

(1998) 05 AHC CK 0119

In the Allahabad High Court

Case No : Civil Miscellaneous Arbitration Application No. 7 of 1996

Raj Kumar Contractors, Ghaziabad

APPELLANT

Vs

Bareilly Development Authority, Bareilly and others

RESPONDENT

Date of Decision : 20-05-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)
Contract Act, 1872 — Section 56, 9

Citation : (1998) 3 AWC 2344

Hon'ble Judges : A.K. Banerji, J

Bench : Single Bench

Advocate : Pankaj Naqui, for the Appellant; Shashi Kant, for the Respondent

Final Decision : Allowed

Judgement

A.K. Banerji, J.—By means of this application filed u/s 11(6) of the Arbitration and Conciliation Act, 1996 (the Act in short), the applicant M/s. Raj Kumar Contractors, through its partner Shri Raj Kumar Wadhwa (applicant in short) has prayed for appointment of arbitrator/arbitrators as provided in the arbitration clause in the contract entered into between the parties.

2. The case of the applicant is that it is a partnership firm which undertakes building construction work on contract. It entered into an agreement dated 20.1.96 with the respondents for the construction of Middle Income Group and Low Income Group houses in Nehru Enclave Scheme in Saidpur Hawkins, Bareilly at the site to be provided by the respondents. The work was to commence by 25.1.96 and was to be completed by 24.10.96. According to the applicant, a work order was issued to the applicant and mobilization advance of Rs. 13,56,652 by means of a cheque dated 24.1.96 was also given. Despite the letter dated 29.2.96 sent by the applicant to the respondents for the demarcation of the site and handing over possession of the land, nothing was done and ultimately by letter dated 6.4.96, the applicant was informed that it was not in the knowledge of the respondents that the proposed site had already been

returned by the Ceiling Department to the land-holders way back in the year 1992, hence the consent of the applicant was required for an alternative site and in the meantime, the applicant was directed to return the mobilization advance. As the applicant had, in the meantime, incurred expenses by placing orders for materials and they were being asked to refund the mobilization advance without there being any fault on the part of the applicant, a dispute arose between the parties which was liable to be referred to arbitrators as per clause 32 of the general conditions of contract. The applicant sent a registered notice dated 9.6.96 calling upon the respondents to appoint the required arbitrators as per the terms and conditions of the contract bond dated 20.1.96 and to refer the matter to the said arbitrators within one month from the date of receipt of the registered notice. However, there was no response. In the meantime, as the respondents were threatening to recover the mobilization advance and also to encash the bank guarantee given by the applicant, they were constrained to file a Misc. Suit No. 200 of 1996 u/s 9 of the Arbitration and Conciliation Act before the Civil Court for injunction. The applicant also approached this Court by means of the present application.

3. On notice being issued to the respondents, they have filed a counter-affidavit denying, inter alia, that any work order was given to the applicant in pursuance of the contract. It was also stated that as the proposed site was not available, the applicant was provided with an alternative site at Priyadarshini Nagar which was accepted by them and they also started the work. The mobilization advance given for the purpose of construction of houses in the Nehru Enclave is being utilized by the applicant at the work site in Priyadarshini Nagar. Consequently, there was no question of referring any-matter to arbitration in terms of the agreement dated 20.1.96 and the present application was misconceived.

4. The applicant has filed a rejoinder-affidavit to the said counter-affidavit in which the averments made in the counter-affidavit have been denied. It is reiterated that a work order had been issued to the applicant. So far as the site at Priyadarshini Nagar was concerned, it has been stated that the same was as per a different contract dated 19.1.96 and was not an alternative to the Nehru Enclave, as stated by the respondents. It was further reiterated that there was a dispute between the parties within the meaning of clause 32 of the contract and the respondents having not referred the dispute to the panel of arbitrators despite the receipt of the registered notice dated 9.6.96 the present application before this Court u/s 11(6) of the Act was fully maintainable.

5. I have heard Shri Pankaj Naqvi, learned counsel for the applicant and Shri Shashi Kant Gupta, learned counsel for the respondents. I have also perused the affidavits filed by the parties. Before considering the respective submissions made by the learned counsel for the parties, it would be worthwhile to quote the relevant portion of the arbitration clause No. 32 which reads as follows :

"All disputes between the parties to the contract arising out of and relating to the contract shall after written notice by either party to the contract to the other

party, be referred to arbitration as above unless the parties otherwise agree. Such reference shall not take place until after completion, alleged completion or abandonment of the work or determination of the contract....."

