
(1997) 07 BOM CK 0107

In the Bombay High Court

Case No : Miscellaneous Civil Application No's. 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58 of 1997

Rani Constructions Pvt. Ltd.

APPELLANT

Vs

Konkan Railway Corporation Ltd.

RESPONDENT

Date of Decision : 04-07-1997

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(8)

Citation : (1998) 1 ALLMR 115 : (1997) 4 BomCR 198

Hon'ble Judges : M.B. Shah, C.J

Bench : Single Bench

Advocate : S.G. Desai and S.D. Padiyan, for the Appellant; S.K. Kakodkar and E. Afonso, for the Respondent

Final Decision : Allowed

Judgement

M.B. Shah, C.J.—These applications for referring the dispute for arbitration are filed by petitioners Rani Construction Pvt. Ltd., against Konkan Railway Corporation Ltd. Contentions raised in all these applications are identical. Facts are similar. Hence, all these matters are disposed of by this common judgment. With regard to the Exhibits and other particulars, I have referred to Miscellaneous Application No. 50 of 1997. Written submissions given by the learned Counsel for the respondents are taken on record. At the outset it is required to be observed that most of the objections raised against referring the matter to arbitrators are without any substance.

2. The petitioners M/s. Rani Constructions Pvt. Ltd., having its office at Goa, have filed these applications u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) for appointment of a qualified, independent and impartial arbitrator as the sole arbitrator to adjudicate upon and decide the disputes between the parties raised in communication dated 19th May 1996 (Exhibit P-9 to Application No. 50 of 1997) to the extent they relate to the agreement dated 30th December 1991. In the aforesaid petitions, the petitioners

have claimed amounts as stated below :-

3. Exhibit P-9 is a letter addressed to the Chairman and Managing Director, Konkan Railway Corporation Ltd., (KRCL for short) raising claims due to suspension of work under various agreements from 26th March 1993 to 15th November 1993. By the said letter, it was pointed out that by the claim dated 21st May 1994, the petitioners had submitted in detail the statements for all the contracts affected by the suspension of work running into 856 pages to the Chief Engineer, KRCL, Panaji. It is stated that number of reminders are sent for the said claims and it was requested that the said claims may be negotiated and settled as early as possible. It was further stated that in case nothing was heard within 15 days from the receipt of the letter, the petitioners have a right to initiate arbitration proceedings under the arbitration clauses included in the General Conditions of Contract of KRCL.

4. It appears that the petitioners thereafter appointed one Raghuchander as their arbitrator and informed KRCL to appoint their arbitrator. To this letter, the Chief Engineer, Headquarters, KRCL replied on 15th July 1996 stating that the appointment of arbitrator is the exclusive privilege of the Chairman cum Managing Director of KRCL and contended that the petitioners' letter was illegal and that KRCL would not take cognizance of the same.

5. Again, on 6th August 1996 (Exhibit P-10 to the Application), the petitioners requested the respondents to settle the suspension claim within 15 days by taking appropriate decision failing which the petitioners would proceed according to law at the risk and cost of the respondents. The petitioners further reiterated their request to refer the disputes for arbitration under the provisions of the arbitration agreement as modified by the Ordinance (Arbitration Act). It was also pointed out that because of inordinate delay in settlement of the petitioners' claim, the dispute may be referred to arbitration. As there was no response from the respondents, the petitioners filed the above applications on 26th March 1997.

6. The applications are opposed by the respondents by filing affidavits.

7. For deciding the controversy in question, I would first refer to the relevant clauses of the contract which provide for arbitration. Clauses 62, 63.2.2, 63.2, 63.3(a) and (b) and 63.3(g) read as under :-

SETTLEMENT OF DISPUTES MATTERS FINALLY DETERMINED BY THE CORPORATION

"62. All disputes or differences of any kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Corporation and the Corporation shall within a reasonable time after the receipt of the Contractor's representation make and notify decisions thereon in writing. The decisions, directions and certificates given and made by the Corporation, or by the Engineer on behalf of

the Corporation, with respect to any matters decision of which is specially provided for by Clauses 17, 21.5, 37, 43(a), 53.2, 60.2 and 61.1(b) of these conditions (which matters are referred to hereinafter as "excepted matters) shall be final and binding on the Contractor, provided further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration.

