

(2001) 08 DEL CK 0078

In the Delhi High Court

Case No : AA No's. 539, 540, 541, 542 and 544/99

M/s Power Grid Corporation of India Ltd.

APPELLANT

Vs

M/s RPG Transmission Limited

RESPONDENT

Date of Decision : 20-08-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 13, 16, 4
Limitation Act, 1963 — Article 136, 24

Citation : (2002) 2 RAJ 414

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. Mukul Rohatgi, ASG and Ms Neelima Tripathi, for the Appellant;
Mr. J.M. Mukhi, Ms Radha Rangaswamy and Ms Shakumbri Singh, for the
Respondent

Judgement

A.K. Sikri, J.—These five applications are filed by the applicant M/s power Grid Corporation Ltd. u/s 11 of the Arbitration and Conciliation Act, 1996. According to the applicant, certain disputes have arisen and as per the arbitration clause contained in the agreement, the applicant appointed Mr. Justice V.A. Mohta (Retd), former Chief Justice of Orissa High Court as its arbitrator. The request was made to the respondent to appoint its arbitrator. However, the respondent did not appoint the arbitrator and rather took various objections objecting to the invocation of arbitrator by the petitioner. Therefore, the prayer made in these application is for appointment of second arbitrator on behalf of the respondent as well the presiding arbitrator. Since the points the points in issue involved in all these cases common, these applications were heard together.

2. Certain contracts were entered into between predecessors in interest of the petitioner, namely, NHPC or NTPC or NEEPC of Orissa Electricity Board or Gujarat Electricity Board etc. On the one hand and M/s SAE (India) Ltd. on the other hand. the name of M/s SAE (India) Ltd. has been changed to M/s R.P.G. Transmission Ltd., the present respondent. Under these contracts, the predecessors in interest of the petitioner paid certain excise duties to the

respondent. Contracts were for fabrication of tower parts. These excise duties were paid by predecessors in interest of the petitioner to the respondent apparently on the belief that such excise duties were payable in law. However, although respondent has been depositing the excise duty, it challenged the imposition thereof with the excise authorities. Legal issues relating to refund of excise duty were finally decided in the favor of the respondent on 19th December, 1996 on the pronouncement of the judgment by the Supreme Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . Resultantly respondent got the refund of the entire excise duty which was paid by it. The petitioner started excise duty which was paid by it. The petitioner started claiming the refund thereof from the respondent. A sum of Rs.6.08 crores have been paid by the respondent to the petitioner. Since the claim of the petitioner is that much more amount is payable on this account under various contracts and as the respondent refused to pay the same, the petitioner invoked the arbitration clause in these contracts in the manner mentioned above and filed these applications.

3. The initiation of the arbitration proceedings has been challenged by the respondent principally on the following grounds:

1. Although there were twenty five different contracts, only five applications are filed whereas the petitioner is required to file twenty five separate applications relating to different contracts.

2. There is no privity of contract between the petitioner and the respondent. The contracts were not assignable and could be assigned only with the permission of the parties. Contracts were with NTPC, NHPC, NEEPC, Orissa Electricity Board, Gujarat Electricity Board, Tata Export Ltd. and Best and Crompton Ltd. Since there was no contract with the petitioner there is no arbitration clause also between the parties and the petitioner has no right to invoke the arbitration clause containing any such contracts.

3. All contracts are dead which were executed and completed long ago. Thus contracts were all of the vintage of 1978 to 1987 and had all been completed by the year 1981 to 1989. Therefore, at this stage when the contracts expired and along with that these contracts even the arbitration clause expired, the petitioner could not invoke the arbitration clause.

4. Although by an act Parliament i.e. Act 24 of 1993 transmission lines inclusive of contracts vested with the petitioner, this act did not extinguish NHPC, NTPC, NEEPC, Orissa Electricity Board, Gujarat Electricity Board but left them as independent and continuing entities and did not seek to take away their dues or claims prior to 1st April, 1992 as is clear from Section 4 of the Act.

5. The alleged claims are hopelessly time barred inasmuch as the excise duty, refund of which was sought, was paid during the period from 1981-1989 and as per Article 24 of the Schedule of Limitation Act, the limitation period was three years from the date when the money was received. Therefore, the matter was

time barred in all respects in June, 1993. It was submitted that the petitioner or its predecessors in interest had not suffered any loss and there was no question of the principle of *ex aequo et bono* applying to them as per decisions of the Supreme Court on this aspect.

