

(2002) 07 DEL CK 0004

In the Delhi High Court

Case No : AA No. 129/01

Sethi Construction Company

APPELLANT

Vs

Chairman and Managing Director, NTPC and Another

RESPONDENT

Date of Decision : 09-07-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 7, 8, 8(1)

Citation : (2003) 41 SCL 314

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : B.L. Chibber, for the Appellant; Harish Salve, Solicitor General of India, Navin Chawla and Meenakshi Sakhardande, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Jain, J.—This is an application u/s 8 and 11 of the Arbitration and Conciliation Act, 1996 ((for short the Act), praying for appointment of an arbitrator to resolve the disputes and differences, which are stated to have arisen between the applicant and National Thermal Power Corporation, hereinafter referred to as NTPC, the respondent herein.

2. Shorn of unnecessary details, the material facts leading to the filing of the present application are:

A works contract for the construction of a school building was awarded by the NTPC to one M/s. Gangotri Enterprises Limited (hereinafter referred to as the GEL), vide letter dated 1 July 1998. Since the GEL could not complete the work on time, the said work is stated to have been assigned to the applicant by GEL with the consent of the respondent. According to the September 1999, finally approved on 7 October 1999, had agreed that the balance work could be entrusted to the appellant. In terms of the said arrangement, the applicant was to execute the work, as per the contract of GEL with NTPC; get the work executed measured; submit the bills as per the rates settled in terms of the

contract and the NTPC was to make direct payment of the running bills to the applicant in their name. It is also averred that for documentation of this arrangement an agreement was also entered into on 31 August 1999 between GEL and the applicant. Disputes relating to payment for the work done by the applicant having arisen between the applicant and the NTPC, the applicant claims to have requested the NTPC to get these settled by appointing an arbitrator in terms of Clause 56 of the General Conditions of Contract, governing the contract between GEL and NTPC. The said clause provides that all questions and disputes relating to the designs, drawings, quality of workmanship or any other question, claim or right etc, shall be referred to the sole arbitration of the General Manager, NTPC and if he is not willing to act as such, to the sole arbitration of some other person, appointed by the Chairman & Managing Director of NTPC. Having failed to get any response from the NTPC, the present application was filed.

3. In the reply filed on behalf of NTPC, the application is resisted mainly on the ground that there is no privity of contract between the applicant and the NTPC nor is there any arbitration agreement between them and, Therefore, the present application is misconceived. It is also stated that the NTPC has not given any approval to GEL to sub-contract any portion of the contract to the applicant. It is pointed out that the applicant was only a piece rate worker (PRW) of GEL and the engagement of the applicant cannot be considered as sub-contracting of the work in favor of the applicant in terms of clause 37 of the agreement. It is asserted that NTPC is not a party to the agreement dated 31 August 1999 between the applicant and GEL and the NTPC has only agreed to release payments to the applicant directly for the work which was to be executed by the applicant on behalf of GEL.

4. I have heard learned counsel for the parties.

5. It is submitted by learned counsel for the applicant that GEL having assigned the contract in favor of the applicant and NTPC having accepted the applicant as the sub-contractor, the applicant has stepped into the shoes of GEL insofar as the rights and obligations under the contract dated 1 July 1998 are concerned qua NTPC, and, Therefore, the present application is maintainable. Relying on the decision of the Constitution Bench of the Supreme Court in *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, it is also urged that while dealing with this application u/s 11 of the Act, this court is not supposed to go into any contentious issues which may be raised by the respondent in defense.

Learned counsel for the NTPC, on the other hand has vehemently submitted that from the documents available on record it is evident that neither GEL had assigned their rights under the contract in favor of the applicant nor had the NTPC accepted the applicant as a sub-contractor. It was only a working arrangement whereby the applicant was asked to execute the remaining contracted work on behalf of GEL and they were to receive payments for the said

work for and on behalf of GEL. To buttress his said stand, learned counsel has placed reliance on the correspondence exchange between all the three parties - the applicant, GEL and the NTPC. It is thus submitted that there being no arbitration agreement between the applicant and the NTPC, the present application is not maintainable.

