

(2016) 10 KAR CK 0016
In the Karnataka High Court
Case No : SMP No. 103 of 2016

Mott Macdonald Private Limited

APPELLANT

Vs

Bangalore Metro Rail Corporation Limited, Shanthinagar,
Bangalore

RESPONDENT

Date of Decision : 28-10-2016

Acts Referred:

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

Citation : (2017) 1 KantLJ 477

Hon'ble Judges : A.S. Bopanna, J.

Bench : Single Bench

Advocate : Sri Pramod Nair, Advocate, for the Petitioner; Sri N.N. Harish, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

A.S. Bopanna, J.—The petitioner is before this Court in this petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking that an Arbitrator be appointed to arbitrate the dispute between the parties.

2. The petitioner and respondent have entered into a contract agreement as at Annexure-A to the petition regarding which the petitioner claims that certain dispute had arisen and as such the resolution of dispute is to be made in terms of the arbitration clause contained in Clause 34 of the said agreement. In the petition, correspondence exchanged between parties at an earlier point after the dispute arose with regard to the finalisation of the terms and mutually acceptable solution is also referred to by the petitioner. The ultimate notice issued by the respondent to terminate the contract is also produced and in that regard, it is contended that in view of the resolution of disputes that is required to be done in terms thereof, a notice was issued seeking appointment of an Arbitrator. Since the respondent did not respond, the petitioner is before this Court.

3. Respondent on being notified has appeared and filed their objections. Apart

from contending that the need for appointment of an Arbitrator does not arise, specific reference is made to Clause 34 of the agreement which provides for settlement of disputes where under it is to be conciliated and only thereafter arbitration is provided. It is therefore contended that unless the procedure contemplated to exhaust the remedy of conciliation between the parties is followed, the petitioner cannot seek appointment of an Arbitrator. In that view, it is contended that the instant petition is not maintainable in law and therefore the same is liable to be rejected.

4. In the light of the rival contentions, I have perused the petition papers. In view of the objections taken by the respondent, the learned Counsel for the petitioner has relied on the judgment of the High Court of Allahabad (Lucknow Bench) in the case of Sun Security Services v. Babasaheb Bhimrao Ambedkar University and Others, decided on 19-12-2014 to contend that when the attempts of settlement have failed, that itself would be sufficient to invoke the arbitration clause for reference to an Arbitrator. The decision in the case of VISA International Limited v. Continental Resources (USA) Limited, (2009) 2 SCC 55 is relied to point out that where there is a valid agreement between the parties and when such agreement contains an arbitration clause and if dispute arises thereon, the only course is to appoint an Arbitrator and in that regard, the consideration made therein with reference to the Section 7 of the Arbitration and Conciliation Act is pointed out. Further, the decision in the case of Punj Lloyd Limited v. Petronet MHB Limited, (2006) 2 SCC 638 is referred to point out that when under the arbitration clause, the notice is issued and if the appointment is not made within 30 days by the Competent Authority, cause would arise to file petition as contemplated under Section 11(6) of the Act and the other party would forfeit the right to appoint an Arbitrator in terms thereon and it is for the Court to appoint an Arbitrator.

5. Learned Counsel for the respondent, on the other hand, has relied on decision of the Supreme Court in the case of Indian Oil Corporation and Others v. Raja Transport Private Limited, (2009) 8 SCC 520 to contend that the procedure as contemplated under the arbitration clause is to be strictly adhered to and when the clause provides a particular manner in which the Arbitrator is to be appointed, the appointment is to be made only in that manner and not in any other manner. It is therefore contended by the learned Counsel for the respondent that when the arbitration clause in the instant case provides for the procedure of conciliation before considering arbitration and when that procedure has not been adopted, the other party to the agreement cannot seek appointment of an Arbitrator. It is also contended by the learned Counsel that keeping in view the provision contained in the arbitration clause, notice issued seeking appointment of an Arbitrator itself is not in order and therefore the same is not in accordance with the said clause.

6. In the light of the contentions put forth and the reliance placed on the judgments, what is necessary to be taken note at this stage is the clause

contained in the agreement which reads as under:

"34. Conciliation and Arbitration.—Any dispute or claim arising out of or relating to this agreement or the breach, termination or the invalidity thereof, shall firstly be attempted to be settled by conciliation.

