

(2005) 12 KL CK 0050
In the High Court Of Kerala
Case No : A.R. No. 40 of 2004

Roopa Engineering Corporation

APPELLANT

Vs

General Manger, Telecom

RESPONDENT

Date of Decision : 19-12-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 12(1), 16, 34, 37

Citation : (2006) 3 ARBLR 225 : (2006) 1 ILR (Ker) 584 : (2006) 2 KLT 508

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : P. Jacob Varghese and Vivek Varghese, for the Appellant; Mathews K. Philip, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—This is an application filed invoking Section 11 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "Act" seeking the following reliefs:

(i) hold that the Arbitrator Shri. Roy M.Jacob, Area Manager of BSNL, appointed as per Annexure D is illegal and incompetent and be pleased to appoint another arbitrator or arbitrators who may be independent and outside the purview of the BSNL and direct the arbitrators appointed by this Hon"ble Court to adjudicate upon all claims and disputes of the petitioner arising under the contract entered into according to Annexure A tender and direct them to publish the award;

(ii) invalidate the notices issued so far by Respondent No. 3 "ex-pane" in the absence of the petitioner as the petitioner was not agreeable to such appointment and further, the Respondent No.3 has failed to confirm that there are no circumstances likely to give rise tojustifiable doubts as to his independence and impartiality in respect of the work under consideration as required by Section 12(1) of the Arbitration and Conciliation Act, 1996.

(iii) Pass such other orders as to reliefs to the petitioner this Hon"ble Court

deems fit to be granted; and

(iv) allow the petitioner to recover the cost of this proceedings to be recovered from the respondents.

2. The facts on the basis of which this arbitration request is filed are that the petitioner had entered into a contract for supply and erection of pre-stressed concrete poles to Telecom District Manager, Kannur in terms of Annexure A - tender notice and that disputes have arisen between the parties leading the petitioner issuing Annexure B, pleaded to have been submitted before the General Manager (Telecom), Kannur. Since, according to the petitioner, the claims were not settled, Annexure C was issued to the Telecom District Manager in the Department of Telecommunications, Kannur.

3. Following the aforesaid, the General Manager (Telecom) acting on the letter dated 04/02/2003 of the BSNL Corporate office issued Annexure D making an appointment of the 4th respondent as the Arbitrator.

4. This application is filed after the receipt of notice of the proceedings from the 4th respondent for arbitration.

5. The contentions of the petitioner are three folded. First is that, going by the terms of the arbitration agreement contained in Annexure A, the sole arbitrator has to be the Telecom District Manager, Kannur or some other person appointed by him and therefore the BSNL Corporate office could not have taken any decision and hence Annexure D is bad. Secondly, it is urged that the Arbitrator namely the 4th respondent cannot be treated as free from bias having regard to the fact that an institutional decision has been taken by the BSNL Corporate Office which led to the appointment of the 4th respondent as the Arbitrator. Thirdly, it is urged that even if the Telecom District Manager is not an officer available in view of the formation and take over of the activities by BSNL, there is no ground to hold that there can be no arbitration at all owing to clause C of the Arbitration agreement.

6. To resolve the above, it is appropriate to quote the arbitration agreement contained in Annexure A which reads as follows:

In the event of any question, dispute arising under these conditions or any special conditions of contract or in connection with the contract (except as to any matter the decision of which is specifically provided for by these special conditions) the same shall be referred to the sole arbitration of the Telecom District Manager, Kannur or some other person appointed by him. There shall be no objection that the arbitrator is a Government servant, that he had to deal with the matter or to which the contract relates or that in course of his duty as a Govt. Servant he had expressed view on or any of the matter is dispute. The award of the Arbitrator shall be final and binding on the parties to this contract. It is a term of this contract that-

(a) If the Arbitrator be the Telecom Dist. Manager, Kannur,

(i) in the event of his being transferred or vacating his office by resignation or otherwise, it shall be lawful for his successor in the office either to proceed with reference himself or to appoint any other person as Arbitrator

(ii) in the event of his becoming unable to act, for any reason, it shall be lawful for the Telecom Dist. Manager, Kannur to appoint another person, as an Arbitrator (OR);

(b) in the event of his dying, neglecting or refusing to act or resigning or being unable to act for any reason it shall be lawful for the Telecom Dist. Manager, Kannur, either to proceed with the reference himself or to appoint another person as an Arbitrator in place of the outgoing Arbitrator.

(c) It is further a term of this Contract that no person other than the Telecom Dist. Manager, Kannur, or the person appointed by him, should act as Arbitrator and that if for any reason that is not possible the matter is not to be referred to Arbitrator at all.

Upon every and any such reference, the assessment of the cost incidental to the discretion of the Arbitrator.

Subject as aforesaid the Arbitration Act, 1940 and the rules thereunder and any statutory modifications thereof, for the time being in force shall be deemed to apply to the Arbitration proceedings under this clause."

7. By resolution dated 23.01.2001, (Ext. R15), the Memorandum of Understanding entered into between the President of India and the Bharat Sanchar Nigam Limited (BSNL), assets and liabilities except certain assets which are to be retained by the Department of Telecommunications and office of their control, were transferred to BSNL with effect from 1.10.2000. Clause 3 of the said resolution is relevant in the context of this case, which reads as follows:

All the existing contracts, agreements and MOUs entered into by Department of Telecommunications, Department of Telecom Services and the Department of Telecom Operations with various suppliers, contractors, vendors, companies and individuals in respect of supply of apparatus and plants, materials, purchase of land and building and supply of services, subsisting on the date of transfer of business and/or required for operations of BSNL also stand transferred and assigned to BSNL w.e.f 1st October 2000.

