter into long time Power Purchase Agreement with the DISCOMS and that such agreement with DISCOMS would alter the arrangement between the applicant and the respondent. The respondent therefore had put the applicant on the notice of the occurrence of "Force Majeure". In response to the said letter, the applicant vide letter dated 28/1/2015 (Annex. 6) refuted the claim of the respondent with regard to the occurrence of "Force Majeure". The respondent thereafter vide the letter dated 29/1/2015 (Annexure-7) informed the applicant that it had entered into an agreement with Government of Rajasthan to supplement the mining lease dated 25/8/2008, as per the directions of the Government of India, and that the said agreement imposes an obligation on the respondent to enter into a long term power purchase agreement with DISCOMS to continue mining under the mining lease deed, and that there was a restriction on the mining for the supply of power to persons other than DISCOMS. According to the applicant, the respondent instead of providing the documents as sought for, wrote a letter dated 28/2/2015 (Annexure-8) informing the applicant that the respondent was prohibited from supplying power to the applicant effective from 1st March, 2015 and accordingly the respondent would not be in a position to supply power from 1/3/2015 onwards. The applicant

therefore vide the letter dated 8/3/2015 (Annexure-9) confronting the respondent to its claim not to supply power on the alleged event of "Force Majeure", requested the respondent to restore the supply of power forthwith and also called upon the respondent to treat the said letter as the notice for arbitration. In response to the said letter of the applicant, the respondent vide the letter dated 9/3/2015 (Annexure-10) stated that no arbitral dispute had arisen between the parties, and therefore there was no question of invoking the arbitration clause. The applicant therefore filed the present application seeking appointment of the arbitrator under Section 11(6) of the said Act on 13/5/2015.

4. The application has been resisted by the respondent by filing the reply contending inter alia that the application under Section 11(6) of the said Act was not maintainable. It has been further contended that the respondent was generating the power by using Gurha Lignite block allotted to the respondent as per the mining lease agreement entered into by the respondent with the State Government of Rajasthan, and that the group captive consumers including the applicant were aware about the source fuel and obligations attached to such allotment. According to the respondent, the issue relating to the allotment of coal blocks had assumed a great public importance and hence the Ministry of Coal had directed the State Governments to impose a special condition in the mining lease i.e. for signing Long Term PPA with DISCOMS for participation in the tariff based bids floated by DISCOMS/State Designated Agencies. Accordingly, the Government of Rajasthan vide letter dated 11/12/2014 had imposed the special condition with regard to the long term power purchase agreement with DISCOMS. Under the circumstances, the respondent had invoked the "Force Majeure" clause of the agreement entered into with the applicant. It is further contended that any adjudication on whether there is Force Majeure or not, would be passing of an order in a matter where Government of Rajasthan would be adversely affected, and therefore the official function of the Government cannot be put to test in arbitration between the applicant and the respondent. The respondent has further contended that in terms of the amendment to the mining lease agreement, the respondent had to supply power only to the DISCOMS with effect from 1/3/2015, and therefore the respondent had applied to the RRVPNL for cancellation of the Open Access granted to the Captive Consumers including the applicant. The captive consumers including the applicant had also objected to RRVPNL that their open access should not be canceled. However, the RDPPC/RRVPNL overruled their objections and reduced the open access to "0" vide letter dated 19/3/2015 (Annex. R-2). Thereafter the supplementary agreement was executed on 9/4/2015 between the RRVPNL and the respondent (Annexure-R-3). Thus according to the respondent, so long as the Mining amendment was in force, the restriction on supply to persons other than the DISCOMS would remain, and the legality of the mining lease cannot be brought into the question in the arbitration proceedings between the applicant and the respondent.