6. In the end, it was submitted that as the basis conditions in Section 11 of the Arbitration and Conciliation Act, 1996 had not been made which gives jurisdiction and power to the Chief Justice or designate Judge to appoint an arbitrator, the petitions were not maintainable. For this the learned counsel referred to the procedure contained in the arbitration agreements and submitted that Section 11 could be invoked only on the failure of the said procedure contained in the agreement.

4. Before dealing with the aforesaid contentions, one may refer to two judgments of the Supreme Court laying down guidelines on which applications u/s 11 of the Act are to be considered. First case is *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.*, In this case the Supreme Court held that order passed u/s 11(6) by Chief Justice of High Court or his nominee, is an administrative order, its purpose being the speedy disposal of commercial dispute. Such order is no subject to judicial review under Article 136. The Supreme Court held that under Sections 13 and 16 of the Act questions as to the qualifications, impartiality and jurisdiction of the arbitrator can be raised before the arbitrator, so no party would be left with a grievance. Following observations would be worth quoting as they have bearing on the present cases.

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"To attract the confidence of the international mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 on the UNCITRAL Model and, Therefore, in interpreting any provisions of the 1996 Act, courts must not ignore the objects and purpose of its enactment. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that the 1996 Act limits intervention of court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject-matter of judicial scrutiny of a court of law.

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The provisions of the Act aim at achieving the sole objective of resolving the dispute as expeditiously as possible so that trade and commerce are not affected on account of litigation. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of courts in the arbitral process.

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When the matter is placed before the Chief Justice or his nominee u/s 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same.

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Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Therefore, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceedings, it would be open to raise any objection, as provided under the Act."

(emphasis supplied)

5. Second case in the line is Nimet Resources Inc. and Another Vs. Essar Steels Ltd., In this case, the Supreme Court held that even if there was doubt as to the existence of arbitration agreement but the appropriate course would be for the arbitrator to decide the question u/s 16 rather than Chief Justice or his nominee u/s 11 by making the following observations:

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"Under Section 7 of the Arbitration and Conciliation Act, 1996, if the contract is in writing and reference is made to a document containing arbitration clause as part of the transaction it would mean that the arbitration agreement is part of the contract. Therefore, in a matter where there has been some transaction between the parties and the existence or the arbitration is in challenge, the proper course for the parties is to thrash out such question u/s 16 of the Act and not u/s 11 of the Act.

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It is permissible u/s 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange or documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, in terms of Section 7 of the Act, the appropriate course would be that the arbitrator should decide such a question u/s 16 of the Act rather than the Chief Justice of India or his nominee u/s 11 of the Act."

(emphasis added)

6. The combined reading of these two judgments makes it amply clear that normally such questions which fall for consideration by the arbitrator under Sections 13 and 16 of the Act including in respect of his jurisdiction as well as existence or validity of the arbitration agreement are to be left to the arbitrator to decide and court while exercising power u/s 11 of the Act need not decide these contentious issues. Of course the court should satisfy itself about the existence or non-existence of an arbitration agreement but once it is found that it is contentious issue for which detailed discussion and reference to documents etc. is required which would be appropriate to appoint the arbitrator and leave such matter to the arbitrator to decide. The court at the stage may only take a prima facie look over the matter in order to scuttle the totally frivolous petitions.

7. Let us take a prima facie or broad view of the matter keeping in view the aforesaid guidelines.

8. In so far as contention of the respondent that there is no privity of contract between the parties, it may be stated that admittedly by an act of Parliament, the petitioner was created for the transmission lines and contracts entered into by NTPC, NHPC, NEEPC stood transferred to and vested in law with the petitioner. Apart from this there is yet another significant aspect which cannot be ignored at this stage, namely, after the judgment in the case of Mafatlal Industries (supra) , the petitioner entered into correspondence with the respondent for refund of the amount. There is a letter dated 18th November, 1996 on record stating "that the issue regarding unjust, enrichment of excise duty is awaiting decisions of the 9 Judge Bench of Hon'ble Supreme Court" and by letter dated 16th August, 1996 the respondent even agreed to refund the amount to none else but the petitioner. In fact as pointed out above, the respondent has paid in all sum of Rs.6.08 crores to the petitioner. No doubt, the respondent claims that this payment was made to the petitioner without acknowledging the liability. However, fact remains that the respondent acknowledged the relationship of the petitioner under the various contract and paid amount. Therefore, it cannot be said to be a straight case where one can hold that there is no arbitration agreement the parties. The petitioner has also explained, in these applications, as to how it acquired the interest in the contracts entered into with respondent with Orissa Electricity Board, Gujarat Electricity Board, Tata Export Ltd. and Best and Crompton Ltd. What is the effect of various letters exchanged between the parties, contracts in question entered into by the respondent with the predecessors in interest of the petitioner etc. are the questions will have to be gone into by the arbitral tribunal.