DEMAND FOR ARBITRATION

63.1.1. In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Corporation of any certificate to which the Contractor may claim to be entitled to, or if the Corporation fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 62 of these conditions, the Contractor after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

OBLIGATION DURING PENDENCY OF ARBITRATION

63.2. Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Corporation shall be withheld on account of such proceedings provided however it shall be open for the arbitrator or arbitrators to consider and decide whether or not such work should continue during arbitration proceedings."

8. The learned Counsel for the respondents submitted that this application for referring the matter to arbitration is not maintainable because arbitration proceedings have already started on 3rd June 1995 when the petitioners demanded arbitration and, therefore, this application under the present Act is not maintainable. In my view, this submission is without any substance. On rejection of the demand, within three years, the petitioners are entitled to file an application for referring the dispute for arbitration.

9. It has been further contended by the learned Counsel for the respondents that the petitioners have not complied with requirements of arbitration clause. Therefore these applications be rejected. It is submitted that under the arbitration clause, the petitioners were first required to present a claim before KRCL and thereafter, KRCL was required to notify its decision thereon in writing and if the petitioners were not satisfied, then as provided u/s 63.1.1, the petitioners were required to present a claim on disputed matters and were required to demand in writing that the disputes or difference be referred to arbitration.

10. As narrated above, in my view, these conditions are already complied with by the petitioners. The petitioners, as stated above, have submitted its consolidated claim for various claims by a letter dated 10th June 1994 written to the Chief

Engineer, KRCL. By a letter dated 17th June 1994, the petitioners claimed increase in the rates due to prolongation in work. Further, the petitioners wrote letter dated 21st October 1994 to the Chairman-cum-Managing Director of KRCL stating therein that the petitioners were promised that compensation will be paid with the least possible delay so that the work could be restarted and progressed expeditiously. The petitioners requested that at least 75% of claim on ad hoc basis be given to it. The petitioners again wrote letters dated 15th May 1995, 3rd June 1995 and 13th December 1995 requesting that their claim be settled. On 5th February 1996, the petitioners requested that the matter be referred to arbitration. Subsequently, a notice dated 19th May 1996 was sent to the Chairman and Managing Director of KRCL to settle the claim and setting out that in case no reply was received, arbitration proceedings would be initiated under the arbitration clause. As nothing was done, the petitioners appointed one Raghuchander as their arbitrator and requested the respondents to appoint their arbitrator. To this letter, the petitioners were informed that it was the sole privilege of respondent No. 1 to appoint the arbitrator. In this set of circumstances, it is clear that the conditions as required under Clause 63.1.1 of the agreement are fully complied with. The petitioners have demanded in writing that disputes and differences be referred to arbitration. The petitioners have made its claim and within reasonable time, there was no response from the respondents. The respondents had not even bothered to reply to the various letters written by the petitioners. Therefore, the contention raised by the learned Counsel for the respondents that the conditions precedent as prescribed in Clause 63.1.1 or 63.1.2 is not complied with are without any substance.

