

(2018) 11 RAJ CK 0034

In the Rajasthan High Court

Case No : Civil Writs No. 16258 of 2018

**Power Grid Corporation Of India Limited, @APPELLANT@Hash Sethi
Construction Company,**

Date of Decision : 16-11-2018

Acts Referred:

Arbitration and Conciliation Act, 1995 — Section 5, 16
Constitution Of India, 1950 — Article 226, 227

Citation : (2018) 11 RAJ CK 0034

Hon'ble Judges : Ashok Kumar Gaur, J

Bench : Single Bench

Advocate : Prateek Sharma, Dinesh Mishra, Tarun Kumar Mishra

Final Decision : Dismissed

Judgement

1. The petitioner-Power Grid Corporation of India Limited, Central Public Sector Enterprise (hereinafter shall be referred to as "the petitioner-

Corporation") has filed the instant petitioner challenging the notice dated 01.05.2018 by which the respondent No.2-Arbitral Tribunal of Shri

Sukhjinder Singh (sole Arbitrator) has been nominated as Arbitrator. The petitioner-Corporation is also aggrieved by the notice dated 03.07.2018

issued by the respondent No.2 asking the petitioner-Corporation to appear on 13.07.2018.

2. The brief facts of the case are that the respondent No.1 M/s.Sethi Construction Company was awarded the work of renovation of Bassi Sub

Station Township and site office building vide LOA dated 30.09.2014 for an amount of Rs.86,34,070/- and the completion period of the work was eight

months from 15 days from the date of issuance of LOA. The petitioner has pleaded that the work was commenced on 12.11.2014 by the respondent

No.1 and as per Clause 18 of the Special Condition of Contract, the respondent

No.1 was to depute at least one experienced diploma holder in Civil

Engineering and breach of such condition, was to result into suitable recoveries to be made from the bills of the respondent No.1.

3. The petitioner has alleged that the respondent No.1 did not comply with the said condition and was informed about this by various letters. The

petitioner has pleaded that from time to time the respondent No.1 was informed about the poor workmanship in painting work and was also instructed

to perform all the work, as per the specifications mentioned in the LOA.

4. The petitioner has pleaded that contract was amended vide letter dated 25.03.2015 and amount of Rs.85,02,384/- was agreed between the parties.

The petitioner has alleged that the respondent No.1 submitted its first complete bill for an amount of Rs.35,11,174.44p and the same was processed

and the payment was released. The petitioner withheld an amount of Rs.1,00,000/- against defects in tiles and painting work, etc.

5. The petitioner has alleged in the writ petition that after inspection being carried out on the site and certain samples were taken in the presence of

the respondent No.1, the vigilance report dated 17.10.2015 was sent to the respondent No.1. The allegation of the petitioner is that after vigilance

inspection, the respondent No.1 discontinued all the work and questioned the report after two

8. The petitioner has alleged in the writ petition that on the basis of the notice dated 01.05.2018, the respondent No.2 issued a notice of appearance

dated 03.07.2018 for participating in the arbitration case before the Arbitral Tribunal of Shri Sukhjinder Singh (sole Arbitrator) and date was fixed for appearance on 13.07.2018.

9. The petitioner has pleaded that immediately after receipt of notice dated 03.07.2018 issued by the respondent No.2, the petitioner-Corporation

raised an objection with regard to appointment of Arbitrator by the respondent No.1 but still the respondent No.1 has proceeded with the appointment of Arbitrator.

10. The grievance raised in the instant petition is with regard to the appointment of sole Arbitrator by the respondent No.1. The learned counsel for the

petitioner submitted that the notices dated 01.05.2018 and 03.07.2018 are without jurisdiction.

11. Counsel for the petitioner submitted that the respondent No.1 failed to

appreciate the true meaning of Clause 69.1 of the General Terms and Conditions of Contract which deals with arbitration, as no steps were taken for settling the dispute amicably and straightway making appointment of Arbitrator by the respondent No.1 vide notice dated 01.05.2018, is premature and illegal.

12. Counsel for the petitioner has submitted that Clause 69.1 of the General Terms and Conditions of the Contract of resolving the dispute amicably is a restrictive clause and has to be exercised before invoking the process of arbitration. Counsel submitted that though there was no objection about appointment of Arbitrator from the side of the petitioner-Corporation, however before invoking the process of arbitration, valuable time and money could be saved by resolving the dispute amicably.

