
(2003) 04 DEL CK 0069
In the Delhi High Court
Case No : Suit No. 1089-A/99

Satish Kumar Marwah and Sons

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-04-2003

Acts Referred:

Arbitration Act, 1940 — Section 11, 20
Arbitration and Conciliation Act, 1996 — Section 21, 85(2)

Citation : (2003) 5 AD 99 : (2003) 3 ARBLR 187 : (2003) 105 DLT 760 : (2003) 70 DRJ 51

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : Raman Kapur, for the Appellant; Jhum Jhum Sarkar, for the Respondent

Final Decision : Allowed

Judgement

Manmohan Sarin, J.—This is a petition u/s 20 of the Arbitration Act, 1940 filed by the petitioner seeking directions to the respondents to file arbitration agreement and refer the remaining claims/ disputes No. 8, 9, 11 and 12, which were not referred to the arbitrator for adjudication.

2. The petitioners' case is that the respondents had appointed Dr. Y.P.C. Dongey as a sole arbitrator. However, claims No. 8, 9, 11 and 12 were not referred to him. The present petition is to seek the reference of the said claims.

3. The facts in brief leading to the present petition may be noted.

(i) Petitioner was awarded a contract on 27.6.88 for construction of Govt. Higher Secondary School, vide agreement dated 34/EE/PWD-17/88-89 dated 27.6.88. The stipulated date of completion was 4.5.90. However, the work was actually completed on 4.8.93. The final bill was paid to the petitioner on 28.2.95. Petitioner made a request for appointment of the arbitrator on 25.5.1995. The respondent , however, appointed Mr. Y.P.C. Dongey as sole arbitrator on

15.3.1999 for adjudication of claims without referring claims No. 8,9, 11 and 12. Thereupon, the petitioner filed petition U/s 20 of the Arbitration Act, 1940.

4. As the request for appointment of arbitrator was made on 25.5.1995 i.e. prior to 26.1.96, the date of commencement of the Arbitration and Conciliation Act, 1966, counsel for petitioner submits that based on the judgment of Supreme Court in M/S Shetty's Construction Co. P. Ltd. Vs. Konkan Railway Construction reported as AIR 1998 SC 1535, the provisions of the 1940 Act would apply. In the said judgment, while interpreting Section 85(2)(a) of the Arbitration and Conciliation Act and Section 21 of the said Act, for the purpose of determining the date of commencement of arbitration proceedings, the criteria of making of request for arbitration in terms of section 21 was applied.

5. On perusal of the Arbitration Agreement in this case, I find that there is a specific agreement between the parties providing for the application of 1940 Act or its statutory modification and re-enactment .

Accordingly, the dictum given by the Supreme Court in Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., would be applicable. The present case would be governed by the re-enactment i.e. Arbitration and Conciliation Act 1996. Accordingly, the present petition is to be treated as one u/s 11 of the Arbitration and Conciliation Act, 1996.

6. The Supreme Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., , has described that the function and the role of the court, while dealing with the request of appointment of arbitrator as purely administrative and ministerial. It is not adjudicatory. The Supreme Court has gone to the extent of holding that even the notice to the other party is not a legal requirement. The Supreme Court observed as under:-

"There is nothing in section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. "The Supreme Court further held " that the word "decision" is used in the matter of the request by a party to nominate an arbitrator does not itself mean that an adjudicatory decision is contemplated."

From the foregoing, it would be seen that all issues with regard to any challenge to the jurisdiction of the arbitrator or with regard to the maintainability or objections to the reference of claims are left to the exclusive domain of the arbitrator. Objections and pleas of the respondent of the claims not being referable or admissible under the agreement or objection to jurisdiction are to be decided by the arbitrator. These are the objections which the respondents can raise before the arbitrator.

Accordingly, the petition is allowed. Claims No. 8, 9, 11 and 12 are directed to be

referred to the arbitrator, before whom the other claims under the agreement are pending adjudication, by the respondents within one month from today.