

(2002) 02 DEL CK 0102
In the Delhi High Court
Case No : OMP 118 of 2000

NBCC

APPELLANT

Vs

AM Rasool Constn. and Engineering Services (P) Ltd.

RESPONDENT

Date of Decision : 21-02-2002

Acts Referred:

Citation : (2002) 8 AD 297 : (2002) 2 ARBLR 183 : (2002) 97 DLT 498

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Yogesh Malhotra, Rajan Khanna and V.P. Malhotra, for the Appellant;
George Thomas, for the Respondent

Final Decision : Dismissed

Judgement

J.D. Kapoor, J.—Short controversy in this petition u/s 33 of Indian Arbitration Act, 1940 (hereinafter referred to as Act) is as to the scope of arbitration agreement between the parties. Admittedly arbitration proceedings are continuing and are in progress. Petitioner has challenged the jurisdiction of Indian Courts before the learned Arbitrator and has approached this court to have the effect of arbitration agreement determined as contemplated by Section 33 of the Act as according to the petitioner Clause 51 of the General Terms and Conditions of the Contract between the petitioner and Housing Corporation of Libya which were part and parcel of the Contract between the parties has ousted the jurisdiction of India Courts.

2. Section 33 of the Act provides as under:-

"Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits.

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for

discovery and particulars as it may do in a suit."

3. Arbitration clause of the Contract between the parties reads as under:-

"14. Disputes if any, relating to or arising out of the provisions of this contract shall be referred to the sole arbitration of the Project Director who may either himself arbitrate the dispute or refer the same for arbitration to some other officers of the Corporation other than the officers connected with the Superintendent of the works at work site. The decision of the arbitrator shall be final and binding on both the parties."

4. Put briefly the facts relevant for determining the aforesaid controversy are as under:-

5. The petitioner was awarded the work for construction of 1305 houses by the Housing Corporation of Libya, an undertaking of Government of Libya. The petitioner gave sub-contract to the respondent for 100 houses to be constructed in Libya. As per contract executed between the parties the material for construction was to be supplied by the petitioner and the respondent was only to provide labour for execution of the contract. Clause 4 of the general terms and conditions of the contract between the parties provided that following documents shall form part of the tender documents:

- (a) General Terms and Conditions.
- (b) Financial Terms & Conditions.
- (c) Technical Specifications and conditions
(Parts II).
- (d) Bill Quantities for each type of houses.

6. Clause 8 of the General Terms and Conditions provided that respondent shall pay to his workers and staff wages not below the wages as fixed by the Libyan Government from time to time. Clause 10 provided that respondent shall abide by Bye-laws of Libyan Government and shall be responsible for any acts of violation in this regard. Apart from the aforesaid ancillary clauses of the contract between the parties the most significant clauses that go to the root of the contract between the parties are Clauses 22 and 52 of the contract between the petitioner and the Housing Corporation Libya These are:-

"Clause 22. The General Conditions of the Contract entered into by the Corporation with the housing Public Corporation Libya shall be applicable to PRW also."

7. Clause 51 of the General Terms and Conditions of the Contract between the petitioner and Housing Corporation of Libya is as follows:-

"Enforcement of Libyan Laws and Jurisdiction of Libyan Courts."

8. Since certain disputes arose between the parties, the respondent filed petition (S.No. 99A/95) u/s 20 of the Arbitration Act, 1940 before this court in 1995 for appointment of the Arbitrator by invoking Clause 14 of the Agreement referred above. In para 20 of the petition, the respondent invoked the jurisdiction of this Court by averring that not only the petitioner has got their head office/regd. office at New Delhi, but the work was also awarded to the respondent from Delhi. In reply to the aforesaid para, the petitioner averred that para 20 of the petition is legal and needs no reply. However, this Court vide order dated 20.12.1996 directed the Managing Director of the petitioner to appoint the Arbitrator within four weeks. Feeling aggrieved, the respondent filed appeal Bearing No. FAO(OS) 40/99 before the Division Bench of this court. The Hon'ble Division Bench allowed the appeal vide order dated 25.9.1997 and directed the Single Judge of this court to appoint an independent Arbitrator. On 19.11.1997 this court appointed Justice G.C. Jain as an Arbitrator. Both the parties submitted themselves before Justice G.C. Jain. Unfortunately Justice G.C. Jain expired during the proceedings. The respondent approached this court for appointment of another Arbitrator which request was allowed on 18.11.1998 and Justice M.P. Singh (Retd.) was appointed as Arbitrator.