13. Counsel for the petitioner submitted that various efforts for amicable resolution of the dispute were undertaken by the petitioner-Corporation but the respondent No.1 failed to respond to the same and has directly adopted the process of arbitration bypassing the restrictive clause with regard to amicable settlement of dispute provided under Clause 69 of the General Terms and Conditions of the Contract.

14. Counsel for the petitioner further submitted that no notice prior to the appointment of Arbitrator was ever served by the respondent No.1 and only notice dated 01.05.2018 appointing the Arbitrator was served upon the petitioner-Corporation and the same was duly responded vide reply dated 28.05.2018 raising objection with regard to nomination of the Arbitrator.

15. The respondent No.1 has filed reply to the writ petition. It has been stated that the respondent had fulfilled its all obligations under the contract but the petitioner-Corporation failed to make payment to the respondent in terms of the contract. The respondent has submitted that even the inspection was carried out at the back of the respondent and the alleged recovery ordered against the respondent was without giving any show cause notice as the contract had expired on 20.04.2015. The respondent has pleaded that time and again request was made to the petitioner Corporation to make payment of the work done so that no dispute could arise but the petitioner-Corporation stopped the payments compelling them to refer the dispute to the Arbitrator.

16. The respondent has pleaded that after lot of persuasions and number of

requests, when the petitioner-Corporation was not ready to amicably resolve the dispute, the Arbitrator was nominated from their side under Clause 69.1 of the General Terms and Conditions of Contract and they sent the intimation to the petitioner-Corporation vide letter dated 01.05.2018. It is also submitted that the respondent made a request to the petitioner Corporation to nominate an Arbitrator from their side, as per the Contract but the petitioner-Corporation did not respond to the letter of the respondent and showed no response and did not nominate any Arbitrator from their side even after passage of more than a month and as such, as per the contract, the Arbitrator nominated by the respondent No.1 became the proceedings. Counsel for the respondent argued that a notice was given by the respondent for appointment of Arbitrator by nominating their Arbitrator with a request for nomination of one more Arbitrator from the petitioner's side, as per Clause 69.1 of the General Terms and Conditions of Contract. It is stated that the petitioner-Corporation ought to have nominated one more Arbitrator within one month of receipt of their notice and since they failed to do so, as per the Contract, the Arbitrator nominated from the side of respondent became the sole Arbitrator.

19. Counsel argued that the petitioner-Corporation is barred from taking advantage of their own neglect and their inaction and non-appointment of Arbitrator acts as an estoppel against them.

20. Counsel for the respondent further argued that as per Section 5 of the Arbitration and Conciliation Act, 1995, the judicial authority could not intervene in the present matter and all the issues can be raised before the Arbitrator and exercise of power is conferred under Section 16 of the Act, 1995.

21. Counsel for the respondent argued that the present petition is an attempt to delay the process of arbitration by the petitioner and the sole Arbitrator shall decide all the disputes on the basis of the facts and the same cannot be resolved through the present writ petition.

22. Counsel for the petitioner-Corporation Mr.Mathur has relied upon a judgment of the Delhi High Court in the case of M/s.Haldiram Manufacturing

Company Pvt. Ltd. Vs. M/s.DLF Commercial Complexes Limited (IA No.3363/2011 in CS (KOS) 2288/2010) dated 16.04.2012. The relevant

paragraphs of the judgment are reproduced hereunder:-

13. On a plain reading of the clause 34 contained in the application form and the legal position discussed herein above, this court is of the considered view that it cannot be said that the parties had not agreed to the terms and conditions of the said Application Form. The said Application Form, in fact, has been issued and printed by the defendant itself and therefore, the plaintiff cannot be heard to say that the application form constituted a unilateral agreement and not a bilateral one. The application form is duly signed by the Chairman of the plaintiff and the said form has been duly attested by the defendant. In fact the payments were being made by the plaintiff in accordance with the terms contained in the application form. Moreover no dispute has even been raised by the plaintiff to challenge any of the terms and conditions contained in the application form. To this extent, therefore, this Court does not subscribe to the arguments advanced by the learned counsel for the plaintiff that the said Application Form constitutes a unilateral agreement and not bilateral one.

14. The controversy in hand does not come to an end here as the arbitration clause under consideration has another dimension. It would be manifest on perusal of the above arbitration clause that the disputes arising between the parties at the first instance were to be mandatorily settled amicably by mutual discussion as the word used is shall in the clause and it is only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. Hence, clearly the first step stipulated in the said clause is the settlement of disputes through mutual discussion and second step is the settlement through arbitration. The Forum of Arbitration was, therefore, made dependent on the outcome of the first step that is of mutual settlement.