Learned counsel for the applicant has contended that in the present case, the contract containing arbitration clause has not been disputed neither has the receipt of the notice dated 9.6.96 for appointing arbitrators as per clause 32 of the contract been disputed. As after signing of the contract, the applicant has incurred heavy expenses and the work had to be abandoned as the respondents were unable to provide the site earmarked, the applicant was not at fault, consequently, the respondents are liable to settle his claim. They not having responded for the appointment of the arbitrators, this Court has jurisdiction u/s 11(6) of the Act to direct the respondents to appoint the arbitrators. On the other hand, learned counsel for the respondents has contended that there was no question of abandonment as neither the work order was given to the applicant nor was there any question of incurring any expenses by the applicant. It has further been contended that the applicant had in collusion with the lower staff of the respondents managed to procure an unsigned copy of the work order and also within two days of the signing of the contract obtained mobilization advance of over rupees thirteen lacs. It has further been contended that as the site which was proposed to be given was not available, consequently it was a case of frustration of contract and the arbitration clause which is a part of the contract will become void and unenforceable.

6. I have carefully considered the respective submissions made by the learned counsel for the parties. The main question for consideration is whether the arbitration clause was attracted in the present case and whether the question regarding frustration of contract was open for consideration in the present proceedings before this Court. It is noteworthy that the signing of the contract dated 22.1.96 containing the arbitration clause is not being disputed neither has this been disputed that the respondents have not appointed the panel of arbitrators as envisaged under clause 32 despite the receipt of the notice, As already noticed above, the case of the respondents is that the contract having frustrated on account of non-availability of the site, the arbitration clause also falls through. So far as this submission is concerned, u/s 56 of the Contract Act, a contract to do an act which after the contract was made impossible, is void. What emerges from this section is that only that contract which is for doing an act becomes frustrated when it is impossible to be performed. It does not signify that an agreement to refer a dispute to arbitration arising out of a contract is also automatically frustrated. An agreement to refer a dispute to arbitration arising out of a contract cannot be said to be a contract to do an act. A Division Bench of our Court in the case of Municipal Board Vs. Eastern U.P. Electric Supply Co. Ltd. and Others, , has held as follows :

"In a contract containing an arbitration clause there is (i) a promise of one party to do an act for a consideration furnished by the other party, and (ii) an

agreement to refer dispute arising out of that contract to arbitration. Section 56 of the Contract Act applies to the former and not to the latter agreement. Referring a dispute to arbitration, is not a duty to be performed under a contract and there is hardly any question of the performance of the duty being rendered impossible. Moreover whether a contract is frustrated or not is itself a dispute that arises under a contract and if the contract contains an arbitration clause that dispute must be referred to arbitration. Hence even if a contract is said to be frustrated the arbitration clause remains operative."

Similarly the Supreme Court in the case of *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, , observed as follows :

"But assuming that the appellants had established frustration even then it would not be as if the contract was ab initio void and, therefore, not in existence. In cases of frustration it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes."

In view of the above settled position, I am unable to accept the submission made by the learned counsel for the respondents that the arbitration clause in the contract cannot be looked into as the contract has frustrated. In my view, it is open to the arbitrator while considering the dispute raised by the applicant to consider the question whether there was an abandonment of the work and also whether the contract was frustrated and if so, what shall be the effect on the claim of the applicant. That apart, the arbitration clause contains the words "all disputes between the parties to the contract arising out of and relating to the contract shall after written notice by either party to the contract to the other party, be referred to arbitration". Interpreting such words as "arising out of" or "in respect of" or "in connection with" or "in relation to", the Supreme Court in the case of *Renusagar Power Co. Ltd. Vs. General Electric Company and Another*, , has held that such words are of widest amplitude and contain and include even the questions as to the existence, validity and effect (scope) of the arbitration agreement. In view of the same also, it is open to the arbitrator to consider such submissions. The, arbitration clause lays down that Vice-Chairman shall appoint the Secretary, Executive Engineer and Chief Accounts Officer of Bareilly Development Authority jointly for claims for amounts in dispute of over Rs. 5,000. In the present case as the claim made by the applicant is much over Rs. 5,000, learned counsel for the applicant submits that direction be issued to the Vice-Chairman to appoint a panel of arbitrators as per this clause. The prayer appears to be reasonable.

7. As a result, this application is allowed. Let the Vice-Chairman of the Bareilly Development Authority (respondent No. 2) appoint the arbitrators as laid down in clause 32 of the arbitration clause of the contract within one month from the

date of the receipt of the certified copy of this order.

8. Costs on parties.