
(2002) 08 MP CK 0042

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 3685 and 3686 of 2002

Northern Coalfields and Another

APPELLANT

Vs

Vijay Bahadur Singh and Sons Pvt. Ltd.

RESPONDENT

Date of Decision : 06-08-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16

Citation : (2003) 2 ARBLR 412 : (2003) 2 MPHT 39 : (2003) 2 MPLJ 154

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : N.S. Kale and H. Singh, for the Appellant; N.S. Ruprah, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.

In these two writ petitions petitioners are challenging the appointment of Arbitrator made in MCC No. 850/2001 and MCC No. 862/2001 by nominee of Hon'ble the Chief Justice of this Court in an application u/s 11 of Arbitration & Conciliation Act, 1996.

Petitioners submit that petitioner M/s. Northern Coalfields is a subsidiary company of Coal India Ltd. and duly incorporated as a registered Company under the Indian Companies Act. It carries on business of extraction and sale of coal. The petitioner company invited tender for work of widening of Haul of mid entry in mine at Nigahi project in W.P. No. 3686/2002 and for work of benching of the site dumps in main entry at Nigahi Project in W.P. No. 3685/2002.

Respondent/Company M/s. Vijay Bahadur Singh & Sons Pvt. Ltd. submitted its tender and the same was accepted. An agreement was entered into on 12-5-97 in W.P. No. 3685/2002 and in W.P. No. 3686/2002 agreement was entered into on 7-1-99. Agreement was signed between the petitioner and the respondents and the work was to be taken by the respondent/Company; certain dispute

arose; respondent claimed a sum of Rs. 1,20,36,465/- (in W.P. No. 3685/2002) and a sum of Rs. 51,91,452/- (in W.P. No. 3686/2002). An effort was made for conciliation; Shri J.D. Rai was appointed as Conciliator in the matter pertaining to W.P. No. 3685/2002; Conciliator had passed an order on 27-8-99; he directed Northern Coalfield Ltd. to pay Rs. 22 lacs; rest of the claim was refused.

In both the matters applications u/s 11 of Arbitration & Conciliation Act, 1996 were filed before this Court for an appointment of Arbitrator. These applications were registered as MCC Nos. 850/2001 and 862/2001. Petitioner/Company filed its reply to the application and it was the stand taken that the application of the respondent u/s 11 of the Act is not maintainable as there was no arbitration clause in the agreement. Nominee of Hon'ble the Chief Justice has allowed the applications and has appointed Chairman-cum-Managing Director, Northern Coalfield Ltd. as sole Arbitrator in terms of Clause 9 of the agreement. Aggrieved by the order of appointment of Arbitrator, petitioner preferred SLP before the Apex Court which was dismissed as withdrawn on 7-5-2002. Petitioner submits that SLP was withdrawn in the light of the judgment passed by the Apex Court in case of Konkan Railways Corporation Ltd. and Anr. v. Rani Constructions Pvt. Ltd., passed in Civil Appeal Nos. 5880-89 of 1997. Petitioner submits that Clause 9 of the agreement does not tantamount to arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996. Thus, nominee of the Hon'ble Chief Justice has erred in law in directing the appointment of Arbitrator.

Shri N.S. Kale, learned Senior Counsel for the petitioner has taken this Court through the various provisions of the Arbitration and Conciliation Act, 1996 (for short "the Act") and submits that though SLP cannot be preferred directly against the order before the Apex Court as the order of appointing an Arbitrator u/s 11 of the Act is an administrative order; the same can be challenged in a writ petition and writ can be issued. Learned Senior Counsel further submits that though there is a provision empowering Arbitrator to adjudicate as to the arbitrability of the issue, the Arbitration Tribunal may rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement, this Court's jurisdiction is not ousted under Article 226 of the Constitution. He has placed reliance on certain decisions of the Apex Court to be referred later.

Shri N.S. Ruprah, learned Counsel appearing for the respondent submits that Section 16 of the Act empowers the Arbitrator to decide the questions raised in the writ petition if any challenge is allowed to the appointment of Arbitrator that may delay the proceedings before the Arbitrator. Thus, no interference is called for in the writ petition by this Court. Otherwise also he submits that it is only in the case of non-performance of the duties, refusal to appoint an Arbitrator writ of mandamus can be issued not where appointment of Arbitrator has been made.