15. Indisputably, no mutual discussion between the parties has taken place, prior to the filing of the present suit. Surprisingly, the defendant in their reply dated 14th August, 2009, to the legal notice of the plaintiff dated 13th July, 2009 had neither called upon the plaintiff for such mutual discussions as envisaged in Clause-34 of the application form and nor had specifically reminded the plaintiff of the Clause for adjudication of the disputes through arbitration.

16. On a holistic reading of the said arbitration clause, it is decipherable that the first option given by the defendant to the plaintiff is for settlement of

the disputes through mutual discussion and the option of arbitration would come at the second stage. The defendant has admittedly not called upon the plaintiff for any mutual discussion and therefore, the defendant itself has ignored Clause-34 of the said application form and having ignored the said clause itself, this Court does not find the defendant has any right to move the present application to seek rejection of the present plaint based on the alleged arbitration agreement.

The defendant cannot be allowed to rely on the said clause for invoking arbitration proceedings and at the same time ignore the course of action of 'mutual discussion' contrived in the said clause. The conduct of the defendant clearly is contrary to the mandate of the said clause and thus the stage to invoke arbitration proceedings before exhausting the first stage of mutual discussion does not arise. However, at this stage the defendant cannot be allowed to take shelter under the said clause for invoking the arbitration proceedings when it has retracted from the same. The defendant cannot be allowed to approbate and reprobate and thus in the facts of the case at hand is not entitled to relief.â??

23. Counsel for the respondent has relied upon judgment of the Apex Court in SBP & Co. Vs. Patel Engineering Ltd. & Anr. reported in (2005) 8

SCC 618 and judgment of the Apex Court in State of UP & Ors. Vs. Bridge & Roof Co. (India) Ltd. Reported in JT 1996 (7) 395.

24. I have heard counsel for the parties and with their assistance perused the material available on record.

25. This court before dealing with the rival contentions of the parties, would like to quote the Clause 69.1 of the General Terms and Conditions of the

Contract, which reads as under:-

â??69.0 ARBITRATION AND LAWS

69.1 Arbitration Except where otherwise provided for in the Contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever is any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these Conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of

the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of Power Grid Corporation

of India Ltd., and if the General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman &

Managing Director, Power Grid Corporation of India Ltd., willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is

an employee of Power Grid Corporation of India Ltd., and that he had to deal with the matters to which the Contract relates and that in the course of

his duties as such he had expressed views on all or any of the matters in dispute or difference.

The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at

the time of such transfer, vacation of office or inability to act. Chairman and Managing Director, Power Grid Corporation of India Ltd., shall appoint

another person to act as arbitrator in accordance with the terms of the Contract. It also a term of this Contract that no person other than a person

appointed by CMD, POWERGRID, as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to

arbitration at all. The above shall except otherwise stipulated apply to Contracts whose value does not exceed Rs. fifty lakhs. For Contract value

exceeding Rs. fifty lakhs in the event of any differences/disputes which cannot be resolved amicably.

The aggrieved party as Claimant shall serve a notice of his/their disagreement/ dispute having arisen on the opposite party (respondent) calling upon the

Latter to nominate his/their nominee as arbitrator within one month of the date of such notice and that in the event of failure in nominating arbitrator by

the Respondent within 30 days of the Notice by the Claimant, the arbitrator nominated by the Claimant shall become the Sole Arbitrator. Where,

however, if both the party nominates one arbitrator each i.e. Contractor nominates one person to act as arbitrator and POWERGRID nominates one

arbitrator. As required under Indian Arbitration Act 1940 both the arbitrators shall appoint umpire, before entering into the reference of

disagreement/disputes before the two arbitrators enter into the reference.

Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under

and for the time being in force shall apply to the arbitration proceeding under this clause. It is a term of the Contract that the party invoking arbitration

shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such

dispute. The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The work under the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the Contractor

shall be withheld on account of such proceedings. The Arbitrator/Arbitrators shall be deemed to have entered on the reference on the date he/they

issue notice to both the parties fixing the date of hearing and holding the arbitration proceedings referred to him/them. The venue of arbitration shall be

such place as may be fixed by the Arbitrators in his/their sole discretion. The Award of the arbitrators/umpire as the case may be shall be final,

conclusive and binding on all parties to his Contract. The cost of arbitration shall be borne by the parties to the dispute, as may be decided by the

arbitrators.