9. First and foremost contention of Mr. George Thomas, learned counsel for the respondent is that the petition is not maintainable u/s 33 of the Act firstly it challenges the interim order of the Arbitrator and not the award wherein the Arbitrator has decided five preliminary objections raised by the petitioner for the first time before the Arbitrator though he had the liberty to raise these objections in the petition u/s 20 of the Arbitration Act seeking appointment of the Arbitrator, secondly Section 33 is invoked only against arbitrator award or against the existence of arbitration agreement or its validity or to have its effect determined and since through this petition the petitioner has neither challenged the existence of the agreement nor its validity nor the award the same is not maintainable and thirdly the petitioner had raised contradictory objections/pleas before the Arbitrator inasmuch as that he first sought the rejection of the claim of the respondent being barred by Limited Act of Indian Law and at the same time challenged the jurisdiction of the Delhi Courts/Arbitrator coupled with the fact that the petitioner has in this petition taken the plea that the cause of action arose on 23.4.2000 when the interim order was passed by the learned Arbitrator whereby the preliminary objections were rejected. On the one hand the petitioner had submitted to the jurisdiction of the Indian Court and at the same time challenged its jurisdiction also.

10. I am afraid none of the grounds challenging the maintainability of the petition under the provisions of Section 33 has any substance or merit. Merely because a party does not take legal objections which are either on factual matrix or as to the claims being barred by limitation or the proceedings being not maintainable on account of jurisdiction does not mean that it is precluded from taking legal objection for all times to come. Objection of such nature can be raised at any stage including the stage of appeal. Any plea or objection that hits

at the foundation or existence of the suit of the plaintiff remains always open. It is admitted that in response to the claims filed by the respondent the petitioner has raised the objection as to the jurisdiction of the Arbitrator by taking the plea that it is the Libyan courts as per the agreement between the parties which has jurisdiction. This objection did not find favor with the Arbitrator and he disposed this objection by way of written order.

11. As regards Section 33 it consists of two parts. The petitioner has availed the second part which means to have the effect of either arbitration agreement or the award determined.

12. The scope of Section 33 of the Act came up for consideration of Hon''ble Supreme Court in Shiva Jute Baling Limited Vs. Hindley and Company Limited, wherein it was held that Section 33 contemplates an application for three purposes, namely (i) when it is desired to challenge the existence of an arbitration agreement, (ii) when it is desired to challenge its validity, and (iii) when it is desired to have its effect determined. An arbitration agreement may come into existence in one of two ways: it may either arise out of an agreement which contains nothing else besides the arbitration agreement, or it may arise out of a term contained in a contract which deals with various other matters relating to the contract. Where one is dealing with an arbitration agreement of the second kind, Section 33 is concerned only with the term relating to arbitration in the contract and not with the other terms of the contract which do not arise for consideration on an application under that section.

13. The aforesaid view of the Supreme Court was subscribed by it in Jawahar Lal Burman Vs. Union of India (UOI), also wherein it was held that a party affirming the existence of an arbitration agreement cannot apply u/s 33 for obtaining a decision that the agreement in question exists but an application to have the effect of arbitration agreement determined can legitimately cover the dispute as to the existence of said arbitration agreement. That means that application to have the effect of agreement can be made provided the existence of the agreement is not disputed. Thus the remedy by way of Section 33 of the Act is available to the petitioner to have the effect of the same determined as it affirms existence of arbitration.

14. Mr. Thomas has further contended that the instant petition is not maintainable as no award has been made till date and it is an interim order of the Arbitrator which is being challenged through this petition and so far as the remedy to a party getting the effect of the agreement determined is concerned it is an independent remedy by way of moving an appropriate petition in this regard and not by way of challenging either the interim order of interim award or the final award.

15. Next Mr. Thomas has vehemently contended that the petition is barred by the principle of re judicata inasmuch as that in the petition filed by the respondent u/ s 20 of the Indian Arbitration Act 1940 seeking arbitration in respect of disputes

and differences referred therein the petitioner had agreed not only for the appointment of the Arbitrator but also submitted to the jurisdiction of the Indian Court and, Therefore, the decision of the Court in appointing the Arbitrator u/s 20 which has force of judicial decision and attained finality firstly because no objection to the jurisdiction of the Indian Court was raised by the petitioner and secondly no appeal was filed against the said order.