Section 16 of the Act empowers the Arbitral Tribunal to rule on its own jurisdiction. No doubt, in certain circumstances, it is open to Hon'ble the Chief

Justice or the nominee to decide about existence of arbitration agreement in the proceeding for appointment of Arbitrator, Arbitration Tribunal is not the only forum to decide about the existence of arbitration clause. The source of jurisdiction of Arbitration Tribunal is the arbitration clause. If such a question is raised before Hon''ble the Chief Justice or his designate, he has to decide it, is the law laid down by the Apex Court in *Wellington Associates Ltd. Vs. Mr. Kirit Mehta*, . The Apex Court further held that an agreement that parties "may" go to suit or may also go to arbitration cannot be said to be an agreement within the meaning of Section 7 of the Act. Section 7 postulates an agreement which necessarily or rather mandatorily requires the appointment of an Arbitrator/ Arbitrators.

In *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.*, the Apex Court laid down that an order passed u/s 11(6) of the Act by Chief Justice of the High Court or his nominee is an administrative order; its purpose being the speedy disposal of commercial disputes; such order would not be subject to judicial review under Article 136 of Constitution. However, certain contingencies may arise when Hon''ble the Chief Justice or his nominee refuses to make an appointment of an Arbitrator; in such a case a party seeking appointment of an Arbitrator cannot be said to be without any remedy. If it is held that an order u/s 11(6) of the Act is a judicial or quasi judicial order, then the said order would be amenable to judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a Court of law even against an order of appointment of an Arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting the UNCITRAL Model. Therefore, even an order refusing to appoint an Arbitrator will not be amenable to the jurisdiction of the Supreme Court under Article 136 of the Constitution. However, an order of refusal which has decided contentious issues would be an act of non-performance of duty and the authority concerned could be directed by mandamus to perform its duty. The Apex Court has further laid down that bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the Arbitrator, and in respect of the jurisdiction of the Arbitrator could be raised before the Arbitrator who would decide the same. Therefore, the power should be exercised by Hon''ble the Chief Justice or his nominee without wasting any time to achieve the purpose of the Act.

The Apex Court further considered the question in *Konkan Railway Corpn. Ltd. and Anr. v. Rani Constructions Pvt. Ltd.* (2000) 8 SCC 159 : 2000 Arb.W.L.J. 682 (SC), and referred the question whether order of Chief Justice or his nominee u/s 11 of the Act is a judicial order and thus appealable under Article 136 of the Constitution. It was observed that the judgment of *Konkan Rly. Corpn. Ltd. v. Mehul Constructions Co.* (supra) requires reconsideration on the ground that (i) 1996 Act did not take away power of Court to decide preliminary issues, notwithstanding Arbitrator's "competence" to decide such issues; (ii) in other

countries where UNCITRAL Model was being followed, Court could decide such issues judicially and need not mechanically appoint an Arbitrator; (iii) there were situations where preliminary issues would have to be decided by Court rather than Arbitrator; next question for which the reference was made is : if order of C.J. or his nominee were to be treated as an administrative one it could be challenged before a Single Judge of High Court, then before a Division Bench and then Supreme Court under Article 136; result would be further delay in arbitration proceedings; and (iv) an order u/s 11 does not relate to administrative functions of C.J. or C.J.I.

The Apex Court has answered the reference on January 30th, 2002 in *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, . The questions have been answered by the Apex Court. It has been held that SLP is not maintainable against an order u/s 11 of Arbitration and Conciliation Act, 1996. Only an adjudicatory order dealing with rival contentions of parties and passed by an authority constituted by the State by law for the purpose of discharging its obligation of securing justice for its people, can be appealed against under Article 136. Applying the legislative intent, their Lordships laid down the Section 11 ensures that appointment is made by a person occupying a high judicial office, who would naturally act with due care and caution to make certain that a competent, independent and impartial Arbitrator is appointed. If a party is aggrieved about the appointment, party would have the right to require the Tribunal to rule on its jurisdiction u/s 16. The authority of Arbitral Tribunal u/s 16 goes to the root of its jurisdiction not just its extent. Their Lordships further held that Section 11 cannot be interpreted on the basis of external aids; UNCITRAL Model Law.

From the aforesaid discussion it is clear that petitioner can raise the dispute as to the arbitrability of the issue and existing arbitration agreement before the Arbitrator appointed u/s 11 as provided u/s 16 of the Act; scope of which is wide and goes to the root of jurisdiction as to existence and validity of the arbitration agreement which exactly is the issue espoused in the present writ petitions.

Thus, Arbitrator is competent to decide the question raised; this Court's interference is not called for. It is not a case where appointment of Arbitrator has been refused. No mandamus is required to be issued in such cases as that may delay the proceedings.

Writ petitions are devoid of merit. They are dismissed. Costs on parties.