11. The next contention which has been raised by the learned Counsel for the respondents is that the power of attorney-holder of the petitioners Prakash Shetti was not holding a valid power of attorney for filing the applications and, therefore, the applications should not be entertained. It has been rightly pointed out by the learned Counsel for the petitioners that this contention is without any substance. It is submitted that the petitioner-company has already passed a Resolution dated 7th January 1996 authorising Prakash Shetti to raise claims arising out of the contract work undertaken by the company in respect of KRCL in Goa Sector. The Resolution is at Exhibit P-13 to the affidavit in rejoinder. The Resolution further provides that the Managing Director of the Company may execute a power of attorney on behalf of the company in favour of Prakash Shetti. A copy of the said power of attorney is produced at Exhibit P-12. It has been executed by the Managing Director of the company Mr. G. Gundaiah. However, the learned Counsel for the respondents submitted that in the power of attorney, it has not been mentioned that Mr. G. Gundaiah is the Managing Director and, therefore, that power of attorney should not be considered. This contention does not merit any consideration because the Resolution and the power of attorney are sufficient to empower the power of attorney-holder to file these applications.

12. The learned Counsel for the respondents further submitted that the

applications are not accompanied by affidavits or supported by relevant documents to the effect that conditions required under the procedure prescribed by this Court are satisfied. This submission is also without any substance. The applications are accompanied by necessary affidavits and the documents upon which reliance is placed by the parties.

13. The learned Counsel for the respondents further contended that in any set of circumstances, the respondents be directed to appoint arbitrators as provided in Clause 63.3(b) of the agreement. As against this, it is submitted that as provided u/s 11(6) of the Arbitration Act, Arbitrators be appointed.

14. For deciding this contention, relevant clauses of section 11 are required to be considered which read as under :-

"11. Appointment of arbitrators. --(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and --

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, --

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless

the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to --

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

Thus, section 11 provides for appointment of Arbitrator. Under sub-section (1), a person of any nationality can be appointed as an Arbitrator unless there is any agreement to the contrary. Under sub-section (2), parties are free to agree on a procedure for appointment of arbitrator or arbitrators. In a case where three arbitrators are required to be appointed on account of failure of an agreement between the parties with regard to the procedure for appointment of arbitrator, then, under sub-section (3), each party is entitled to appoint one arbitrator and the two appointed arbitrators are required to appoint a third arbitrator who would act as presiding arbitrator. Sub-section (4) provides that in a case where appointment procedure prescribed under sub-section (3) applies and a party fails to appoint an arbitrator or the two appointed arbitrators fail to agree on the third arbitrator, then request is to be made to the Chief Justice or the person designated for appointment of arbitrators. In a case where sole arbitrator is required to be appointed for arbitration and if parties fail to agree on the arbitrator, then, under sub-section (5), the arbitrator is to be appointed by the Chief Justice or any person designated by him upon a request of a party. In cases where appointment procedure is agreed upon by the parties and still the parties fail to abide by it, sub-section (6) provides for the procedure for securing appointment of arbitrators. Under Clause (a) of sub-section (6), if a party fails to act as required under the agreed procedure, the Chief Justice or the person designated by him is required to appoint arbitrator or arbitrators. If under Clause (b) of sub-section (6) the parties or the two appointed arbitrators under sub-section (3) fail to reach an agreement expected of them under that procedure, then also the Chief Justice or the person designated by him is required to take action and appoint arbitrator. Similarly, under clause (c) of sub-section (6), if a person fails to perform any function entrusted to him or it under the procedure prescribed for appointment of arbitrator, then also, at the request of the parties, the Chief Justice or the person designated by him is required to appoint arbitrator/arbitrators. Sub-section (8) prescribes the objective criteria for appointment of arbitrators by the Chief Justice or the person designated by him. It provides that before appointing an arbitrator, due regard should be had to (a)

the qualifications required of the arbitrator by the agreement of the parties and (b) other considerations as are likely to secure appointment of an independent and impartial arbitrator.

