

(2001) 11 DEL CK 0024

In the Delhi High Court

Case No : IA No. 8470 of 2001 in S. No. 2065A/95

National Thermal Power Corporation Limited

APPELLANT

Vs

Vijay Fire Protection Systems Limited and Others

RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 13, 16, 17
Arbitration and Conciliation Act, 1996 — Section 85

Citation : (2002) 61 DRJ 869

Hon'ble Judges : Om Prakash Dwivedi, J

Bench : Single Bench

Advocate : Ashwani Kumar, Sangeeta Bharti and Ruchi Narula, for the Appellant; Sandip Sharma, for the Respondent

Final Decision : Dismissed

Judgement

O.P. Dwivedi, J.—This order shall govern the disposal of IA.NO. 8470/2001 filed by the defendant u/s 85 of the Arbitration & Conciliation Act, 1996.

2. Briefly narrated the facts leading to this application are that the petitioner National Thermal Power Corporation (NTPC), a Government of India undertaking, had issued bid documents specifications No. CC-32-133 vide letter dated 29th December, 1980 to the contractor M/s Vijay Fire Protection Systems Limited for providing fire protection system on the petitioner's plant at Ramagundam. The respondent No. 1 had submitted its proposal dated 19th February, 1981. The proposal was considered and ultimately the work was awarded to the respondent No. 1 and in this regard a telex dated 18th February, 1982 was sent to the respondent No. 1 which was followed by award letter dated 23rd March, 1982. The total value of the contract awarded to the contractor was Rs. 2,58,70,595/-. During the execution of the work the respondent No. 1 raised some claims with regard to the alleged variation in the contract which were disputed by the petitioner. Respondent No. 1 thereupon invoked arbitration clause contained in clause No. 26.6.1 of the agreement, vide their letter dated 9th December, 1989.

Thereafter, the matter regarding the appointment of the arbitrator was not pursued for many years. Then after the expiry of more than ten years from the award of the contract, respondent No. 1 served a notice 10th May, 1994 calling upon the petitioner to appoint the arbitrator within 15 days as per the provisions of Arbitration Act, 1940 failing which Sh. M.M. Sharma was to act as sole arbitrator appointed by respondent No. 1. Respondent No. 1 approached the President of Institute of Engineers for appointment of arbitrator on behalf of the petitioner and also for the appointment of the nominees of the Institution to enter upon reference and settle the disputes between the parties. The President Institution of Engineers appointed Mr. D.B. Chachad as an arbitrator on behalf of the petitioner and also appointed Brig. D.R. Kathuria as its nominee arbitrator without hearing the petitioner. The Arbitral Board consists of Brig. D.R. Kathuria, Mr. Chachad and Mr. M.M. Sharma held its first meeting on 29th July, 1995. The petitioner did not attend the said meeting nor submitted to the jurisdiction to the said arbitration Board. Instead the petitioner filed the petition under Sections 5, 11 and 12 of the Arbitration Act, 1940 in this regard on 2nd September, 1995 which was registered as OMP/ Suit No. 2060A/95. In the said petition under Sections 5, 11 and 12 of the Arbitration Act, 1940 the contention of the petitioner is that the action of contractor/ respondent No. 1 in seeking reference of the disputes to the arbitrators, respondent Nos. 2 to 4, is wholly illegal malafide vexatious and untenable. It is contended that reference of the disputes to the arbitrator after a period of more than 10 years from the date of completion of the work is incompetent and barred by limitation and suffers from the delay and laches. As per the procedure prescribed in the arbitration clause, the respondent No. 1 who ought to have approached the President of Institutions of Engineers after the expiry of 60 days of the appointment of Mr. M.M. Sharma, failed to do so. It is further alleged by the petitioner that the arbitrator appointed by the respondent No. 1 namely Mr. M.M.Sharma who is respondent No. 2 in the suit stand convicted under the provisions of Prohibition of Corruption Act by learned special Judge Ranchi and is as such disqualified to act as an arbitrator and the petitioner cannot be forced to contest the claims before such an arbitrator. However, the Arbitral Tribunal in its very first meeting dated 29th July, 1995 proceeded of its own to decide their appointment as legal and valid. It is contended that arbitrators are incompetent and not qualified to discharge quasi judicial function and have already misconducted themselves by irregularly deciding the question of legality of their appointment. In the said petition under Sections 5, 11 and 12 of the Arbitration Act, the petitioner has prayed for super session/revocation of Arbitration Agreement. The petition has been contested by the respondent on various grounds.