8. The aforesaid Ext. R15 was followed by Ext. R16 dated 30.09.2000 by which the Department of Telecommunication, Department of Telecom Services and Department of Telecom Operations concerned with providing telecom services in the country and maintaining the telecom network/telecom factories were separated and carved out of the Department of Telecommunications as a precursor to corporatisation. It provided for transfer of the business of providing telecom services and running the telecom factories to the newly set up Company, viz., Bharat Sanchar Nigam Limited w.e.f 1st October 2000. The Government decided to retain the functions of policy formulation, licensing etc. and

administrative control of PSUs, standardisation & validation of equipment and R & D etc. These were to be the responsibilities of Department of Telecommunications (DoT) and Telecom Commission.

9. In the light of the aforesaid facts, I proceed to consider the first contention of the petitioner that the sole arbitrator has to be the Telecom Manager, Kannur or some other person appointed by him and therefore BSNL corporate office could not have taken any decision leading to Annexure D naming the 4th respondent as the arbitrator. Clause 3 of Ext. R15 quoted in Para No. 7 above clearly provides for transfer of all existing contracts, agreements and MOUs entered into by the Department of Telecommunication, Department of Telecom Services and the Department of Telecom Operations with various contracting parties in respect of different types of contracts subsisting on the date of transfer of business to BSNL, being assigned to that Company. Annexure A, tender notice was issued by the Telecom District Manager, Kannur. The admitted situation is that the authority that entered into the contract on behalf of the President of India was the Telecom District Manager. Obviously, that officer is part and parcel of the Department of Telecommunication. Going by Clause 3 of Ext. R15, all such contracts stand transferred in favour of BSNL. Therefore, BSNL becomes the sole authority to be treated as the contracting party and the nature and structuring of the administrative set up of BSNL including distribution of its business and duties and responsibilities among its officers cannot be treated as to be one that continued under the Department of Telecom Services. So much so, the BSNL corporate office is the appropriate authority to take a decision to appoint a person as the arbitrator since BSNL corporate office stepped into the shoes of the Telecom Department including Telecom District Manager, Kannur and it will neither be in the interest of the administration nor of any party to the contract to hold that the authority to take such decision is not with the BSNL corporate office. The first contention of the petitioner therefore fails,

10. Secondly, the petitioner urges that the appointment of the 4th respondent being an institutional decision, would lead only to the 4th respondent being biased. The learned Counsel for the petitioner referred to various decisions relating to the rule of bias. The decisions of the Apex Court in *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, *Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd.*, do not lay down any proposition to hold that when nomination and appointment of a person is within the authority of a contracting party, the mere fact that the person so appointed is an employee of the contracting party results in a situation of bias. In fact, going by the terms of the arbitration agreement between the parties, there is more than enough room for the BSNL, as the successor, to have nominated and for the General Manager (Telecom), Kannur SSA to have appointed the 4th respondent as arbitrator for determination of the disputes between the parties. The second contention of the petitioner is also therefore rejected.

11. In the aforesaid circumstances, the 3rd submission made to the effect that

an arbitration agreement would survive on the non-availability of the office of the Telecom District Manager does not arise for consideration. However, the learned Counsel for the petitioner relied on the decision of the Apex Court in Union of India Vs. R.B. Ch. Raghunath Singh and Co., and the decision of this Court in Crompton Greaves v. Toshiba Anand Lamps Ltd. 1986 KLT 734 and the decisions in Union of India (UOI) Vs. Om Prakash, and in Smt. Shila Banerjee Vs. State of West Bengal, to urge that the vacancy of office of the named arbitrator cannot be treated as nullifying the arbitration agreement. In support of the said proposition, Ram Babu Vs. Lakshmi Narain and Another, is also referred. Even in the absence of the named arbitrator being available, it may be within the power of the Court to appoint an arbitrator and hold that the arbitration clause in the agreement, survives even if the agreement had failed. However, the said proposition of law is not required to be applied, having regard to the findings that I have arrived at above.

12. Apart from the above findings, unlike in the Arbitration Act of 1940 under the Arbitration and Conciliation Act, 1996, once a party has made an appointment, it is not within the province of the proceedings u/s 11 of the 1996 Act to decide as to whether that arbitrator has jurisdiction to act or not. I say so because u/s 16 in Chapter IV of the 1996 Act, relating to its jurisdiction, the arbitral tribunal is competent to rule on its own jurisdiction. A ruling of the arbitral tribunal u/s 16, upholding the absence of jurisdiction is one against which an appeal lies u/s 37 of the Act. If the arbitral tribunal does not rule so, it may be open to the tribunal to carry on with the arbitral proceedings and pass an award which could be subjected to change only u/s 34 of the Act, and not otherwise. In this view of the matter also, there is no scope for adjudicating on the jurisdiction of an arbitrator who is in office, in a proceeding u/s 11 of the Act of 1996.

The application fails and accordingly the same is dismissed. No costs.