9. In so far as contentions regarding contracts being dead or the claim being time barred, it may again be pointed out that as far as question of refund of excise duty is concerned, the same was still alive although the contracts had been executed. The excise duty was paid by the petitioner to the respondent on the assumption that it was payable under the law. The respondent had contested the levy of excise duty and the matter was pending with the authorities at various levels and ultimately decided by the Supreme Court only on 19th

December, 1996. Therefore, prima facie it cannot be said that the contracts are dead in so far as the question of claim of refund of the excise duty by the petitioner from respondent is concerned. Further, it may be significant to state that the respondent admitted its liability to refund by letter dated 16th August, 1996 stating that amount had now become legally due to the petitioner and would be refundable to the petitioner from the date of the judgment. Thereafter, payments were made in part during the period from 15th January, 1997 to 8th May, 1997. The petitioner is reckoning the limitation period from these dates and submits that it is within time. Thus again this issue will have to be thrashed by the arbitral tribunal. Same would be the position in respect of assignment of the contract.

10. In so far as question of not filing of twenty five different applications are concerned, at this juncture of time, it would not be appropriate to direct the petitioner to file twenty five different applications which may have been better course of action. In any case these applications cannot be rejected on this hypertechnical ground. In these five applications, the petitioner has made claims in respect of twenty five contracts. In fact all contracts with NTPC are clubbed in one application, with NHPC in another applications and so on. Terms and conditions of the contracts clubbed in each application are also same. Thus I am not inclined to throw these applications on this hypertechnical objection.

11. In so far as contention regarding not following of the procedure is concerned, this objection also is again too technical. The objection of the respondent is that the petitioner should have approached the designated authority specified in the arbitration agreement, in the first instance. However, keeping in view the stand of the respondent in opposing these applications so vociferously, no purpose would have been served in taking such a course as ultimately the petitioner had to come to this court by filing the present applications. Therefore it would not be proper to mandate the petitioner to compete the ritual of the procedure prescribed in the agreement and further delay the whole process of Constituting the arbitral tribunal.

12. Following directions are given in each case:

AA No.539/99:

The contracts which are subject matter of this arbitration application contain the arbitration clause as per which the disputes are to be referred to the adjudication of three arbitrators, one to be nominated by the purchaser, other by the contract and third by the President of the International Chambers of Commerce, in the case of foreign contractors and President of Institution of Engineers, India in case of local contracts. The petitioner has appointed Mr. Justice (Retd.) V.A. Mohta, former Chief Justice of Orissa High Court. The respondent did not nominate its arbitrator as it raised objections to the initiation of arbitration proceedings itself. Normally the respondent loses its right to nominate the arbitrator. However, keeping in view the fact that the respondent had challenged the arbitration and

for this reason did not not appoint its arbitrator, the respondent is given thirty days" time to nominate its arbitrator. Direction is also given to President of Institution of Engineers, India as well to appoint the third arbitrator within thirty days of receipt of this order who would be treated as the presiding arbitrator. In case the respondent does not nominate its arbitrator within thirty days then Mr. Justice Jaspal Singh, a retired judge of this court shall be the arbitrator as if nominated by the respondent.

AA No.540/99

13. Various contracts which are subject matter of this arbitration application also contain the same arbitration clause as per which Engineer-in-Chief of the work at the time of the dispute shall send to the contractor a panel of three persons, who shall not be the employees of the corporation, and thereafter, the contractor within fifteen days of the receipt of such panel, communicate to the Engineer-in-Chief the name of one of the persons from the such panel and such person shall then be appointed as sole arbitrator by the Engineer-in-Chief. Accordingly, direction is given to the present Engineer-in-Chief to send the panel of three persons to the respondent within thirty days of the receipt of this order and the respondent shall communicate to the Engineer-in-Chief the name of one of the persons from such panel. In case the respondent does not exercise its option within fifteen days, Engineer-in-Chief shall select one person from the aforesaid panel and appoint him as the sole arbitrator.