15. Considering the aforesaid scheme of section 11, it is apparent that parties to the dispute are free to agree on a procedure for appointing the arbitrator or arbitrators. If parties fail to act as required under the procedure, then the party aggrieved can request the Chief Justice to take necessary measures unless the agreement for the appointment procedure provides other means for securing the appointment of arbitrator. In the present case, admittedly, other means for securing the appointment of arbitrator is not provided. As discussed above, the respondents have failed to act as required under the agreed procedure and in that set of circumstances, at the request of the petitioners, arbitrators are required to be appointed by observing the criteria laid down u/s 11(8). Sub-section (8) does not provide that even if parties have failed to abide by the agreement prescribing the procedure for appointment of an arbitrator, yet the Chief Justice or the person designated by him should appoint the arbitrator as per the agreed procedure. At the same time, Chief Justice or the person designated by him is required to bear in mind the qualifications of the arbitrator as required under the arbitration agreement and also to secure independent and impartial arbitrator who can do justice between the parties.

16. In proceedings u/s 20 of the Arbitration Act, 1940, in the case of Union of India (UOI) Vs. Prafulla Kumar Sanyal, , it was contended that when arbitration agreement contains adequate and exhaustive machinery for appointment of arbitrator, it must be construed as the arbitrator having been appointed under sub-section (4) to section 20. Dealing with this contention, and after referring to its earlier decision in the case of Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., , the Supreme Court held that the said decision did not consider whether u/s 20(4) the Court is bound to appoint an arbitrator who has actually not been appointed but for whose appointment adequate and exhaustive machinery has been provided for. The Court negated the said contention by holding (in paragraphs 4 and 5) as under :-

"Taking into account the wording of the sub-section the Court shall make an order of reference to the arbitrator appointed by the parties, we do not feel that the sub-section required the Court to appoint an arbitrator, who had not actually been appointed, but for whose appointment adequate provisions have been made.

5. In the instant case, as an arbitrator has not been appointed by the parties and as the parties are not agreed upon an arbitrator the Court may proceed to appoint an arbitrator, but in so doing it is desirable that the Court should consider the feasibility of appointing an arbitrator according to the terms of the contract."

In this view of the matter, it is not necessary that arbitrators as provided under the agreement should be appointed, but the qualifications required of the

arbitrators by the agreement between the parties are required to be kept in mind.

17. The procedure prescribed for appointment of arbitrator under the agreement is as under :-

"63.3 (a) Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to :-

i) A sole arbitrator who shall be an Officer of the Corporation nominated by the Chairman & Managing Director of the Corporation in that behalf in cases where the claim in question is below Rupees Five Lakhs and where the issues involved are not of a complicated nature. The Chairman & Managing Director shall be the sole judge to decide whether or not the issues involved are of a complicated nature.

ii) Two arbitrators, who shall be Corporation Officers of equal status to be appointed in the manner laid down in Clause 63.3(b) for all claims of Rupees Five Lakhs and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The Chairman & Managing Director shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two arbitrators being divided in their options the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Clause 63.3(b) for his decision.

63.3(b) For the purposes of appointing two arbitrators as referred to in Clause 63.3(a)(ii) above, the Corporation will send a panel of more than three names of officers of the appropriate status of the Corporation to the Contractor, who will be asked to suggest a panel of three names out of the list so sent by the Corporation. The Chairman and Managing Director will appoint one arbitrator out of this panel as the Contractor's nominee, and then appoint a second arbitrator of equal status as the Corporation's nominee either from the panel or from the Accounts Department. Before entering upon the reference the two arbitrators shall nominate an Umpire who shall be an officer of the Corporation to whom the case will be referred to in the event of any differences between the two arbitrators.

63.3(g) Subject to the aforesaid, Arbitration Act 1940 and the Rules thereunder and any statutory modification thereof shall apply to the arbitration proceedings under this clause."

In the present case, admittedly the claim involved is of more than Rs. 5 lacs. The dispute is with regard to the claim of the petitioners for damages for delay in handing over possession of the land and prolongation of work.