3. Now, the respondent has come up with this application u/s 85 of the new Act alleging that new Act has come into force with effect from 25th January, 1996 so the parties shall be governed by the new Act. It is submitted that under the new Act any challenge to the Constitution of the Arbitral Tribunal has to be made before the arbitrator Tribunal itself u/s 13 or 16 thereof. Therefore, the petition

under Sections 5, 11 and 12 of the Arbitration Act 1940 is not maintainable and is liable to be dismissed as such.

4. In the present case the Award Letter dated 24th March 1982, contains the Arbitration Clause 6.0 which reads as under :-

It is specifically agreed by the between the parties that all the differences or disputes arising out of this Contract or touching the subject matter of this Contract, shall be decided by process of settlement and arbitration as specified in Clause 25.0 and 26.0 of section GCC, Conditions of Contract, volume-I and provisions of the Indian Arbitration Act, 1940 shall apply and Delhi Courts alone shall have exclusive jurisdiction over the same."

5. Clause 26.6.2 of General Conditions of Contract reads as under:-

The arbitration shall we conducted in the accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be New Delhi, India.

It is to be noticed that whereas Clause 6.0 of the Award Letter dated 24th March, 1982 makes applicable only the provisions of Indian Arbitration Act, 1940, Clause 26.6.2 of the General Conditions of Contract also makes applicable "any statuary modification thereof"

6. The arbitration agreement between the parties contained in Clause 6 of the award letter dated 24th March, 1982 supersedes General Conditions of Contract. Therefore, as per the agreement between the parties which is contained in Clause 6 of the Award Letter only the provision of Indian Arbitration Act, 1940 shall apply. Moreover, Clause 6 of the Award Letter dated 24th March, 1982 itself makes it clear that reference to Clause 25 and 26 of GCC has been made only to indicate how Arbitration clause can be invoked. The substantive law applicable to the Arbitration proceedings will be Indian Arbitration Act, 1940. The General Conditions of the Contract cannot be read as overriding or as an exception to the specific arbitration agreement between the parties which is contained in Clause 6 of the Award Letter. For this reason alone, the contention put forward by the learned counsel for the respondent is liable to be rejected.

7. Learned counsel for the applicant learned heavily on a decision of the Supreme Court in the case of Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., wherein Supreme Court dealt with three cases. On such case considered by the Supreme Court was that of M/s Rani Construction Pvt. (CA No. 61 of 1999) which dealt with a contract for construction of certain works of the Himachal Pradesh State Electricity Board. There was an arbitration agreement contained in Clause 25 which, in relevant part reads as under :-

"Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time bring in force shall apply to all arbitration proceedings under this clause."

8. In that case the disputes had been referred to the sole arbitrator on December 4, 1993 but the arbitrator gives his award on February 23, 1996 after the new Act had come into force. The question arose whether the Award will be enforceable under the provisions of new Act or old Act. On account of difference of opinion in two judgments of Himachal Pradesh High Court, both rendered by single Judges, a reference was made to larger bench. Vide judgment dated 16th July, 1998 a Division Bench of the High Court of the Himachal Pradesh held that Clause 25 of the agreement "does not admit of interpretation that this case is governed by Act of 1996". Hon'ble Supreme Court after an exhaustive survey of the case law on the point gave its conclusion at page 3944 which read 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 proceedings which are required to be taken under the old Act for award becoming decree u/s 17 thereof and also appeal arising there under.