5. The learned Senior Counsel Mr. Virendra Lodha for the applicant placing reliance on the arbitration clause contained in the PDA submitted that the dispute

having arisen between the parties with regard to the non-supply of the power by the respondent to the applicant and the respondent having refused to appoint the arbitrator, despite notice given by the applicant, the arbitrator is required to be appointed under Section 11 of the said Act. Placing reliance on the decision of the Apex Court in case of Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, , he submitted that the Chief Justice or his designated under Section 11(6) is required to examine only two issues, as to whether the party making the application has approached the appropriate Court and whether there is an arbitration agreement and the party who has applied under Section 11 is a party to such agreement or not. According to him, the Court, while exercising the powers under Section 11 of the said Act, should not embark upon the examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once the Court finds that there was an arbitration agreement between the parties. He has placed reliance on the decision of Supreme Court in case of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, to buttress the said submission. He further submitted that the respondent had wrongly invoked the force majeure clause, misinterpreting the documents of the Government of Rajasthan, and the issue whether there was force majeure or not would also have to be adjudicated by the arbitrator that may be appointed by the Court.

6. The learned counsel Mr. Shankar Narayan for the respondent however while not disputing the clauses including the clause of arbitration contained in the PDA, submitted that the respondent was constrained to stop the power supply to the applicant on account of the governmental restrictions on mining, which cause was beyond the control and willful default on the part of the respondent, and therefore the respondent had invoked the force majeure clause as contained in the PDA. Relying upon the decision of the Apex Court in case of Arasmeta Captive Power Company Private Limited and Another Vs. Lafarge India Private Limited, , he submitted that the existence of the conditions of the agreement, for exercise of power under Section 11 of the said Act has to be examined by the Court before making appointment of the arbitrator. Referring the various communications that ensued between the applicant and the respondent, and between the respondent and the Government of Rajasthan, he submitted that in view of the special condition imposed in the mining lease for signing a long term PPA with DISCOMS, and the RRVPNL having reduced the open access to "0", the respondent was not in a position to supply power to the applicant, and the legality of such restrictions put by the Government cannot be brought into question in the arbitration proceedings between the applicant and the respondent. According to him, such dispute was incapable of being adjudicated by resorting to the arbitration, and therefore did not fall within the purview of the arbitration clause as contained in the PDA.

7. Before advertng to the rival contentions raised by the learned counsels for the parties, it would be apposite to reproduce the legal position settled by the Supreme Court with regard to the scope of Section 11(6) of the said Act. The

Bench of Seven Judges in case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, , while examining the issue as to whether the power exercised by the Chief Justice of High Court or Chief Justice of India under Section 11(6) is a judicial power or an administrative power, held in para 39 that:-

39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act."

8. In case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., , the Supreme Court explaining further the scope of Section 11 , observed in para 22 as under:-

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11 , the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1) The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.

22.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

9. Again the Supreme Court in case of Arasmeta Captive Power Co. P. Ptd. (supra) considering the earlier decisions held as under:-

"On a careful reading of the paragraph 39 and conclusion No. (iv), as set out in paragraph 47, it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of/an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection".

10. As regards the power of the Court to decide the issue of the arbitrability of dispute, the Apex Court in case of Boozallen & Hamilton Inc. (supra) observed as under:-

"32. The nature and scope of issues arising for consideration in an application under section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under-section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under section 34 of the Act, relying upon sub-section 2(b)(i) of that section.

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34. The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

(i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public for a (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the excepted matters excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal."

11. The Supreme Court in the said decision also carved out the examples of non-arbitrable disputes in para 36, which reads as under:-

"36. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

12. If the facts of the present case are examined in the light of the aforesaid legal position, it emerges that the respondent has neither disputed the execution of the PDA nor the clauses contained therein including the arbitration clause. The correspondence that ensued between the parties have also not been disputed. One of contentions raised by the respondent is that on account of force majeure as a result of the government restrictions, the respondent was constrained to discontinue the power supply to the applicant, and the said dispute being not arbitrable, as the arbitrator cannot adjudicate upon the legality of the government decision imposing special condition on mining, the applicant was not entitled to invoke the arbitration clause or approach this Court under Section 11 of the said Act.