` 16. The Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, has laid down the following guidelines for application of principle of *re judicata*:-

"The principle of *re judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a rest is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suitor proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of *re judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

17. However in another case *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another*, the Supreme Court expanded the scope of Section 11 of the CPC to various other kinds of proceedings apart from the civil suits and observed that though this Section generally comes into play in relation to civil suits but the doctrine of *res judicata* has been applied since long in various other kinds of proceedings and situations by Court in England, India and other countries. The doctrine of *res judicata* is mainly to avoid multiplicity of litigation and to bring about finality in it. In view of this underlying object the Hon'ble Supreme Court conceived of many other situations where the principle of *res judicata* gets invoked. Some of these are as under:-

"The rule of constructive *res judicata* is engrafted in Explanation IV of Section 11 of the CPC and in many other situations also principles not only of direct *res judicata* but of constructive *res judicata* are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as *res judicata* and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of *res judicata* also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be by implication; then also the principle of *res judicata* on that issue is directly applicable. When any matter which might and ought to have been made a ground of defense or attack in a former proceeding but was not so made, then such a matter in the eyes of law, to avoid multiplicity

of litigation and to bring about finality in it is deemed to have been constructively in issue and, Therefore, is taken as decided."

18. Incidentally it was also held in this case that for applying the principle of constructive res judicata what is to be seen is whether from the order dismissing the SLP in liming it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the aggrieved party. The Supreme Court observed that in a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must by necessary implication be taken to have decided that it was not a fit case where special leave should be applicable as there may be several reasons for dismissing the petition or may be one or more reasons or even merits of the award might also have to be taken into consideration but the fact that the order is a non-speaking order it is difficult to accept that certain order must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award.

19. It is settled proposition that unless and until issue is directly and substantially involved in the proceedings and is determined on merits, the principle of res judicata does not get invoked.

20. There is no doubt that doctrine of res judicata has inherent object of not only providing finality to the decision of the Courts but also to put an end to the future litigation once for all. But the condition precedent is that the dispute or controversy should have been adjudicated upon on merits and that too explicitly and not peripherally or in absence of objection.

21. There is no gainsaying the fact that the order as to the jurisdiction of the court is challengeable at any stage including even the stage of execution of a decree. Ordinarily executing court cannot go behind the decree unless the decree suffer from the vice of non jurisdiction as such a decree is a nullity and is inexecutable. Admittedly in the instant case neither was any objection raised by the petitioner before the court before whom petition u/s 20 of the Act was moved nor was the question of jurisdiction of Indian Courts decided and determined by the court and Therefore the order of the court in appointing the Arbitrator on the premise that there was no objection to the jurisdiction of the Indian Court cannot be presumed as an order whereby the issue of jurisdiction of the court was determined on merits and attained finality and as such was binding upon the parties.

22. Even if it is assumed that the petitioner had submitted itself to the jurisdiction of the Indian Court and did not raise the objection in this regard still the fact remains that the petitioner can approach the court at any stage to get this issue determined by invoking provisions of Section 33 of the Arbitration Act.

23. The instant petition being u/s 33 of the Arbitration Act has to be deemed as an independent petition whereby the petitioner has sought the effect of arbitration agreement determined.

24. Now comes the main question: whether the Arbitration Clause in the contract in question is independent of the General Terms and Conditions of the Contract between the petitioner and Housing Corporation, Libya which has element of an international commercial transaction.

25. The main thrust of the contention of Mr. Yogesh Malhotra, learned counsel for the petitioner is that to have the effect of arbitration clause i.e. Clause 14 determined is to read Clause 4 of the contract between the parties with Clause 22 & 51 of the contract between the petitioner and the Housing Corporation, Libya as Clause 51 of the contract between the petitioner and the Corporation formed part and parcel of the contract between the petitioner and the respondent by way of reference as well as by way of incorporation.

26. According to Mr. Malhotra the effect of these clauses is that the substantive law of the contract is the Libyan Law and, Therefore, it is the Libyan Laws and regulations which are applicable to the contract between the petitioner and the respondent and it is the Libyan Courts that would exercise jurisdiction over any dispute arising from the contract between the petitioner and the respondent.

27. Mr. Malhotra also urged that there is nothing in the arbitration agreement to suggest that the parties had agreed to be governed by the substantive or procedural laws of India and in the absence of any contrary indication, there is a presumption that the parties have intended that the proper laws of contract and the law governing the arbitration agreement are the same and both the substantive law governing the conduct of arbitration shall be governed by the proper law of contract.

28. He has further contended that it is the intention of the parties which is the determining criteria and where there is no express intention, implied intention become the governing criteria. In support of this proposition he has placed reliance upon *National Thermal Power Corporation v. The Singer Company and Ors.* AIR 1992 154 where the Supreme Court held that where the parties have neither expressly nor impliedly elected a proper law the conclusion should be derived on the touchstone of the query "how a just and reasonable person would have regarded the problem like this and for this purpose the place where the contract was made, the form and object of the contract, the place of performance the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection.

