
(2018) 07 UK CK 0023

In the Uttarakhand High Court

Case No : Arbitration Application No. 19 of 2018

M/s Kundan Singh Prem Singh Jamnal	APPELLANT
Vs	
Union of India & others	RESPONDENT

Date of Decision : 05-07-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2 (e), 11, 12, 13, 14, 16

Citation : (2018) 07 UK CK 0023

Hon'ble Judges : SUDHANSHU DHULIA, J

Bench : Single Bench

Advocate : Dinesh Gahtori, Monika Pant

Final Decision : Dismissed

Judgement

SUDHANSHU DHULIA, J. (ORAL)

1. Respondents had given a contract to the petitioner for construction of a bridge. Thereafter, certain dispute arose between the parties. Since the contract has an arbitration clause, the matter was referred for arbitration. Under the arbitration clause, respondents appointed an officer of their department in the year 2010 for adjudication in the matter. The arbitrator did not pass an award even after the lapse of more than six years, and therefore, vide order dated 10.08.2017, the concerned authority held that the arbitrator so appointed has vacated his office. Meaning thereby that the mandate of the arbitrator had come to an end. Thereafter, on the same day i.e. on 10.08.2017, the respondent authority appointed another arbitrator in the matter. This appointment has been challenged by the petitioner before this Court saying that the Court may appoint an arbitrator exercising its power under sub-Sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (from hereinafter referred to as the "Act").

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2. In my opinion, however, this petition is totally misconceived inasmuch as this is not a case under Section 11 of the Act for appointment of an

arbitrator. Here the dispute is as to whether the mandate of the earlier arbitrator has actually come to an end or not. The contract has an arbitration

clause, which reads as under:-

â??70. Arbitration.- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by

the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole

arbitration of an Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub-Division II of

Institution of Surveyor (India) recognized by the Govt. of India to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or

determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall

not take place until alternative arrangements have been finalised by the Government to get the Works completed by or through any other Contractor

or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the

Governmentâ??s right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority

appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their

statement of the case and pleadings in defence.

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The Arbitrator may proceed with the arbitration, exparte, if either party, inspite

of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case

may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute. The

arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract.â??

(emphasis provided)

3. In exercise of the above powers, the respondents vide order dated 10.08.2017 appointed another arbitrator in the matter. The language of the order

dated 10.08.2017 reads as follows:-

â??1. WHEREAS the above mentioned contract agreement was entered between the President of India, represented by Chief Engineer (Project)

Shivalik (Now STF Hirak), C/o 56 APO and M/s Kundan Singh Prem Singh Jammnal, 336 Dehradun Road Rishikesh 249201.

2. AND WHEREAS the said contract includes an Arbitration Agreement vide Condition 70 of IAFW-2249 forming part of the contract which,

interalia, provides that all disputes between the parties to the contract (other than those for which the decision of the Task Force Commander or any

other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be

referred to the Sole Arbitration of a serving Engineer Officer to be appointed by the Director General Border Roads.

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3. AND WHEREAS certain disputes had arisen and request had been made to me for appointment of an arbitrator for adjudication of the disputes.

4. AND WHEREAS Shri Padam Kumar, SE (Civ), was appointed as Sole Arbitrator on 31 Dec 2010 but he was unable to publish the Award in 61/2

years so he was asked to vacate the office of Sole Arbitrator on 10 Aug 2017 vide

our letter No. 24062/DGBR/HRK/Arb/70/E8 dated 10 Aug 2017.

5. NOW THEREFORE by virtue of the aforesaid and provisions contained in condition 70 of IAFW-249, I hereby appoint you as Sole Arbitrator to

adjudicate upon the disputes pertaining to the above contract and request you to enter upon the reference and publish your findings and award in

respect of disputes between the parties. However as regards claims which are covered under the final and binding powers of Task Force Commander

or any other Officer mentioned in the contract and those which have been raised by the contractor after signing the final bill with some specific claims,

as also the claims, for which there is specific prohibition in the contract, I request you to first decide on the jurisdiction and Arbitrability of those claims

as per terms and conditions of the contract and section 16 of Arbitration and Conciliation Act 1996 and only thereafter take up for adjudication on

merit.

6. Please acknowledge.â??

4. According to the petitioner, the matter continued for the last more than six years and when the arbitrator was on the verge of giving an award, he

has been changed. His case therefore is that under these circumstances, it cannot be said that the mandate of the arbitrator has come to an end which

would have resulted in appointment of another arbitrator. If this is so, then the remedy for the petitioner is to move an application before the Principal

Civil Court having original jurisdiction in the matter under sub-Section (2) of Section 14 of the Act. Section 14 of the Act reads as under:-

â??14. Failure or impossibility to act.- (1) the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-

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(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the

parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of

an arbitrator, it shall not imply acceptance of the validity of any ground referred to it in this section or sub-section (3) of section 12.

5. The definition of the "court" has been given under Section 2 (e) of the Act, which reads as under:-

2. Definitions.- (1) in this Part, unless the context otherwise requires,-

(a).

(b).

(c).

(d).

(e) "Court" means-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes

the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the

arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or

any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide

the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having

jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

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6. Therefore, the remedy for the petitioner is to approach the Principal Civil Court having the original jurisdiction in the matter.

7. In view of the above observations, the writ petition fails and it is hereby dismissed.