
(1980) 06 CAL CK 0003
In the Calcutta High Court
Case No : Matter No. 912 of 1980

Ruby Construction Co.

APPELLANT

Vs

Hindusthan Steel Works Construction

RESPONDENT

Date of Decision : 20-06-1980

Acts Referred:

Citation : 85 CWN 4

Hon'ble Judges : Sabyasachi Mukherjee, J

Bench : Single Bench

Advocate : Bhaskar Sen and Shyamal Sen for State Govt, for the Appellant; H.P. Shah for C.M.D.A., for the Respondent

Judgement

Sabyasachi Mukherjee, J.—It appears that there is an arbitration clause in the agreement. Clause 110 of the said agreement is to following effect : In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matters the decision of which is specially provided for by these conditions) whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of contract, the same shall be referred to the award of an arbitrator to be nominated by the employer and an arbitrator to be nominated by the contractor, or in case, of the said arbitrators not agreeing then to the award of an Umpire to be appointed by the arbitrators in writing before proceeding on the reference, and the decision of the arbitrators, or in the event of their not agreeing, of the Umpire appointed by them shall be final and conclusive and the provisions of the Indian Arbitration Act, 1940, and of the Rules thereunder and any Statutory modification thereof shall be deemed to apply to and be incorporated in this contract.

The venue of the arbitration proceedings, unless otherwise mutually agreed upon shall be the Registered Office of the Employer.

The cost of and incidental to the arbitration proceedings and award respectively

shall be in the direction of the arbitrators and the Umpire as the case may be. The Award of the arbitrators or Umpire as the case may be shall be final and binding on all the parties. Provided however, the employer shall not withhold any payments due to the contractor nor the contract in anyway delay the carrying out of the works by reason of any such matter, question or dispute having been referred to arbitration. The contractor shall proceed with the work with due diligence and shall until the award of the arbitrators or the Umpire as the case may be, be published abide by the decision of the employer and no award of the arbitrators or Umpire shall relieve the contractor of his obligation to adhere strictly to the Engineer's instructions with regard to the actual carrying out the work.

Both the Arbitrators were appointed sometime in August, 1978. It appears that they also held a meeting in January, 1979 when they wanted to know the contents of the arbitration agreement and directed the parties to supply a copy of the arbitration agreement. The arbitration agreement contemplates appointment of one arbitrator by the petitioner and one by the respondent, after disputes and difference having arisen between the parties. The petitioner appointed one Mr. Sen Gupta, Advocate as arbitrator and the respondent appointed one Mr. Chopra, who is the Chief Engineer, as their arbitrator, respectively. At the second meeting held in the month of February, 1979 the arbitrators appointed one Mr. B. M. Mukherjee, Project Manager of Durgapur Steel Alloy Plant as the Umpire and they entered upon the reference. One of the contentions raised on behalf of the respondent was that the petitioner had given a "no claim certificate" in respect of their claims which were being sought to be agitated under the arbitration agreement. It was urged in this application, before me, that the arbitrators were acting without jurisdiction because under Rule 2 of the First Schedule to the Arbitration Act, 1940 the arbitrators were obliged, in this case, as they were of even number to appoint an Umpire, not later than one month from the latest date of appointment of the arbitrator. It was urged that the later date of the appointment of arbitrators being August, 1978 and they not having appointed any Umpire by one month from that date they were incapable of acting any further and they were not competent to appoint any one as Umpire as they had purported to do in the meeting held in February, 1979. If the arbitration clause was silent on this point naturally the rules of the First Schedule to the Arbitration Act would have been attracted to this arbitration proceeding. But if the arbitration clause by express, provision or by necessary implication exclude any of the provisions of the First Schedule to Arbitration Act, then, in my opinion the arbitration clause being the bargain between the parties must prevail. The arbitration clause, as I have mentioned, contemplates that arbitrators were to appoint an Umpire in writing, "before proceeding on the reference". Therefore, this clause of the arbitration agreement by express provision excluded the operation of Rule 2 of the First Schedule to the Arbitration Act, 1940 If that is the position, then, the arbitrators having appointed the Umpire at the second meeting held in February, 1979 on the date of their

entering upon reference, in my opinion, did not act illegally or beyond their powers under the arbitration clause. Therefore, this contention on behalf of the respondent cannot be accepted:

2. It was, secondly, urged that one of the main defence of the respondent was that the petitioner had given a "no claim certificate" and the defence of the petitioner was that no claim certificate had been obtained by coercion, by threat or by intimidation. It was urged that such a defence or such a contention should better be decided in a Court of law and it should not be left to be decided in a private forum. It is true that where the very existence of the arbitration agreement, upon which the arbitrators jurisdiction depends, is challenged or is clouded by the allegations of coercion then the arbitrators are not competent to adjudicate the disputes regarding that because their very existence depends upon the adjudication of that question. In this case the jurisdiction of the arbitrators does not depend upon whether no claim certificate was given properly or was given improperly as a result of coercion or intimidation as alleged by the petitioners. It is a contention in defence to the claim which the arbitrators have undoubtedly jurisdiction to decide. If that is the position there being no inhibition or no prohibition of acting, the arbitrators have the competency to adjudicate the dispute. This is admittedly a claim under the Arbitration clause and I see no justification for depriving the parties of their chosen forum in the facts and circumstances of the case. If, on the other hand the arbitrators found that no claim certificate was not properly obtained then the arbitrators would have to decide the claims under the agreement and these claims would naturally depend upon the adjudication of certain technical and engineering matters which, in the facts and circumstances of the case the parties choose would better be left to the technical persons and indeed the two persons selected are engineers connected with this kind of projects. Therefore, in my opinion, there is no justification for the arbitrators' being denied of their jurisdiction because the parties have chosen to go to arbitration.

3. It was, then, urged that the arbitration proceedings have been delayed. It is true that there has been some amount of delay. The claim arose in July, 1978. The Arbitrators were appointed in August, 1978 and they held meetings in January and February, 1979 and they gave certain directions to the petitioner in or about June 1979 to seek certain clarification from this Court about the jurisdiction and the petitioner moved this Court in May, 1980. On the ground of delay in the arbitration proceedings, it may be mentioned that in the petition there are allegations that time was taken by the respondent for more than once for adjournment of the proceedings. So to this delay, the respondents have contributed to a certain extent, if not wholly. In that view of the matter, I would not deprive the parties of their chosen forum for agitation. In these circumstances I hold that the arbitrators have jurisdiction to decide the question referred to them. They will also have the jurisdiction to consider whether the no claim certificate had been given under the circumstances alleged by the petitioner or not if it decided to be so, then whether the claim made by the

petitioner is sustainable and if so to what extent. In the premises, the arbitrators will proceed with the arbitration in accordance with the above directions. I further hold that the appointment of the Umpire in the facts and circumstances of the case was in compliance of the arbitration agreement. The arbitrators will proceed forthwith on a signed copy of the minutes of this order.

Cost of this application will be costs in the arbitration proceedings.