
(2005) 05 JH CK 0028

In the Jharkhand High Court

Case No : Arbitration Application No. 44 of 2003

Navratandas and Co. (P) Ltd.

APPELLANT

Vs

Tata Iron and Steel Co. Ltd.

RESPONDENT

Date of Decision : 20-05-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)

Citation : AIR 2006 Jhar 7 : (2005) 3 JLJR 165 : (2005) 3 JCR 432 : (2006) BankJ 432 : (2005) 4 BankCas 289 : (2006) 2 ARBLR 236 : (2005) 4 BC 289

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : S.J. Roy, for the Appellant; B.P. Verma and Ashok Kr. Yadav, for the Respondent

Judgement

M.Y. Eqbal, J.—In this application u/s 11(6) of the Arbitration and Conciliation Act, 1996 the petitioner has prayed for appointment of an independent arbitrator and for reference of the dispute arose between the parties to the said arbitrator for adjudication.

2. The petitioner was awarded the work of construction of JRD Tata Technical Training Institute at Gopalpur, District Ganjam, Orissa vide work order dated 10.12.1996. The contract work was valued at Rs. 4.48 crores, but as per the drawings issued the total contract work on accepted rates was about Rs. six crores. The petitioner's case is that in course of work, the scope of work was revised drastically and as such the petitioner raised claim of Rs. 96.35 lakhs, but the claim of the petitioner was not settled. It is contended that the respondents have made part payment and in spite of notice, failed to pay the entire amount. The petitioner, thereafter, sent notice dated 15.11.2002 to the respondent demanding Rs. 197.11 lakhs along with 18% interest. Thereafter, the petitioner sent another notice dated 17.12.2002 invoking the arbitration clause. It is alleged that the respondent failed to agree the single arbitrator nominated by the petitioner and consequently the present application was filed.

3. The respondent-Tata Iron & Steel Co. Ltd. filed counter affidavit stating that the petitioners have resorted to arbitration clause No. 40.2 without first resorting to Clause 14.1 which is condition precedent before resorting to the arbitration clause. The respondent's further case is that one M.N. Dastur & Co. Ltd. was a Consulting Engineer of the said Project. The petitioner had written a letter on 8.3.2001 to the said Consulting Engineer including the final bill for the said work. The consulting Engineer passed the bill after statutory and other deductions. The petitioner, however, did not submit "No Claim Certificate" despite repeated reminders. However, the petitioner approached the respondent and everything was settled. The respondent's further case is that as a matter of fact, by letter dated 20th October, 2001, the petitioner gave "No Claim Certificate" stating that the petitioner does not have any further claim.

4. I have heard the learned counsel for the parties. Learned counsel appearing for the petitioner submitted that Clause 14.1 of the Agreement applies only during subsistence of the work. After the work was completed and some claim was left, then Clause 14.2 has to be invoked. On the other hand, learned counsel appearing for the respondent submitted that before invoking Clause 14.2 of the Contract, it was necessary for the petitioner to first raise the claim before the Engineer in accordance with Clause 14.1 of the Contract. Learned counsel further submitted that this case is squarely covered by the order passed in Arbitration Application No. 42 of 2004.

5. Before appreciating the submissions of the learned counsel, I would like to quote Clauses 14.1 and 14.2 of the Agreement which read as under :--

"14.1 Settlement of disputes by Engineer--If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works it shall be first referred to and settled by the Engineer who shall state his decision in writing of the same to the Employer and the Contractor. Such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor until the completion of the works and shall forthwith be given effect to by the Contractor who shall proceed with the works with all due diligence whether notice of dissatisfaction is given by him or by the Employer as hereinafter provided or not.

14.2 Settlement of disputes by arbitration--If the Engineer shall fail to give such decision for a period of 90 days after being requested to do so or if either the Employer or the Contractor be dissatisfied with any such decision of the Engineer then and in any such case either the Employer or the Contractor may within 90 days after expiration of the first named period of 90 days or within 90 days after receiving such decision (as the case may be) require that the matter shall be referred to Arbitration and give a written notice to the other party requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and only such disputes or differences of which such written notice has been given shall, be referred by both the parties to the

arbitration and final decision of a single Arbitrator to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator to the arbitration of two Arbitrators one to be appointed by each party which Arbitrators shall before taking upon themselves the burden of Reference appoint an umpire. On receipt of notice of appointment of an Arbitrator by one of the parties other party shall appoint its nominee as the second arbitrator within one month of the date of receipt by it of the said notice. But if the Engineer has given a decision within a period of 90 days as aforesaid and no notice of dissatisfaction has been given either by the Employer or the Contractor within a period of 90 days from receipt of such decision then the said decision of the Engineer shall remain final and binding upon the employer and the Contractor."

6. At the very outset, I hold that the arbitration clause contained in the Agreement which was the subject matter of the A.A. No. 42 of 2004 is quite different from the arbitration clause quoted herein above. The decision rendered in that case, therefore, will have no application to the present case.

7. In the instant case, as stated in the counter affidavit, the petitioner first consulted the Engineer and submitted final bills for the work and after receiving the amount, alleged to have raised a dispute of huge amount.

8. Be that as it may, the question whether the petitioner rightly invoked the arbitration clause and the question of validity of the reference, if raised, shall be decided by the Arbitrator and not by me exercising administrative power u/s 11(6) of the said Act. In other words, the existence of the arbitration clause and the validity of reference shall only be decided by the Arbitrator. It is also with the domain of the Arbitrator to decide whether the claim of the petitioner has already been settled on full satisfaction.

9. I, therefore, allow this application and appoint Mr. Justice P.K. Sarkar, a retired Judge of the Patna High Court, as independent Arbitrator. He is requested to enter into the reference and give an Award within six months from the date of entering into the reference.

This application stands disposed of accordingly.