

(2002) 07 SC CK 0081

In the Supreme Court Of India

Case No : Arbitration Petition 1 of 2001

Niko Resources Ltd.

APPELLANT

Vs

Gujarat State Petroleum Corporation (GSPC)

RESPONDENT

Date of Decision : 18-07-2002

Acts Referred:

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

Citation : (2003) 1 ALT 62 : (2002) 6 JT 19 : (2002) 10 SCC 71

Hon'ble Judges : V. N. Khare, J

Bench : Single Bench

Advocate : Arun Jaitley, in Arbitration Petition No. 1/2001, P. Chidambaram and Sachin Datta, for Himinder Lal, in Arbitration Petition No. 7/200, for the Appellant; Mukul Rahtagi, ASG, Meenakshi Arora, Devyani Prabhat, B. Sen, Senior Advocate, R.G. Srivastava and B.K. Satija for Respondent No. 1 in Arbitration Petition No. 7/2001, for the Respondent

Final Decision : Disposed Of

Judgement

V.N. Khare, J.—These are two petitions filed by the applicant u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for appointment of an arbitrator on behalf of the respondent in accordance with article 13 of joint operations agreement (in short hereinafter referred to as 'JOA') dated 13/5/994 read with article 31 of production sharing contract (in short hereinafter referred to as 'PSC') dated 23.9.1994 entered into between the parties.

2. The applicant's company is incorporated in Canada having its registered office at 1980, 700-4th Avenue, S.W. Calgary, Alberta, Canada. The applicant company is engaged in business of oil and gas exploration and mining. On 23.9.1994, in pursuance of bids invited by government of India for development of petroleum resources in the area known as Hazira field, a PSC was entered into between the President of India on the one hand and the Gujarat State Petrochemicals Corporation Ltd, (in short 'GSPC') and the applicant on the other hand for

exploitation of petroleum resources. The applicant and GSPC were jointly designated as the 'contractor' under the contract. The aforesaid PSC defines the rights and obligations of the parties and duration of contract is for 25 years. It is alleged that pursuant to the PSC, the contracting parties also entered in JOA to define their respective rights and obligations with respect to operations to be conducted under the PSC. The said agreement was signed on 5.12.1994 at New Delhi. The JOA contained clauses relating to conduct of joint operations, functions and duties of the operator, the manner of conducting and effecting operational programme etc. It is alleged that the applicant constructed a 14 km long. 36" pipeline from Hazira gas field to village Mora in the state of Gujarat which was built as a part of the joint operations. It is further alleged that the parties decided to implement the pipeline project in respect of the cost recovery status of the project. It is alleged that a dispute arose between the parties as a result of action on the part of the respondent in seeking to act in contravention of the terms and conditions of JOA and the illegal action on the part of the respondent in seeking to unilaterally expropriate the pipeline and transfer the same to the third party. The dispute in arbitration petition no, 1/2001 was with regard to the recovery of cost of the laying of pipelines. It is further alleged that, by a letter dated 7.6.2000 GSPC informed the applicant that the pipeline project was taken over by them and subsequently transferred to Gujarat State Petronet Ltd. (in short 'GSPL') a subsidiary of GSPC. On 17.7.2000, GSPL wrote to the applicant asking them to appoint a commissioning coordinator to prepare the staff and the equipment to commission the pipeline. It is alleged that by letter 24.7.2000, the applicant refused to recognise the GSPL. According to the applicant, since the dispute having arisen between the parties with regard to operations, ownership, control and management of 36" pipeline as a result of action on the part of the respondent in seeking to act in contravention of the terms and conditions of the JOA, the said dispute could only be resolved by taking recourse to the arbitration, as provided under JOA. In that view of the matter, the applicant sent a letter to GSPC whereby GSPC was requested to appoint an arbitrator so that arbitral tribunal, as contemplated in the agreement could be constituted for the purpose of adjudicating the disputes between the parties.