3. In cases where arbitral proceedings have commenced before coming into force of the new Act and are pending before the Arbitrator, it is open to the parties to agree that new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

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

5. Once the arbitral proceedings have commenced, it cannot be stated that right to be governed by the old Act for enforcement of the award was an inchoate right it was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act that some legal proceedings for its enforcement must be pending under that Act at the time new Act came into force.

6. If narrow meaning of the phrase "in relation to arbitral proceedings" is to be accepted, it is likely to create great deal of confusion with regard to the matters where award is made under the old Act. Provisions for conduct of arbitral proceedings are vastly different in both the old and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

7. A foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under Foreign Awards Act (Foreign Awards (Recognition and Enforcement) Act, 1961).

9. While considering the case of M/s. Rani Construction, Supreme Court observed

in para 51 of the judgment that Clause 25 containing the arbitration agreement in the case of M/s Rani Construction Pvt. Ltd. v. Himachal Pradesh State Electricity Board (Civil Appeal No. 61 of 1999) does admit of the interpretation that the case is governed by the provisions of the Arbitration and Conciliation Act, 1996. Basing his arguments on these observations of Supreme Court, learned counsel for the respondent vehemently contended that arbitration clause in the instant case is similar to that in the case of Rani Construction and Therefore the same observation will apply which means that the arbitration proceedings will be governed by the provisions of the new Act and not the old Act and since under the new Act a challenge to the constitution of the Arbitral Tribunal lies only before the Tribunal this petition which is under Sections 5, 11 and 12 of the Arbitration Act, 1940 is not maintainable. This argument over looks an important aspect of the case viz. that the application under the Sections 5, 11 and 12 had been filed by the petitioner on 2nd September 1995 i.e. before coming into force of the new Act. With the filing of the application on 2nd September, 1995 a right accrued in favor of the petitioner to get it decided under the provisions of the old Act. The question as to whether the new Act or old Act will apply have to be answered in the light of date of accrual of a particular right. Suppose in M/s Rani Construction case the award had been filed before coming into the force the new Act and objections had been filed against the award u/s 30 and 33 of the Arbitration Act, 1940 could it be said that after coming into force of the new Act, Sections 30 and 33 of the old Act will not apply and Therefore objections under Sections 30 and 33 of the Arbitration Act, 1940 have become not maintainable? In M/s. Rani Construction case, the award had been made after coming into force of the new Act and Therefore in view of the language of the arbitration clause it was held that it admits of the interpretation that new Act will apply. As already noticed in the present case the application u/s 5, 11 and 12 had been filed before coming into force the new Act. Had this application been filed after coming into force of the new Act it could be argued that it will not be maintainable because the right to get it decided under the old Act would have accrued only if the application had been filed before coming into force of the new Act. If the challenge to the constitution of the Arbitral Tribunal is raised after coming into force of the new Act then in terms of arbitration clause the right to get it decided accrued only under the new Act. But if the challenge has already been made before coming into force of the new Act the same shall be decided in accordance with the provisions of the old Act. An arbitration clause as in present case does not wipe off the right already accrued in favor of the petitioner to get the petition u/s 5, 11 and 12 decided in accordance with the provisions of the old Act.

10. Moreover, as already observed clause six of the Award Letter which contains arbitration agreement between the parties makes applicable only the provisions of Arbitration Act 1940. Clauses 25 and 26 of the General Conditions of the Contract cannot override the specific agreement between the parties as contained in the Award Letter. Therefore, the arguments that in view of Clause

26 of the GCC new Act will apply is really not available to the respondents in this case.

11. Accordingly, application being IA.No. 8470/2001, filed by the respondent u/s 85 of the Arbitration & Conciliation Act, 1996, seeking dismissal of the petition under Sections 5, 11 and 12 of the Arbitration Act 1940 is rejected.

S.No. 2065A/95

12. List the matter on 18th April 2002 in the category of short causes.