29. Thus the proper law is the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most intimate connection with the contract. The expression "proper law" refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws and rules. These observations stem from the proverbial law as handed by Dicey Vol. II, Page 1164. Thus unless and until a party chooses a

proper law of contract, the proper law of arbitration agreement remains proper law of contract.

30. The only limitation on this rule that the intention of the parties must be expressed bonafide and it should not be opposed to public policy. This view was subscribed in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* (1939) AC 277 wherein Lord Wright made the following observations:- "...where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bonafide and legal and provided there is no reason for avoiding the choice on the ground of public policy."

31. Interestingly in NTPC case, the position was in reverse order. NTPC had entered into two formal agreements. The General Terms and Conditions of Contract dated 14.2.1981 were expressly incorporated in the agreement in the following form "the laws applicable to this contract shall be the laws in force in India. The Courts of Delhi shall have exclusive jurisdiction in all matters arising under this Contract." The General Terms dealt with the special responsibilities of foreign contractors and Indian contractors. The Singer, being a foreign contractor, was governed by the provisions relating to the foreign contractors. The General Terms further provided for settlement of disputes by amicable settlement, failing which by arbitration. Some of the clauses of the General Terms provided that arbitration shall be conducted in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory modification thereof and the venue of arbitration shall be New Delhi and the contract shall in all respects be construed and governed according to Indian laws. It was in view of these specific terms that the Supreme Court held that it was wrong in treating the award as a foreign award. The Foreign Awards Act has no application to the award by reason of the specific exclusion contained in Section 9 of that Act and the award is governed by the laws in force in India including the Arbitration Act, 1940.

32. According to Mr. Malhotra mere fact that the parties are residents of India does not make it a ground to refer the matter to a domestic Tribunal of arbitration as the contract between the parties is of utmost importance and has to be given full effect.

33. In support of this contention Mr. Malhotra placed reliance on *Gas Authority of India Limited v. Spie Capag S.A. and Ors.* 1994 (1) ALR 429 wherein ingredients of international arbitration agreement were culled out. IT was held that the arbitration agreements which qualify for recognition and enforcement under Article II of the New York Convention and FARE Act should have a foreign element and relate to international commercial transactions and since the international transaction is not capable of a precise definition and its meaning cannot be put in a strait-jacket, a commercial arbitration agreement will be international in character in the following situations:-

1) If one of the parties has business located abroad; or

- 2) The agreement has to be performed abroad; or
- 3) The subject matter of the transactions is located abroad; or
- 4) One of the parties to the transactions is a foreigner.

34. Applying the aforesaid test Mr. Malhotra has contended with vehemence that in the instant case not only the contract has been performed abroad but the subject matter of the transaction is also located abroad and, Therefore, it has to be treated as an international commercial agreement and merely because the parties are Indians and stationed in India would not provide jurisdiction to the Indian Courts.

35. Mr. Malhotra has also tried to draw support and strength from the latest judgment of the Supreme Court in *Atlas Export Industries v. Kotak & Company* (1999) 7 SCC 261 wherein according to him almost identical situation arose as to the jurisdiction of the Arbitrator. The Atlas Export Industries, Junagadh entered into a contract dated 3rd June, 1980 with M/s Ocean dale Company Limited, Hongkong. The agreement was for the supply of 200 MT of Indian groundnut extractions of the specifications as to quantity, quality and packages detailed in the contract and to be shipped on or before 30th June, 1980. The price was agreed at US \$ 200 per M.T. The goods were to be supplied through M/s Kotak and Company, Bombay, M/s Prashant Agencies, Bombay were the brokers. The existence of the contract, to which Atlas, Ocean dale and Kotak were the parties, is not in dispute. Kotak were at all times responsible for the performance on behalf of the final buyers Ocean dale. The letter of credit was opened by Ocean dale in favor of Kotak who then transferred it in favor of Atlas. The letter of credit was opened at US \$203 whereas Kotak's purchase from Atlas was at US \$200. It was agreed upon between Atlas and Kotak that the difference would be paid locally by Atlas to Kotak in Indian rupees. The time for shipment was extended by mutual agreement between the parties and correspondingly the period of validity of the letter of credit was also extended. However, still there was failure to ship the goods by the time appointed by the contract and as extended which resulted into a dispute arising between the parties.

36. It was held that the right of the parties to have recourse to legal action is not excluded by the agreement and the parties are required to have their disputes adjudicated by having the same referred to arbitration. Merely because the Arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. It was a case where the parties had appointed the Arbitrators and suffered an award. The plea of jurisdiction of the Arbitrator was raised before the Supreme Court for the first time. It was neither raised before or during the arbitration proceedings nor in the objection filed before the Single Judge nor in the LPA filed before the Division Bench. It was observed that such a plea is not available to be raised before the Supreme Court for the first time.