6. Section 8(1) of the Act provides that a judicial authority before which an action is brought in a matter which is the subject matter is brought in a matter which is the subject matter of an arbitration agreement shall, if a party so applies, refer the parties to arbitration. Existence of an arbitration agreement between the parties is a pre-requisite for invoking jurisdiction of a judicial authority either u/s 8 or 11 of the Act. Section 7 of the Act states that an "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It is true that the Apex Court in *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.,* , approved in the aforementioned decision of the Constitution bench, has observed that there is nothing in Section 11 which contemplates decision by the Chief Justice or his designate on any controversy that the other party may raise and the only function of the Chief Justice or his designate under the said section is to fill the gap left by a party to the arbitration agreement and all the contentious issues are to be left to the decision of the arbitrator/arbitrators. But the question which requires consideration in the present case is as to whether there is at all any privity of contract between the applicant and the NTPC, as claimed by the applicant and denied by the respondent. If no contract exists between the applicant and the NTPC, all other questions, in particular the scope of powers of this court u/s 8 and 11 of the Act would be of academic interest only and need not be gone into.

7. As noted above, the stand of the applicant is that the works contract dated 1 July 1998 was assigned to them by GEL and, Therefore, all the rights and obligations flowing there from bind the applicant and the first respondent. This position is disputed by the NTPC, whose stand is that GEL continued to be the contractor and they were dealing with the applicant as an agent of GEL and, Therefore, the present application by the applicant is not maintainable.

8. The term "assignment" is not defined. According to Black's Law Dictionary (Sixth Edition), "assignment" means "The act of transferring to another all or part of one's property, interest, or rights. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. The transfer by a party of all of its rights to some kind of property, usually intangible property such as rights in a lease, mortgage, agreement of sale or a partnership. Tangible property is more often transferred by possession and by instruments conveying title such as a deed or a bill of sale".

The Indian Contract Act, 1872 also contains provisions relating to assignment but these nowhere lay down what the assignments are. In *Khardah Company Limited*

v. Raymon and Company, the Supreme Court observed that an assignment of a contract might result by transfer either of rights or of the obligations there under. But there is well recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned, except with the consent of the promisee and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable, unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

The doctrine of assignment is also known to the insurance law and an assignment of the policy is a transfer of the contract of insurance with all its rights and liabilities to the transferee and, Therefore, it is substitution of a new assured for all intents and purposes.

9. Thus, broadly speaking, an assignment is in the nature of a transfer by one to another of his interest or rights is one's property and vests in the latter the former's interests, rights and remedies in respect of the subject matter. In such a case, the latter by virtue of the assignment in his favor will be in position to enjoy the rights of the former in his own name. Obviously, the factum of an assignment or for that matter a transfer of the contract has to be gathered from a specific document in this behalf or at least from contemporaneous action/contract on the part of the parties.

10. Bearing in mind the above principle, I revert to the facts in hand to determine as to whether there was any assignment or transfer of the contract dated 1 July 1998 by GEL in favor of the applicant. To answer the question it would be necessary to refer to some of the documents, relied upon by both the sides.

11. The first document in line, on which reliance is placed by the applicant, is the copy of the minutes recorded in the file of the NTPC, approving the arrangement for direct payment to the applicant. Since a lot of emphasis is laid by the learned counsel for the applicant on these documents, for the sake of ready reference, it would be expedient to extract the relevant portions thereof:

"Considering the urgency of the work for handing over the building on or before 30.11.1999, the Sr. Manager was entrusted the job of getting an agreement (back to back) with the existing PRW of M/s. GEL and M/s. GEL so that the work should not stop for want of payment against the RA bill of PRW. Accordingly, Sr. Manager along with M/s. Sethi Construction Company (PRW) had a meeting with Mr. Markandey Shukla, one of the Directors of M/s. GEL at Lucknow and made an agreement for direct payment to PRW. A Power of Attorney in the name of Proprietor of M/s. Sethi Construction Company i.e., Shri R.K. Sethi was got signed on non-judicial paper and the same is enclosed herewith.

