
(2015) 08 MP CK 0041
In the Madhya Pradesh High Court
Case No : A.C. No. 6 of 2013

Mohan Agrawal Construction Company	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

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

Citation : (2015) 08 MP CK 0041

Hon'ble Judges : Rohit Arya, J

Bench : Single Bench

Advocate : Alok Sharma, for the Appellant; Nakul Khedkar, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Rohit Arya, J—With the consent of learned counsel for parties, matter is heard finally.

2. By this application under Section 11(6) of Arbitration & Conciliation Act, 1996 (for short "Act of 1996"), applicant has approached this Court for appointment of Arbitrator.

3. Facts necessary for disposal of this application somewhat have a chequered history. An agreement dated 14/2/2006 was executed for construction of Administrative Block including Compound Wall and Development for Spt. Bn. at ITBP, Karera (M.P.) between the parties. The agreement contains an arbitration clause, Clause 25 which reads as follows:-

"Clause 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever

in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instructions or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (I) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD, or there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

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4. It appears that some dispute has arisen out of the contract related to execution of work, preparation of final bills etc. It further appears that on 5/10/2010, the applicant by resorting to Clause 25 of agreement, simultaneously sought indulgence of Superintending Engineer and Chief Engineer in the matter of dispute raised there-under. Instead of first filing a claim before the Superintending Engineer and waiting for decision as per Clause 25 of the agreement and thereafter to file an appeal before the Chief Engineer after lapse

of prescribed period, the applicant was required to file an application seeking appointment of arbitrator. It appears that the aforesaid procedure has not been followed and instead applicant has rushed to this Court under Section 11(6) of the Act of 1996 asking for appointment of arbitrator and that led to passing of an order dated 11/4/2012 in A.C. No. 19/2011 by a coordinate Bench, designate of the Hon. Chief Justice. According to applicant, he complied with letter of the Chief Engineer and submitted his claim on 30/11/2010 and 23/12/2010. According to applicant, respondents have provided him final bills on 5/1/2011; however, there appears to be a dispute in this behalf as in para 6 of the reply to the impugned application; wherein, it is stated by the respondents that final bill was made by Voucher No. 42 dated 12/9/2008 and the applicant himself is responsible for alleged delay in payment as EOT application was submitted by him on 12/5/2008. Be that as it may, this Court refrain from commenting upon same as no useful purpose shall be subserved by adverting to same. It is also stated by the applicant that he has made a request to Chief Engineer for appointment of arbitrator on 10/5/2011 vide Annexure P/11 and as respondents did not make appointment of arbitrator within 30 days from the date of aforesaid application, therefore, he filed an application in the month of August, 2011 under Section 11(6) of the Act of 1996 before this Court and same was registered as A.C. No. 19/2011. On notice, respondents have entered appearance and brought on record the fact that arbitrator has been appointed on 14/10/2011. This Court by a detailed order dated 11/4/2012 dismissed the application as rendered infructuous for the reason that arbitrator has already been appointed. It needs mention here that this Court addressed upon the contention of the applicant that the aforesaid appointment of Arbitrator by respondent was bad in law as not only after expiry of period of 30 days from the date of making a request of appointment of arbitrator but also after filing of application under Section 11(6) of the Act of 1996, right of respondents to appoint arbitrator stood forfeited in light of judgment of Hon. Supreme Court in the case of 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 . This Court dealt with contention of learned counsel for the applicant with reference to judgment of Hon Supreme Court in cases, viz. Punj Lloyd Ltd. Vs. Petronet MHB Ltd. (2006) 2 SCC 738 , Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, AIR 2007 SC 1764 : (2007) 2 ARBLR 49 : (2008) 4 CompLJ 20 : (2007) 5 JT 105 : (2007) 5 SCALE 341 : (2007) 5 SCC 304 : (2007) 4 SCR 777 : (2007) AIRSCW 2918 : (2007) 3 Supreme 502 and Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd., (2007) 3 ARBLR 282 : (2008) 4 CompLJ 32 : (2007) 10 JT 129 : (2007) 10 SCALE 9 : (2007) 7 SCC 684 : (2007) 9 SCR 993 and ultimately found that the issue in hand is no more res integra in light of larger Bench judgment of Supreme Court in the 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 resolving out difference of opinion of two Coordinate Bench of Supreme Court. Accordingly, this Court (Hon. Justice Sujoy Paul, designate of

Hon. the Chief Justice to hear arbitration cases at the relevant time) rejected the application upholding the appointment of arbitrator by respondents dated 14/10/2011. The said order has attained finality.