All disputes relating to this contract on any issue whether arising during the progress of the services or after the completion or abandonment thereof or any matter directly or indirectly connected with this agreement shall in the first place be referred to a mutually agreed sole conciliator to be appointed by BMRCL. The conciliator shall make the settlement agreement after the parties reach agreement and shall give an authenticated copy thereof to each of the parties. The settlement agreement shall be final and binding on the parties. The settlement agreement shall have the same status and effect of an Arbitral award. The views expressed, or the suggestions made or the admissions made by either party in the course of conciliation proceedings shall not be introduced as evidence in any arbitration proceedings. Any dispute that cannot be settled through the conciliation procedure shall be referred to arbitration in accordance with the Rules stipulated in tender document in force on the effective date of the Agreement. No dispute or difference shall be referred to arbitration after expiry of 60 days from the date of decision by the Engineer/Conciliator.

Settlement of Dispute.

If the parties cannot resolve any such dispute then dispute shall be referred to arbitration. If any dispute or difference of any kind whatsoever, concerning suitability or otherwise of the personnel employed by the tenderer, defective work, etc., compliance with the procedure of the employer in respect of which the employer's decision shall be final and binding on tenderer, such disputes shall not be arbitrate."

7. A perusal of the clause no doubt would indicate that what is contemplated is conciliation and thereafter arbitration. The legal position as noticed from the decisions cited above is also clear. In that light, even if the decision as cited by the learned Counsel for the respondent in the case of *Indian Oil Corporation and Others v. Raja Transport Private Limited (supra)* is taken into consideration, the case that arose for consideration therein was the situation where the Arbitrators had been appointed and in that light the notice was required to be issued indicating name of the Umpire/Presiding Arbitrator who was to be appointed and in that light, the manner of appointment was considered. In the instant facts, the clause no doubt provides for conciliation. Respondent, at no point of time earlier, has indicated its intention to have the dispute resolved through conciliation though the petitioner had been repeatedly addressing letters raising the issues and seeking resolution with regard to the agreement and had also sought co-operation of the respondent to settle the issues in a fair and mutually acceptable manner. In this regard, the correspondences dated 13-1-2015 and 24-2-2016 would be relevant. It is no doubt true that the said letters were written at a point

before the respondent had terminated tire agreement through its communication dated 26-3-2016. In respect of the very contract, when the petitioner herein had addressed letters to the respondent, had raised certain issues and sought for conciliation, if the intention of the respondent was to adhere to the clause contained in the agreement and conciliate to resolve the issues that had been raised, such opportunity was available to the respondent even at a point prior to the termination of the contract. Instead, the respondent has through communication dated 26-3-2016 terminated the contract which would indicate that the respondent did not have the intention to conciliate the matter. It is only after such termination, the petitioner has again addressed letter and invoked the arbitration clause for appointment of the Arbitrator. From the date on which the letter has been written and invoked the clause, no further steps has been taken by the respondent to appoint the Arbitrator. Therefore, instant petition is filed. At no earlier point did respondent indicate its intention to invoke first part of the Clause 34 to appoint conciliator. But such contention is being urged in the instant petition only with an intention to oppose the petition.

8. Therefore, if these aspects of the matter are kept in view and in that light the provision under Section 11(6) is taken note and further provision as contained in sub-section (6)(a) is also kept in view, I am of the opinion that it is too late in the day for the respondent to urge the contention that the clause has not been properly acted upon. Therefore, I am of the view that in the present facts and circumstances, learned Arbitrator is required to be appointed so as to resolve the issues which has arisen between the parties.

9. The question at this stage would be with regard to the appointment of an appropriate Arbitrator. The learned Counsel for the respondent would contend that even for the purpose of conciliation itself what was required was the appointment of qualified engineers/professionals, by the Managing Director of the respondent. In the present circumstances, since the respondent at that first instance had not appointed an Arbitrator and this Court has been called upon to appoint an Arbitrator and also taking into consideration the nature of the agreement, I am of the opinion that it would be appropriate to appoint a former Judge of this Court who may during the course of the arbitration secure the assistance of the appropriate engineer/professionals to be suggested by the parties during the course of the arbitration. Therefore, keeping in view of these aspects of the matter, Dr. Justice N. Kumar, former Judge of this Court is appointed as the sole Arbitrator to enter upon reference and adjudicate the matter in accordance with law.

10. Registry is directed to dispatch a copy of this order to the Arbitration Centre, Bengaluru. The parties shall also file necessary papers before the Arbitration Centre whereupon the learned Arbitrator shall enter reference and resolve the disputes between the parties in accordance with law.

11. The petition is accordingly disposed of.