With this, NTPC shall have the powers to release the payments directly to M/s. Sethi Construction Company on behalf of M/s. GEL against their RA bills.

Submitted for approval of Competent Authority.

xxxx xxxx xxxx xxxx xxxx The above said arrangement i.e., payment to M/s. Sethi Construction PRW engaged by M/s. Gangotri may be agreed to working the parts as stated above. As natural behavior M/s. Gangotri Construction with the stipulation of undue harassment by NTPC is also built up which is in line with the arrangement made for Part-II 2nd residue work of M/s. Gangotri.

Sd/- Illegible 7/9

DGM ((F)

As per c 37 of GCC the work can be sub-contracted with the prior written approval of the Accepting Authority.

S.M.(F) Sd/- 11/9

xxxx xxxx xxxx xxxx As per the note of M(C) it is seen that the work was already being executed from PRW being appointed by M/s. GEL on this basis the provisional extension was also granted up to 30.11.99. From this it flows that sub-contractor was already working with BTPS as per Clause 37 of the GCC I fail to understand how Clause 37 of the GCC is attracted now as pointed out above. The noting on the file of Phase-II are not enclosed as pointed out above in note dt. 11.9.99. However M(L) is on record and same are re-iterated. We should also keep in mind the past conduct of the contractor in dealing with the NTPC (BTPS). May proceed as per the contract. Sr. M (C-T/S)

Sd/- M.K. Kaul 27.9.99

Subject: Construction of New Block in Notre Dam School in BTPS Staff Colony at BTPS.

The remarks of Manager (Law) may please be seen. The work is of important nature and we are mainly depending on the sub-agency M/s. Sethi Construction Company who is advancing with the progress of work in the absence of the representative of M/s. GEL. as done in case of Phase-II, II raising where the sub-contractor was given direct payment on behalf of M/s. GEL as per agreement reached between them a similar agreement has been formed between M/s. GEL and M/s. Sethi Construction Company, Proposal to process payment to M/s. Sethi Construction Company, the Sub-agency engaged by M/s. GEL as per the agreement may be agreed to.

.935/1.10.99

DGM (Civil)

DGM (F)

The proposal to sub-contract the work as per the proposal of GEL may be granted to Reg XI specific clearance from M (Law) may be obtained before release of payment directly. However DGM (F) may kindly see.

DGM (F) 30.9.99

As per the GCC, the payment may be made to the 2nd party, i.e., to Sethi Construction Company. Similar arrangement has been made for Ph-II works. As proposed payment of R/A bill may be given M/s. Sethi Construction Co.

(Emphasis supplied)

12. The next document referred to above, is the agreement dated 31 August 1999 between GEL (referred to in the agreement as the first party and the applicant, referred to as the second party). Relevant clauses of the said agreement read thus:

"2. WHEREAS, the second party has approached the first party and has requested to executed the entire balance work as on date under the direct supervision of National Thermal Power Corporation of National Thermal Power Corporation Ltd. to their full satisfaction and the first party has agreed to get the entire balance work Executed second party on terms and conditions hereinafter and on the assurance of the second party has obtained written permission from M/s National Thermal Power Corporation Ltd.

3. The running Account Bill shall be paid directly by M/s. N.T.P.C. Ltd., BTPS, to the Second Party in which M/s. National Thermal Power Corporation has agreed on the request to M/s. Gangotri Enterprises Ltd. to accept the authorised signatures of the Second Party on Measurement Books and bills etc., and the cheques will be made out in the name of Second Party instead of the First Party.

4. It has mutually been agreed between the Parties that the amount of security Deposit, Income Tax Deduction, Mobilisation Advance Deduction and interest thereon or any other recoveries done by the NTPC (the second party is not claim for that amount by the first party).

5. All the disputes rising out of and between the parties shall be brought before the Dy. General Manager (Civil), National Thermal Power Corporation Ltd., Badarpur Thermal Power Station, Badarpur for Settlement or arbitration and shall be within the jurisdiction of Delhi court."