5. It further appears that applicant has submitted to the jurisdiction of the arbitrator and filed statement of claim on 3/7/2012.

6. During course of the hearing, it is transpired that number of hearing have taken place before the arbitrator viz. dated 8/10/2012, 9/10/2012 and 22/11/2013 etc. It appears that the Arbitrator Shri Rajeev Kumar has resigned on 18/9/2014, hence, in his place another arbitrator was appointed on 30/10/2014 and arbitration proceedings are going on. These facts are well explicit from Annexure A/1 filed alongwith I.A. No. 3401/2015 by respondents.

7. It appears that while the arbitration proceedings were in progress, the applicant has filed the present application before this Court in February, 2013 under Section 11(6) of the Act of 1996 for appointment of new arbitrator.

8. On notice, respondents entered appearance and filed reply. Parties have brought on record above referred facts through their pleadings.

9. During course of hearing, counsel for the applicant has again raised the same issues which were decided earlier while deciding A.C. No. 19/2011 vide order dated 11/4/2011 and contended that appointment of arbitrator by respondent after submission of application under Section 11(6) of Act of 1996 was illegal, hence the arbitration is without jurisdiction. Under such circumstances, request has been made for appointment of new arbitrator under Section 11(6) of the Act of 1996. Learned counsel for the applicant has relied upon the judgment of Hon. Supreme Court in the cases of *Punj Lloyd Ltd. Vs. Petronet MHB Ltd.*, (2006) 2 SCC 638, *Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd.*, (2007) 3 ARBLR 282 : (2008) 4 CompLJ 32 : (2007) 10 JT 129 : (2007) 10 SCALE 9 : (2007) 7 SCC 684 : (2007) 9 SCR 993, *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, *Today Homes and Infrastructure Pvt. Ltd. Vs. Ludhiana Improvement Trust and Another*, (2013) 5 AD 565 : (2013) 2 ARBLR 241 : (2013) 3 BC 261 : (2013) 114 CLA 471 : (2013) 3 CompLJ 322 : (2013) 3 CTC 559 : (2013) 8 JT 13 : (2013) 3 RCR(Civil) 559 : (2013) 7 SCALE 327 : (2014) 5 SCC 68 and decision of this Court between the same party in case No. 7/2014 decided on 19/3/2015) and in the 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.

10. Learned counsel for the respondents in reply has submitted that the contention advanced by learned counsel for the applicant in fact are mere

repetition of submissions advanced before this Court on earlier occasion. This Court has dealt with submissions on merits and rejected the prayer for appointment of arbitrator. No fault was found with the appointment made by respondents on 14/10/2011. Thereafter, the said order in absence of any challenge has already attained finality. That apart, thereafter, applicant has participated in arbitration proceedings held on number of dates. Arbitrator since has resigned on 18/9/2014, in his place new arbitrator has been appointed on 30/10/2014 by the competent authority under the arbitration Clause 25 of the agreement. Learned counsel also referred to the order of Hon. Supreme Court dated 22/1/2015 between the same parties (Union of India and Anr. Vs. M/s. Mohan Aggarwal Constructions Co.). Hon. Supreme Court has set aside the order of this Court passed on 25/6/2010 appointing Hon. Justice R.B. Dixit (Retd.) as an arbitrator. It is submitted that while setting aside the order of appointment of arbitrator, the Hon. Supreme Court has held that in light of Clause 25 of the agreement, no one, except person provided thereunder can be appointed as arbitrator to meet out the contingencies. Learned counsel submits that Clause 25 provides for arbitration by sole arbitrator appointed by Chief Engineer, CPWD, etc. etc. However, if arbitrator so appointed unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner prescribed therein. It is also a term of the contract that no person other than a person appointed by the Chief Engineer, CPWD, or the administrative head of the CPWD, should be appointed as Arbitrator and if for any reason that is not possible, the matter should not be referred to arbitration at all.