In the event of dispute or differences arising between one public sector enterprise and a Govt. Department or between two public sector enterprises

the above stipulations shall not apply. The provisions of BPE office memorandum No. BPE/GL-001/76/MAN/2 (110-75-BPE (gmi-1)) dateds t1

January 1976 or its amendments for arbitration shall be applicable.â??

(Emphasis supplied.)

26. This court finds that bare perusal of Clause 69.1 contained in General Terms and Conditions of Contract refers to a situation where a contract is

of value exceeding Rs.50 Lakhs and if there is any difference/dispute and it cannot be resolved amicably, the aggrieved party as claimant has to serve

a notice of dispute having arisen on the opposite party calling upon the latter to nominate their nominee as Arbitrator within one month of the date of

such notice and in the event of failure in nominating Arbitrator by the respondent within 30 days of the notice by the claimant, the Arbitrator nominated

by the claimant shall become the sole Arbitrator. This clause further provides that where if both the parties nominate one Arbitrator each i.e.

Contractor nominates one person to act as Arbitrator and Power Grid nominates one Arbitrator, then as per the Indian Arbitration Act, both the

Arbitrators shall appoint umpire before entering into the reference of disagreement/dispute before the two Arbitrators enter into the reference.

27. This court finds that to understand the anatomy of the Clause, intention of the parties is also to be seen. The clause makes it clear that emphasis

has been laid on the intention of the parties to have their disputes resolved by arbitration. The intention of the parties flows from the clause that efforts

would have to be made to settle the dispute in an amicable manner and they can go for arbitration if that dispute is not resolved.

28. This court finds that the Apex Court recently in *M/s.Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. Vs. M/s.Jade Elevator*

Components reported in AIR 2018 SC 4271 has laid emphasis on the intention of the parties to settle the dispute amicably either through arbitration or

by court of law. The Apex Court has laid emphasis on the intentions of the parties to resolve the disputes by arbitration. The relevant paragraphs of

the judgment are quoted hereunder:-

5. It is submitted by learned counsel for the petitioner that if the clause of dispute handling is scrutinized appropriately, the disputes are to be

settled through consultation and, if the consultation fails by treatment of to the arbitration body for arbitration or Court and, therefore, the matter has to

be referred to arbitration. It is canvassed by him that the clause is not categorically specific that it has to be adjudicated in a court of law. It leads to

choices and the choice expressed by the petitioner is arbitration.

6. Learned counsel for the respondent, in his turn, would urge that when it is stated arbitration or Court, the petitioner should knock at the doors of the

competent court but not resort to arbitration, for the clause cannot be regarded as an arbitration clause which stipulates that the disputes shall be

referred to arbitration.

7. To appreciate the clause in question, it is necessary to appositely understand the anatomy of the clause. It stipulates the caption given to the clause

dispute handling.

It states that the disputes should be settled through consultation and if the consultation fails by treatment of to the arbitration body for arbitration or the

court. On a query being made, learned counsel for the parties very fairly stated that though the translation is not happily worded, yet it postulates that

the words 'arbitration or the court' are undisputable as far as the

adjudication of the disputes is concerned. There is assertion that disputes have arisen between the parties. The intention of the parties, as it flows from the clause, is that efforts have to be made to settle the disputes in an amicable manner and, therefore, two options are available, either to go for arbitration or for litigation in a court of law.

8. This Court had the occasion to deal with such a clause in the agreement in INDTEL Technical Services Private Limited vs. W.S. Atkins Rail

Limited . In the said agreement, clause No.13 dealt with the settlement of disputes. Clauses 13.2 and 13.3 that throw light on the present case were

couched in the following language:-

“13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by

the parties shall be referred to adjudication;

13.3. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements,

then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to

decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a

decision under this agreement.”

9. Interpreting the aforesaid clauses, the Judge designated by the learned Chief Justice of India held thus:-

“Furthermore, from the wording of Clause 13.2 and Clause 13.3, I am convinced, for the purpose of this application, that the parties to the

memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed.”

10. The aforesaid passage makes it clear as crystal that emphasis has been laid on the intention of the parties to have their disputes resolved by

arbitration.

