
(2007) 01 RAJ CK 0040

In the Rajasthan High Court

Case No : Arbitration Application No. 5 of 2006

National Construction Co.

APPELLANT

Vs

Rajasthan State Mines and Minerals Ltd.

RESPONDENT

Date of Decision : 08-01-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2007) 1 WLN 130

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Judgement

Shiv Kumar Sharma, J.—In this application u/s 11 of Arbitration and Conciliation Act, 1996 (for short '1996 Act') the applicant company seeks to appoint independent arbitral Tribunal for resolving the disputes between the applicant and respondent.

2. As per the facts stated in the application the applicant entered into an agreement with the respondent to perform excavation of mines on the assigned place for which mining rights were existing with the respondent. It is pleaded that due to the non-cooperation of the respondent the applicant was restrained from carrying out its work and it had to file a civil suit. Looking to the time gap the applicant had given a request letter on 02.06.2005 to respondent to appoint a Committee Arbitrator but the respondent declined the request vide letter dt. 28.06.2005. The respondent in the reply raised preliminary objections in regard to maintainability of the application. It is averred in the reply that since there was no arbitration agreement between the parties, the application was not maintainable. It further averred that the petitioner itself could refer the dispute to Empowered Standing Committee along with a non-refundable fee of 2% of the amount in dispute for covering expenses etc. in view of Clause 39 of the agreement. It is also stated that the Committee was not required to act as an arbitrator as per Clauses 39 and 40 and the remedy in the Civil Court was not barred to either party. The applicant filed Civil Miscellaneous Appeal against the

respondent in the Court of Additional District Judge No. 4 Jaipur City and while issuing order dt. 23.10.2002 it was held that Civil Court had jurisdiction. The said order has been made subject matter of challenge by the respondent and the High Court in SBCWP No. 3691/2003 stayed it. According to respondent, the instant application has been filed by the applicant to circumvent the stay order passed by this Court.

3. The applicant filed rejoinder to the reply.

4. I have heard rival submissions. Before proceeding further, I deem it appropriate to have a look at Clauses 39 and 40 of the agreement dt. 25.04.1995.

Clause 39 provides as under:

If any question, difference or objection whatsoever shall, arise in any way in connection with or arising out of this instrument or the meaning of operation of any part thereof or the rights, duties or liabilities of either party, then save in so far as the decision of any such matter as herein before provided for and been so decided, every such matter consisting a total claim of Rs. 50,000/- or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated or has been rightly terminated shall be referred for decision to the empowered standing committee which would consist of the following:

- (i) Executive Director, RSMDC
- (ii) Finance Advisor, RSMDC
- (iii) Advisor (Law) RSMDC
- (iv) Chief Mining Engineer, RSMDC
- (v) Project Manager (Contract) Member, Secretary,

For this purpose the contractor shall refer the dispute to the Committee along with a non-refundable fee of 2% of the amount in dispute, for covering expenses etc. of the Committee.

Clause 40 reads as under:

40. If either party wants to raise any dispute whatsoever in connection with or arising out of this contract and wish to seek his remedy in the Civil Court, when it is mutually agreed by the parties that Jaipur Courts alone shall have exclusive jurisdiction to hear, determine and adjudicate all such disputes, actions and proceedings arising out of the contract.

5. It is contended on behalf of the applicant that when excavated minerals were not lifted by respondent, the applicant sent various letters seeking cooperation of the respondent but the respondent did not co-operate with the applicant. Thereafter request was made by the applicant vide letter dt. 02.06.2005 to

appoint a Committee under Clause 39 but the respondent turned down the request vide letter dt. 28.06.2005.

6. Contention of learned Counsel for the respondent on the other hand was that since the applicant did not deposit the amount 2% fee as required by Clause 39; the applicant cannot claim the benefit of this clause, which is not an arbitration clause. It is further stated that since the applicant has availed the remedy of Civil Court instant application is not maintainable.

7. Having closely scanned Clause 39, I find that it is an arbitration clause. It is well settled that no particular form is required for an arbitration agreement. What is required to be ascertained is whether the parties have agreed to refer their disputes to third persons. In Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, it was observed that where a mining lease between the Governor of a State and the lessee relating to minor minerals provided that any doubt, differences or dispute arising after the execution of the lease deed touching the construction of the terms of the lease deed or anything therein contained or any matter or things connected with the said lands or working or non-working thereof or the amount of payment of any rent or royalty reserved or made payable thereunder, the matter in difference shall be decided by the less or (i.e. Governor) whose decision shall be final, the clause spelt out an arbitration agreement and could not be termed as providing a departmental appeal.

8. Evidently vide letter dt. 02.06.2005 (Annex. 2) the applicant made following request:

It is therefore prayed that the matter be referred to arbitrators as specified in Clause 39 of the agreement.

In reply to the letter, the respondent wrote to the applicant vide letter. dt. 28.06.2005 (Annex. 3), thus:

Therefore, at this stage, no matter can be referred to the arbitrators as specified in Clause 39 of the agreement.

9. Once the respondent admitted that Clause 39 is the arbitration agreement, it cannot be now permitted to take U turn and plead that there was no arbitration agreement between the parties. Since the respondent categorically declined to refer the matter to arbitrator under Clause 39, payment of non refundable fee of 2% does not assume significance.

10. Since the demand of applicant to appoint arbitrator was not accepted by the respondent, this Court is empowered to issue necessary directions u/s 11 of 1996 Act. In Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , the Apex Court propounded thus:

As far as Section 11(6) of the Arbitration and Conciliation Act, 1996 is concerned, if one party demands the opposite party, to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the

right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court u/s 11, that would be sufficient. Only then the right of the opposite party ceases.

11. In the facts and circumstances of this case, this Court is empowered to issue necessary directions u/s 11 of 1996 Act. Clause 40 is an independent clause and it does not override Clause 39. As already noticed the order passed by the Civil Court in favour of the applicant has already been stayed by the High Court on a writ petition filed by respondent. In such a situation the contention of the respondent that the applicant has an alternative remedy of Civil Court, cannot be accepted.

12. For these reasons, I allow the application and appoint Hon^{ble} Justice N.M. Kasliwal (Retired) as sole arbitrator. The arbitrator may fix his fee and the time for the disposal of the dispute in the circumstances so warranted. Deputy Registrar (Judicial) shall inform the Arbitrator accordingly.