13. The Court does not find any substance in the said contention raised by the respondent, inasmuch as admittedly the dispute had arisen between the parties on the respondent having discontinued the power supply to the applicant in

contravention of the terms and conditions contained in the PDA. If the clause of arbitration as contained in the PDA is read as it is, it does not exempt any dispute or any clause from referring the same to the arbitrator, muchless the force majeure clause as contained in the said agreement. There is no "excepted matters" excluded from the purview of the arbitration agreement, nor does the dispute fall within the examples of the non-arbitrable disputes, as pointed out by the Apex Court in case of Boozallen & Hamilton Inc. (supra).

14. It is true that the doctrine of frustration or force majeure has been recognized under the law of contract, under which the non performance of the agreement stands excused, nonetheless, it would be a matter of evidence to be led by the parties before the Arbitrator as to whether the force majeure in fact existed or not. As rightly submitted by the learned Senior Counsel Mr. Lodha for the applicant, the issue whether the force majeure existed or not, and the issue whether the respondent had rightly invoked the clause of force majeure or not, would be the issues or disputes which could be decided by the arbitrator only and not by this Court. The Apex Court in case of the The Southern Gas Ltd. Vs. Visveswaraya Iron and Steel Ltd., , while examining the issue whether force majeure was determine by the Arbitrator, held as under:-

"4. The orders of the High Court have been challenged herein on the ground that whether or not it was a case of force majeure", was a preliminary question determinable by the Arbitrator. In other words, if the respondent could successfully plead and prove to the satisfaction of the Arbitrator that force majeure" clause was attracted, it would preclude other disputes being raised before and determined by the Arbitrator. In any event, the matter initially had to go to the Arbitrator to be stopped or continued after the decision on the question of force majeure. We think that the appellant is on sound ground in contending this way towards interpretation of the agreement contained in Clause (7) above referred to read with Clause (22) providing for arbitration. Even learned counsel for the respondent appreciated the logic of the argument and has in the manner submitted to it before us. Let the Arbitrator, therefore, first go into the question whether the dispute falls within the ambit of the arbitration agreement dependent on the determination whether the breach could invoke the force majeure" clause or not, and if not then to proceed further within his domain to determine all questions as raised by the parties".

15. It cannot be gainsaid that the arbitral tribunal has powers to decide about its own jurisdiction and about the scope of its authority in view of Section 16 of the said Act. As per sub-section (5) of Section 16 , the arbitral tribunal can continue with the arbitral proceedings and pass award, after rejecting such pleas. In view of the wide powers conferred upon the arbitral tribunal, the Court does not find any impediment in holding that the respondent shall be at liberty to raise all legal contentions before the arbitrator that may be appointed by the Court. Such contentions may be decided by the arbitrator in view of Section 16 of the said Act.

16. In the aforestated factual and legal position, the Court is of the opinion that since the existence of arbitration agreement between the parties is not disputed, since the dispute is covered by the said arbitration agreement, which does not exempt any dispute much-less dispute with regard to force majeure, and since the respondent has refused to appoint the arbitrator despite called upon by the applicant by giving the notice as per the agreement, this is a fit case to exercise the power under Section 11(6) of the said Act and appoint the arbitrator.

17. In that view of the matter, the application deserves to be allowed and is accordingly allowed. Without prejudice to the contentions raised by the learned counsel for the respondent, it was submitted by him that in case the Court is inclined to allow the application, any retired judge of Rajasthan High Court or Delhi High Court be appointed as the sole arbitrator, to which the learned counsel for the applicant had no objection. Hence, considering the said submission, and considering the facts and circumstances Hon"ble Mr. Justice Sunil Ambwani (the Former Chief Justice, Rajasthan High Court), is hereby appointed as the sole Arbitrator to resolve the disputes between the parties. The cost of arbitration proceedings and the arbitration fees may be fixed as per the Rajasthan High Court Arbitration Manual. A copy of this order be sent to the Hon"ble Mr. Justice Sunil Ambwani (the Former Chief Justice, Rajasthan High Court), resident of E-190, Kalkaji Main Market, New Delhi.