11. In the case at hand, as we find, Clause 15 refers to arbitration or court. Thus, there is an option and the petitioner has invoked the arbitration

clause and, therefore, we have no hesitation, in the obtaining factual matrix of the case, for appointment of an arbitrator and, accordingly, Justice

Prakash Prabhakar Naolekar, formerly a Judge of this Court, is appointed as sole Arbitrator to arbitrate upon the disputes which have arisen between

the parties. The learned Arbitrator shall be guided by the Arbitration & Conciliation (Amendment) Act, 2015. The learned Arbitrator shall make

positive efforts to complete the arbitration proceedings as per the Act of 2015.

12. The Registry is directed to send a copy of this order to the sole Arbitrator. Learned counsels for the parties are also at liberty to bring it to the notice of the Arbitrator.

13. The arbitration petition is, accordingly, allowed. There shall be no order as to costs.â??

29. This court finds that the letter written by the respondent No.1 on 01.05.2018 makes a reference that a serious dispute has arisen in respect of

LOA issued to it and there was no solution in sight because of the unwillingness of the authorities designated for execution purpose and there was no

alternative available with the respondent No.1 than to go for arbitration. The respondent No.1 in accordance with the provisions of the Contract viz.

Clause 69.1 invoked the power of arbitration to be conducted as per the Arbitration and Conciliation Act, 1996 and from their side, they nominated one

Sukhjinder Singh, Retired Chief Engineer (MES) as Arbitrator in the matter. Several instances were also given in the brief facts as how dispute has

arisen between the parties and letter dated 01.05.2018 was to be treated as notice for appointment of Arbitrator. 30. This court finds that the

petitioner-Corporation sent a reply to the notice dated 01.05.2018 through their counsel and submitted that notice should be withdrawn and the alleged

dispute should be settled amicably within a period of fifteen days.

31. This court finds that the letter/notice given by way of intimation dated 01.05.2018 was as per the requirement of Clause 69.1 of the General Terms

and Conditions of Contract and the opportunity was given to the petitioner-Corporation to nominate their Arbitrator and if they failed to do so, no

illegality can be found with the action of the respondent No.1 to appoint their Arbitrator and he was to become sole Arbitrator.

32. This court further finds that so far as the condition that any dispute, if arisen, is required to be resolved amicably, the dispute/difference between

the parties was writ large since 2015 and if after several correspondences and meetings, the dispute/difference was not resolved, the other party is

bound to take the recourse of arbitration clause provided in the contract.

33. The submission of Mr.Mathur that straightway respondent No.1 has

proceeded to appoint the sole Arbitrator in an illegal manner, this court finds that if the petitioner-Corporation has also certain claims against the respondent No.1 or there were violations of terms & conditions of the Contract, the proper remedy would have been to go to the Arbitrator and settle the dispute.

34. The submission of the learned counsel for the petitioner that formation of arbitration is dependent on the outcome of the first step of mutual settlement, this court finds that the language used in Clause 69.1 of the General Terms and Conditions of Contract requires that the difference/dispute may be resolved amicably.

The aggrieved party has a right to raise the dispute due to act of the opposite party and accordingly the arbitration process is to be commenced. In the judgment relied upon by the counsel for the petitioner of Delhi High Court in the case of M/s.Haldiram Manufacturing Company Pvt. Ltd. (supra), the Court has considered the arbitration clause where at the first instance the dispute between the parties was required to be mandatorily settled amicably by mutual discussion and only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. The Delhi High Court considering the language of a particular clause came to the conclusion that in the facts of the case first step was the settlement of disputes through mutual settlement and second step was settlement through arbitration.

35. This court from the reading of Clause 69.1 of the General Terms and Conditions of Contract does not find that the party aggrieved is first bound to have amicable solution/resolve of their dispute and further from the facts pleaded in the writ petition and reply filed by the respondent No.1, it is borne out that differences between both the parties were prevailing and the dispute was not resolved in any amicable way in any manner.

36. So far as the reliance placed on the judgment by the learned counsel for the respondent in the case of SBP & Co. (supra), the Apex Court has laid down the parameters, as how the writ jurisdiction is to be invoked. The relevant paragraphs 45 & 46 of the judgment are quoted hereunder:-

44. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders

of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

45. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.â??

37. This court, following the order passed by the Apex Court in SBP & Co. (supra), finds that no interference can be made in the writ petition filed by the petitioner under Articles 226 & 227 of the Constitution of India.

38. Accordingly, this court does not find any illegality in the notices dated 01.05.2018 and 03.07.2018 and accordingly the writ petition stands dismissed. No costs.