37. Needless to say the problem arises where there is no express intention. In

that case one has to search for implied intention. Broadly, the following factors either collectively or individually go to decide the jurisdiction of the Courts or the Arbitrators in respect of contracts which are required to be executed in a foreign land irrespective of the fact whether parties to the contract reside in the native country:

- (i) The place of execution of contract.
- (ii) Location of business of one of the parties to the contract.
- (iii) The nationality of one of the parties.

38. In the understanding of Mr. Malhotra there was not only implied reference but the manifest intention between the parties demonstrated by Clause 51 of the contract between the petitioner and the Housing Corporation of Libya and Clauses 4 & 22 of the contract between the petitioner and the respondent that the jurisdiction of Indian Courts was excluded.

39. I am afraid I don't find myself in comport with the view propounded by Mr. Malhotra. Merely because by Clause 4 of the contract between the petitioner and the respondent the general terms and conditions of the contract between the petitioner and the Housing Corporation of Libya were made part of the contract between the petitioner and the respondent does not mean that disputes to be arbitrated upon by way of Clause 14 were governed by Clause 51 of the contract between the petitioner and the Corporation as the contract between the petitioner and the Corporation was an independent contract and so was contract between the petitioner and the respondents. Arbitration clause in the contract between the petitioner and the respondent was an independent clause. Clause 51 of the Terms and Conditions of the Contract between the petitioner and the Housing Corporation of Libya had neither over-riding nor superseding effect.

40. Had there been an intention to arbitrate the disputes in Libya the clause agreeing upon the Project Director being the Sole Arbitrator for adjudicating the disputes would not have figured. Substantive laws of the contract may be the Libyan Laws but it does not mean that the Libyan Laws would also refrain the adjudication of the disputes between the parties relating to or arising out of the contract between the petitioner and the respondent through arbitration.

41. The intention of the parties was manifest and pronounced that the disputes between the parties have to be referred to the sole Arbitration of the Project Director in India. Both the parties are independent Companies. They entered into an independent contract as petitioner had an independent contract with Housing Corporation Libya. There is an expressed intention in Clause 14 which is independent of all other clauses including the clauses of General Terms and Conditions. Moreover both the parties are residents of India. Contract was also signed in India. Their registered offices are also situated in India.

42. If the intention is express, it is immaterial whether the contract is of the nature of international commercial transaction of one of the parties has a

business located abroad or contract is to be performed abroad or one of the parties to the transaction is a foreigner. Parties agree for arbitration with open eyes being fully conscious of the consequences. Once they express their intention in black and white, they cannot be allowed to wriggle out by resorting to legal wrongs or clutching flimsy straw to come out of it.

43. So far as the disputes between the petitioner and the Housing Corporation Libya are concerned these are to be adjudicated upon by the Libyan Courts. The arbitration clause was independent clause between the parties stemming from an independent contract though by virtue of Clause 51 of the contract all other substantial terms of the General Terms and Conditions of the Contract between the petitioner and the Housing Corporation Libya became part and parcel of the contract between the parties. Thus incorporation of the terms and conditions of the contract between the petitioner and the Housing Corporation Libya by way of Clause 4 in the contract between the petitioner and the respondent does not affect the arbitration clause contained in independent contract between the parties. Intention of the parties. was clear that they would decide their disputes on the Indian soil through the arbitration of the Project Director.

44. It is pointed out that there are various other sub-contractors engaged by the petitioner in India and all their disputes are conducted and decided by the Indian Arbitrators in accordance with the Indian procedural laws and, Therefore, the respondent cannot be discriminated against. In view of this and even otherwise the respondent cannot be put in jeopardy by directing it to go to Libya and get the issues decided whereas both the parties are residents of India.

45. Merely because the petitioner is a Government Authority and has sources does not mean that the respondent should be made to suffer the rigours of settling its disputes in Libya particularly in view of the specific agreement between the parties that they will settle their disputes through Project Director as sole Arbitrator or some other person nominated by him. Now it is too much and too late in the day to raise such an objection when the arbitration five years ago and proceedings have already commenced and continuing and and that too after the appointment of the Arbitrator by this Court which was neither challenged at first instance nor by way of appeal.

46. Foregoing reasons lead me to the most ineluctable conclusion that the parties had expressly agreed for submitting themselves to Indian Courts in case any disputes arose from the contract in question. The petition is completely devoid of merit and is dismissed.