11. Learned counsel for the respondents submitted that in view of aforesaid self contained arbitration clause in the agreement, the Hon. Supreme Court has ruled that persons provided for under the arbitration clause can only be appointed as arbitrator and none else and since High Court contrary to said provision, appointed Retd. Justice R.B. Dixit as arbitrator vide impugned order, same was set aside. With the aforesaid submissions it is submitted that applicant cannot be permitted to repeat his request in the matter of appointment of arbitrator in second round of litigation, therefore, application be dismissed.

12. Heard learned counsel for the parties.

13. There is no dispute between the parties that the then designate of Hon. Chief Justice (Hon. Shri Justice Sujoy Paul) vide order dated 11/4/2012 passed in Arbitration Case No. 19/2011 has rejected the application of the applicant filed under Section 11(6) of the Act of 1996 as infructuous in light of appointment of an arbitrator by order dated 14/10/2011. That order has already attained finality. Pursuant to which application has already submitted his claim and respondents have also submitted the reply affidavit. The arbitrator is seized with the matter. Number of proceedings have also taken place before him viz. on 8/10/2012, 12/7/2013, 22/11/2013, etc. etc. As arbitrator has resigned on 18/9/2014, respondents have appointed another arbitrator vide order dated 30/10/2014

under Clause 25 of the agreement, who is also seized with the arbitration proceedings. In the conspectus of facts and circumstances of the case, in the opinion of this Court the application under Section 11(6) of the Act of 1996 filed in February, 2013 on the strength of judgment of Hon. Supreme Court in the matter of Datar Switchgears Ltd. (supra) followed in catena of judgment, is held to be not maintainable as the grounds raised in this application under Section 11(6) of the Act of 1996 have already been dealt and decided. Arbitration proceedings are going on before the present arbitrator.

14. So far as contention advanced in the context of appointment of arbitrator on 30/10/2014 after resignation of previous arbitrator on 18/9/2014 by respondents, the answer lies in the detailed arbitration Clause 25 of the agreement itself where-under it is provided that in the event arbitrator resigned, the sole arbitrator should be appointed in the manner provided for in the arbitration clause itself. Both parties are bound by the arbitration clause. Hence, appointment of another arbitrator on 30/10/2014 is held to be in accordance with the provisions contained in arbitration Clause 25 of the agreement. No interference in that behalf is warranted. The aforesaid view also finds support from the judgment of Hon. Supreme Court between the same parties (supra) wherein, Hon. Supreme Court ordered for strict adherence to arbitration Clause 25 of the agreement.

15. The last contention advanced by learned counsel for the applicant relates to inconvenience being caused in the matter of arbitration sittings. It is contended that dispute is pending since the year 2011 and as arbitrator so appointed not stationed at Gwalior qua his continuance at one place is subject to his posting and therefore, element of uncertainty in the matter of completion of arbitration proceedings looms large. To substantiate his arguments, learned counsel for the applicant has relied upon the judgment of Hon. Apex Court in the matter 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 to contend that it is a case where suitable directions deserves to be issued to respondents for expeditious disposal of arbitration proceedings and also as regards the place of sitting of the arbitration to be either at a place where agreement was entered into or work has been executed instead a distinct place.

16. Having considered the submissions so advanced, in the opinion of this Court there is a substantial force in the submission so advanced.

17. Hon. Supreme Court in the case of Singh Builders Syndicate (supra) in para 16 and 17 has held as under:-

"16 We fail to understand why the General Manager of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that

merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as Arbitrators and that the Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

17. Constituting Arbitral Tribunals with serving officers from different far away places should be avoided. There can be no hard and fast rule, but there should be a conscious effort to ensure that Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades."

18. Hence, in the facts and circumstances of the case, it is considered apposite to dispose of this application with following directions:-

"(i) applicant shall be free to file a detailed self contained and explanatory representation seeking indulgence of competent authority for change of venue of the sitting of arbitration at a place where the agreement was entered or where the work was executed to help facilitate availability of official and official record concerning arbitration for expeditious disposal of the arbitration as arbitration proceedings are lingering since year 2011 and still the same is not concluded so far involving substantial amount of expenditure and time.

(ii) respondents are directed to decide the aforesaid representation as regards place of sitting of the arbitration in the light of directions of the Hon''ble Supreme Court referred to above (supra).

(iii) respondents shall also take a conscious decision as regards continuance and conclusion of the arbitration proceedings before the present arbitrator to avoid further dragging of the arbitration proceedings which is not in the interest of either party.

19. With the aforesaid, application stands disposed of.