3. The applicant informed the GSPC about the appointment of Hon'ble Mr. Justice P.N. Bhagwati, former Chief Justice of India as its arbitrator. It is further alleged that after the applicant invoked the arbitration agreement, the respondent instead of appointing the arbitrator in terms of the said arbitration clause, wrote to the applicant showing its unwillingness to appoint an arbitrator by letter dated 29.9.2000. It is under such circumstances, the applicant has filed these two petitions being arbitration petition Nos. 1 & 7 of 2001 before me.

4. Shri P. Chidambaram, learned senior counsel appearing in arbitration petition No. 1/2001 and Shri Arun Jaitley, learned senior counsel appearing in arbitration petition No. 7/2001 urged that the disputes have arisen between the parties and the applicant having nominated its arbitrator, this Court is required to appoint an

arbitrator on behalf of the respondent in terms of Article 13 of JOA dated 13.5.1994 read with Article 31 of PSC dated 23.9.1994. Whereas, Shri Mukul Rohtagi, learned additional solicitor general and Shri B. Sen, learned senior counsel appearing on behalf of the respondents urged that there being multiple parties, there ought to be one arbitrator for each of them and that no single arbitrator can be appointed jointly for GSPC and Union of India. It was also, inter alia, urged that the present application is not maintainable as there is no arbitration agreement or for that matter no written contract between the parties relating to the construction of and for laying of 36" pipeline, that the dispute is not referable to the tribunal, and that, this Court has no jurisdiction to appoint any arbitrator or for that matter refer the dispute to the tribunal.

5. The objection taken by respondent that there being multiple parties, no joint arbitrator for GSPC and Union of India can be nominated, it is necessary to set out Clause 31.4 of the PSC, which runs as under:

"31.4 - The arbitral tribunal shall consist of three arbitrators. The party or parties instituting the arbitration shall appoint one arbitrator and the party or parties responding shall appoint another arbitrator and both parties shall so advise the other parties. The two arbitrators appointed by the parties shall appoint the third arbitrator."

6. In view of Clause 31.4, there can be only two arbitrators - one by the applicant and the other by GSPC and the Union of India. I, therefore, reject the said argument.

7. Coming to the other objections on behalf of respondent, I am of the view that the said objections need not detain me in proceeding further in the matter in view of the decision in *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, . In the said case, it was held as under:

"it might also be that in a given case the chief justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the arbitral tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the arbitral tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the arbitral tribunal may rule on its own jurisdiction. That the arbitral tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the arbitral tribunal's authority u/s 16 is not confined to the width of its jurisdiction, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the arbitral tribunal that it had been wrongly constituted by reason of the fact that the chief justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."

8. Shri Mukul Rohtagi, learned additional solicitor general stated that GSPC has already nominated Mr. Justice D.P. Wadhwa (former judge of Supreme Court of India) as their arbitrator and that he may be appointed by me as arbitrator on

their behalf too.

9. After having heard learned counsel for the parties and perused the record, I am of the view that there exists a dispute between the parties and there is an arbitration clause in the agreement. Further I find that the respondent company has failed to appoint an arbitrator in compliance of the notice sent by the applicant. It is not disputed that the applicant is a body corporate situated outside India. I, therefore, find that there is an arbitration agreement between the parties under the category of international commercial agreement.

10. I, therefore, allow these two petitions and appoint Mr. Justice D.P. Wadhwa -a former judge of Supreme Court of India as an arbitrator jointly on behalf of GSPC and Union of India in arbitration petition No. 7/2001 and also in arbitration petition No. 1/2001 on behalf of GSPC. The cost of arbitration shall be fixed as provided in Clause (8) of Section 31 of the Act.

11. The arbitrator would be governed by the provisions of the Act, although the arbitration agreement was entered into prior to enforcement of the Act. It is made clear that it would be open to the respondent to raise such objections which are permissible under law before the arbitrators.