
(2000) 02 SC CK 0034

In the Supreme Court Of India

Case No : Arbitration Petition No. 2 of 1999

National Aluminium Company Limited

APPELLANT

Vs

Metalimpex Limited

RESPONDENT

Date of Decision : 01-02-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 10(2), 11, 17

Citation : (2000) 1 JT 629 Supp

Hon'ble Judges : D.P. Wadhwa, J

Bench : Single Bench

Judgement

D.P. Wadhwa, J.—This is an application u/s 11 of the Arbitration and Conciliation Act, 1996 (for short, the 'Act') by National Aluminium Company Ltd. ('NALCO' for short) through Mr. Ashim Choudhary, Executive Director, made to Hon'ble the Chief Justice of India, with a request to nominate an Arbitrator as M/s Metalimpex Ltd. ('Metalimpex' for short), the Respondent, failed to nominate an Arbitrator in terms of the arbitration agreement between the parties. NALCO is an Indian company and Metalimpex, a Bangladeshi company. The arbitration would be international commercial arbitration as defined in Clause (f) of Sub-section (1) of Section 2 of the Act as under:

2. Definitions - (1) In this part, unless the context otherwise requires, -

(a) to (e)...

(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is -

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country

(g) to (h)....

2. The arbitration agreement was entered into between the parties under the Arbitration Act, 1940 before it was repealed by the Act. Section 85 of the Act provided for repeal and saving. It is as under:

85. Repeal and saving - (1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal -

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties, but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

The arbitration agreement is as under:

In the event of any question or dispute arising under or out of or relating to construction, meaning and operation or effect of this contract or breach thereto, matter in dispute shall be referred to two Arbitrators, one to be nominated by the seller and the other by the buyer and in case of the said Arbitrators not agreeing, then to an umpire to be appointed by the Arbitrators in writing before proceeding on the reference. The decision of the Arbitrators or in the event of their not agreeing, of the said umpire shall be final and binding on the parties to the contract. The provisions of the Indian Arbitration Act and the Rules made thereunder, shall apply to the proceedings.

The Arbitrator, or the umpire as the case may be, shall be entitled, with the consent of the parties, to enlarge the time from time to time, for making the award. The Arbitrators/umpire shall give a reasoned award. The venue of the arbitration shall be Bhubaneswar (India). The arbitration shall take place in English language. Pending the settlement and thereafter until the Arbitrators make the award.

(A) The parties shall continue to perform their obligations hereunder, without prejudice to a final adjustment in accordance with the award made by the Arbitrators; except that where the dispute is for non-payment or non-realisation of the price of the materials, the seller will not be obliged to continue/supply the materials; and

(B) The operation and activities which shall have given rise to the arbitration need not be discontinued, but if the award recognises that a complaint was justified, provisions may be made in the award for such reparation or compensation in respect of such continued operations and activities as shall be decided by the Arbitrators to be appropriate.

The arbitration agreement envisages appointment of two Arbitrators, one to be nominated by each party, who would in turn, appoint an umpire. In *M.M.T.C. Limited Vs. Sterlite Industries (India) Ltd.*, a question arose whether there is anything in the Act to make an agreement under the Arbitration Act, 1940, unenforceable. This Court answered in the negative and said as under:

We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two Arbitrators would appoint the umpire or the third Arbitrator before proceeding with the reference, the requirement of Sub-section (1) of Section 10 is satisfied and Sub-section (2) thereof, has no application. As earlier stated, the agreement satisfies the requirement of Section 7 of the Act and, therefore, is a valid arbitration agreement. The appointment of Arbitrators must, therefore, be governed by Section 11 of the New Act.

4. In *Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd.*, this Court while considering Section 85 of the Act held as under:

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before coming into force of the new Act (The Arbitration and Conciliation Act, 1996).

2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the Arbitrator. It would cover not only proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any proceeding which is required to be taken under the old Act for award becoming decree u/s 17 thereof and also appeal arising thereunder.

3.....

4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

5.....

6.....

7.....

5. Chief Justice of India u/s 11 of the Act, read with Appointment of Arbitrators by The Chief Justice of India Scheme, 1996, designated me to consider the request of NALCO.

6. An arbitration agreement within the meaning of Section 7 of the Act, exists between the parties. It relates to international commercial arbitration. Request was accordingly made to the Chief Justice of India. It is not required of me to go into the merit of disputes between the parties. There is, however, a contract between them for supply of Aluminium Ingots by NALCO to Metalimpex. NALCO is claiming US \$ 62,112.93 towards loss of sales realisation, interest thereon and other charges. Disputes having arisen between the parties, NALCO nominated Mr. B. Pahadi as Arbitrator and called upon Metalimpex to nominate its Arbitrator. Metalimpex having failed to do so within the stipulated period, NALCO has thus made request to nominate an Arbitrator on behalf of Metalimpex. Notices were issued to Metalimpex but it failed to respond. Ultimately, service on Metalimpex was effected by means of publication in the newspaper "Daily Jankantha" which has wide circulation in Bangladesh. Still, Metalimpex failed to appear.

7. Suggestion was mooted by me if in the circumstances, I myself could appoint a sole Arbitrator. Mr. Ashok Kumar Gupta, Learned Counsel for NALCO, submitted that since the arbitration agreement envisages two Arbitrators who in turn have to appoint an umpire, it may not be legal to appoint the sole Arbitrator and in this connection, he referred to Section 10 and Section 34 of the Act. Section 10(1) of the Act lays down that the parties are free to determine number of Arbitrator(s), provided that such number shall not be an even number. Sub-section (2) of Section 10 provides that failing the determination referred to in Sub-section (1), the arbitral Tribunal shall consist of a sole Arbitrator. Section 34 of the Act lays down grounds for setting aside arbitral awards. Section 34(2)(v) thereof provides that an arbitral award may be set aside only if the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless said agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement was not in accordance with this part. I think Mr. Gupta is right in his submissions. It appears to me that I cannot travel beyond the terms of the agreement. If both the parties were represented before me and they had agreed, a sole Arbitrator could have been appointed.

8. I have examined the request of NALCO. I find there is an arbitration agreement between the parties which relates to international commercial arbitration. Arbitration would be governed by the Act though the arbitration was entered into before the enforcement of the Act which was January 25, 1996.

9. I, therefore, accept the request of NALCO and would appoint Justice S.K. Mohanty, a retired Judge of the Orissa High Court, as an Arbitrator nominated by Metalimpex. Cost of the arbitration shall be fixed by the arbitral Tribunal as provided in Clause (8) of Section 31 of the Act. NALCO shall also be entitled to cost of these proceedings.