18. Keeping the agreed procedure in mind, it would be just and proper to direct respondent No. 1 to send a panel of more than three names of officers of appropriate status of the Corporation to the petitioners and the petitioners will appoint one person out of the said panel as the petitioners' arbitrator. Similarly, the Chairman and Managing Director of KRCL will appoint a second arbitrator of

equal status as the respondents" nominee either from the panel or from outside the panel ensuring that one of the two arbitrators so nominated is from the Accounts Department. This would be in conformity with Clause 63.3(b) of the contract. However, with regard to the third arbitrator, instead of following the agreed procedure, it would be in the interest of the parties to appoint an independent presiding arbitrator. Considering the dispute and the stake involved in the matter, Mr. G.D. Kamat, Chief Justice (Retd.), Gujarat High Court, is appointed as the third arbitrator who shall act as the presiding arbitrator. This would ensure independent and impartial arbitration.

Miscellaneous Civil Application No. 49 of 1997

In Miscellaneous Application No. 49 of 1997, petitioners have raised an additional contention to the following effect :-

"There is no dispute. It is faked. The Contractor claims for the second time for item 5 and 6 of the Schedule of Works executed paid for and accepted finally by the Contractor as evident from Bill No. 22 dated 31-1-1995 (R59-61) the disputed claim is asserted in the pre final bill dated 16-10-95 (R62-64). There is no linkage between items 2, 3 and 4 of the said Schedule and items 5 and 6 thereof. The final classification of soils after the complete excavation upon which payment are made for items 2, 3 and 4 (see clauses 17 of the Special Conditions of Contract (R 18) has nothing to do with the payments already made for items 5 and 6 before final classification for the purpose of items 2,3 and 4. Payments are made for items 5 and 6 according to whether the railway out spoils or contractors earth are actually used for filling, irrespective of classification of soils for the purpose of items 2,3 and 4. Railway's out spoils are paid less than Contractor's earth. Upon final classification for the purpose of payment for items 3 and 4 the contractor does not do the filling once again by soil of the final classification."

19. It has been pointed out by the respondents that the petitioners have submitted pre-final bill on 10th October 1995. They demanded arbitration on 20th May 1996. The Chief Engineer of the KRCL has replied on 27th May 1996, inter alia, that pre-final bill is awaiting for want of work done. Hence, it may be possible to take up scrutiny of the petitioners' final bill till they submit the same. Again, by a letter dated 13th June 1996, the Chief Engineer, Panaji, requested the petitioners to submit final bill incorporating the facts stated therein for arranging payment. Subsequently, the Chief Engineer wrote to the petitioners on 8th July 1996 that the approval of the arbitration proceedings and appointment of arbitrator was the exclusive privilege of the Chairman and Managing Director of KRCL Director under the contract. Thereafter, the petitioners wrote letter dated 26th July 1996 to the Chairman-cum-Managing Director, inter alia, requesting for scrutinising the bill and for taking appropriate decision at the earliest. The petitioners also demanded for the appointment of and referring the dispute to arbitration. That letter was replied by the Chief Engineer on 14th August 1996 wherein it was stated that the demand for arbitration was rejected by the competent authority as the claims made by the petitioners were relating

to classification, specification and measurement which are excepted matters in terms of Clauses 21.5, 43(a) and 62 of the General Conditions of the contract.

It is made clear that the learned Counsel for the respondents has specifically stated that he is not raising the contention that the claim of the petitioners is within the excepted matters as contended in the aforesaid letter.

Considering the aforesaid submissions, it is apparent that respondents have failed to appoint the arbitrators as required under the arbitration clause. Whether the dispute is arbitral or not would be required to be decided and dealt with by the arbitrators after recording evidence and verifying the facts. Hence I do not find any substance in the additional contentions raised by the respondents.

20. It is agreed by the learned Counsel for the respondents that within two weeks from today, a panel of names would be furnished to the petitioners and one name would be suggested by the respondents.

21. In the result, all the aforesaid Applications are allowed accordingly.

22. At the request of the learned Counsel for the respondents, operation of the aforesaid order is stayed for a period of four weeks from today.