AA No.541/99

14. In the contracts which are subject matter of this arbitration application also contain the same arbitration clause as per which the dispute are to be referred to the sole arbitration of the person appointed by the respondent's Engineer at the time of dispute. Accordingly, the respondent's Engineer is directed to appoint the sole arbitrator and refer the disputes to him within thirty days of receipt of this order.

AA No.542/99

15. The contracts which are subject matter of this arbitration application contain the same arbitration clause 32 as per which the dispute are to be referred to arbitration as per provisions of Arbitration Act, 1940 at the time in force. Accordingly, in these things, court can appoint the arbitrator. I accordingly appoint Mr. Justice Jaspal Singh, a retired Judge of this court as the sole arbitrator.

AA No.544/99

16. There are eighteen contracts which are the subject matter of this arbitration application. In respect of seventeen contracts, the arbitration clause 26 is common. As per this arbitration has to be conducted by there arbitrators one each to be nominated by the contractor and owner and the third to be named by the President of Institution of Engineer, India. The petitioner had appointed Mr.

Justice(Retd.) V.A. Mohta, former Chief Justice of Orissa High Court. The respondent did not nominate its arbitrator as it raised objections to the initiation of arbitration proceedings itself. Normally the respondent proceedings itself. Normally the respondent loses its to nominate the arbitrator. However, keeping in view the fact that the respondent had challenged the arbitration and for this reason did not appoint it arbitrator, the respondent is given thirty days's time to nominate its arbitrator. Direction is given to President of Institution of Engineers, India as well to appoint the third arbitrator within thirty days of receipt of this order who would be treated as the presiding arbitrator. In case the respondent did not nominate its arbitrator within thirty days then Mr. Justice Jaspal Singh, a retired judge of this court shall be the arbitrator as if nominated by the respondent.

17. In respect of one contract arbitration clause 40 stipulates that disputes shall referred to two arbitrators one to be nominated by the purchaser and one to be nominated by the sellers/contracts on in case of disagreement between the arbitrators, to an Umpire appointed by the arbitrators in writing. The petitioner had already Mr. Justice V.A.Mohta. I accordingly appoint Mr. Justice Jaspal Singh, a retired Judge of this court as the second arbitrator. Both these arbitrators shall appoint umpire or the third arbitrator to be treated as the presiding arbitrator which is the scheme as per Arbitration and Conciliation Act, 1996.

18. This completes the exercise of Constituting the arbitral tribunal in accordance with the arbitration agreements in each case. This may ultimately result in having different arbitral tribunals. However, it would be seen that the questions of law to be decided in all these cases are same with almost identical factual matrix in each case. The parties are also same in all these cases. Therefore, in order to avoid multiplicity of proceedings, unnecessary expenditure and also conflict of decisions, it would be appropriate if the arbitral tribunal constituted for all these cases comprise of same arbitrator. Normally with the consent of parties, I would have accomplished this. However, since the respondent has objected to the very constitution of arbitral tribunal in these cases, and Therefore, it was not possible to obtain its consent, this purpose could not be achieved by consensus. However, I suggest that, if parties agree ultimately in all these cases, there could be one arbitral tribunal Constituting of three arbitrators in the following manner:

1. The petitioner nominated Mr. Justice (Retd). V.A. Mohta, former Chief Justice of Orissa High Court as its arbitrator.
2. The respondent may nominate its arbitrator of its choice within thirty days.
3. Mr.Justice Jaspal Singh, a retired Judge of this court, could be the third and presiding arbitrator. This suggestion is made keeping in view that the issues raised are purely legal, and Therefore, it may not be necessary to approach the President of Institution of Engineers, India.

19. However, it is made clear that it is up to the parties to agree on this aspect. Otherwise the directions which have already been given above, in respect of each

petition, shall remain.

20. It may be mentioned that some observations are made dealing with the contentions of the respondent only to demonstrate that these are the contentious issues which have to be decided by the arbitrators as per the aforesaid judgments of the Supreme Court. These petitions cannot be thrown out at the threshold because the petitioner has been able to show that prima facie existence of arbitration agreement and the claims being within the period of limitation etc. However, it is only a tentative expression and the arbitrators shall decide the disputes after hearing the parties and adjudicating the matter in all length and breadth.

21. All these applications stand disposed of.