13. The General Power of Attorney dated 31 August 1999, referred to in the afore-extracted minutes, is to the following effect:

"KNOW ALL MEN by this power of attorney, I, Markandey Shukla S/o Shri S.P. Shukla, Director of M/s. Gangotri Enterprises Ltd., having its registered office at B-158, Sec.-A, Mahangar Lucknow-6 and local office at P-32, South Extension, Part-II, New Delhi do hereby appoint/nominate and constitute Shri Rajender Kumar Sethi S/o Late Shri Shadari Lal Sethi R/o A8-A9, Gali No. 2, Arjun Nagar, Delhi-51 as my true and lawful General Attorney in the name and on behalf of aforesaid Company to do and execute the balance work of Construction of Block of Notre Dame School in Pmt Colony at BTPS awarded by M/s. N.T.P.C. Ltd. BTPS Badarpur, New Delhi vide letter of award No. 10285/BTPS/CC/98-99/03 Dt.

1/7/98 and all or any of the following acts, deeds or things by the said attorney in connection with the above work.

1. To sign the measurement books, prepare and submit the bills to the department, get the cheques prepared in his own name and receive payments on behalf of the co.
2. To appear and argue his stand on behalf of the co. before Senior Officers of N.T.P.C. Ltd.
3. Generally to do all such acts deed and things as our said attorney shall think expedient for the process purposes aforesaid as effectually in all respects as we would be ourselves relating to the aforesaid work.

We hereby rectify and agree to rectify confirm all whatever our said attorney shall lawfully do or cause to be done by virtue of this deed which will remain irrevocable till the completion of the above work."

(Underlined for emphasis)

14. It is pertinent to note that at the request of the application, the NTPC had issued a certificate dated 11 April 2001, the relevant portion of the said certificate reads thus:

"A Contract Agreement was entered into between, BTPS and M/s. Gangotri Enterprises Limited (M/s. GEL), B-158, Sector-A, Mahanagar, Lucknow (UP) for construction of Notre Dame School Building in Permanent Colony at BTPS vide LOA No. 10285/BTPS/CC/98-99/03 dated 01.07.98. Against execution of this work by M/s. GEL, payments up to Running Account Bills (RAB) No. 3(Civil portion) were made to them. However, pursuant to an agreement to Aug, '99 between M/s. GEL and M/s. Sethi Construction Co. (Regd. Office at 110, Ram Nagar Extn, Delhi-51) payments for the balance work which was done by M/s. Sethi Constructions Company was to be made directly to M/s. Sethi Constructions Company after RAB No. 3 of Civil portion till the completion of work, as detailed below:

And accordingly, in line with this agreement, for all subsequent RAB payments, cheques of net payable amount were made favoring M/s. Sethi Construction Co. after deducting tax as spelt out below. Income tax (TDS) at the applicable rates was deducted from all the said payments made directly to M/s. Sethi Construction Co. and deposited into Govt. Account. TDS certificate for the same have been/are being issued to M/s. GEL"

15. A bare reading of the afore-extracted documents leaves little room for doubt that the applicant was dealing with the NTPC for and on behalf of GEL as their general power of attorney holder. On the strength of the afore-extracted minutes, heavily relied upon of the afore-extracted minutes, heavily relied upon by learned counsel for the applicant, it is difficult to hold that the applicant was accepted by the NTPC as a sub-contractor in terms of Clause 37 of the general

conditions of contract, which, though provides for appointment of a sub-contractor by the contractor but such an appointment has to be with the prior written approval of the accepting authority i.e. NTPC. Further, the said clause also stipulates that employment of piece rate workers shall not be deemed as sub contracting. It is not in dispute that GEL had employed the applicant as a piece rate worker (PRW). In my view, the NTPC is not at all concerned with the underlying contract/agreement, which the applicant had entered into with GEL on 31 August 1999.

16. In my considered opinion there is no privity of contract between the applicant on the one hand and the NTPC on the other hand and, Therefore, the present application u/s 8 and 11 of the Act by the applicant is misconceived. Applicant's remedy may lie elsewhere.

17. For the foregoing reasons, the application fails and is accordingly dismissed.