
(2011) 07 AP CK 0090

In the Andhra Pradesh High Court

Case No : Arbitration Application No. 44 of 2011

Sri N.N. Capoor

APPELLANT

Vs

Sri A. Koteswara Rao and Another

RESPONDENT

Date of Decision : 19-07-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 2, 7, 9

Citation : (2011) 5 ALD 493

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Advocate : P. Shiv Kumar, for the Appellant; Ch. Purnachandra Rao, for the Respondent

Final Decision : Dismissed

Judgement

B. Seshasayana Reddy, J.—This application has been taken out by N.N. Capoor under Sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act", for short) seeking appointment of a Presiding Arbitrator to resolve the disputes in respect of the property covered by the Registered Development Agreement-cum-General Power of Attorney, dated 12.02.2009.

2(a). The applicant-N.N.Capoor is the owner and possessor of Plot bearing No. 253, admeasuring 1190 square yards situated at Road No. 18, Jubilee Hills Cooperative House Building Society Limited, Jubilee Hills, Hyderabad. He executed a registered development agreement-cum-General Power of Attorney dated 12.02.2009 in favour of the Respondents. According to him, he executed the development agreement as a collateral security for the loan of Rs. 20,00,000/-availed by him from the Respondents. The original title of the plot was also deposited with the Respondents as a security measure. The Respondents issued a notice dated 22.3.2010 calling upon the applicant to deliver vacant possession of the plot in terms of the development agreement-cum-GPA dated 12.2.2009. The applicant issued a reply dated 30.4.2010 stating that the development agreement has been executed in favour of the

Respondents as a security for the loan availed from them. On receiving the reply, the Respondents sent a rejoinder reiterating the stand taken by them in the notice dated 22.3.2010. The applicant filed O.P. No. 1881 of 2010 on the file of II Additional Chief Judge, City Civil Court, Hyderabad u/s 9 of the Act seeking injunction against the Respondents from selling, alienating or dealing in any manner in respect of the said property and obtained interim orders in I.A. No. 3380 of 2010. The applicant also lodged a private complaint against the Respondents for various offences and thereupon, the Station House Officer, Jubilee Hills P.S., Hyderabad registered a case in Crime No. 263 of 2010 and the crime is under investigation.

2(b) The development agreement contains an arbitration clause with regard to settlement of dispute. The applicant invoked the arbitration clause in the development agreement and nominated Sri K. Venkateshwar Rao, Chartered Accountant as Arbitrator on his behalf and requested the Respondents to nominate their arbitrator. The notice sent to the Respondents returned unserved. However, the Respondents sent a legal notice dated 28.01.2011, nominating one Mr. T. Ravi Krishna, Legal Consultant, as the Arbitrator on their behalf. Thereupon, the applicant sent a reply dated 10.02.2011 informing the Respondents of his nominating Mr. K. Venkateshwar Rao on his behalf. The arbitrators appointed by the applicant and the Respondents have to appoint a common umpire to commence the arbitration proceedings for resolution of the disputes. As on this day, no Presiding Arbitrator has been appointed by the arbitrators chosen by the parties. Hence, this application seeking the prayer stated supra.

3. Notice to the Respondents came to be ordered on 14.6.2011. The Respondents entered appearance through a counsel and filed counter.

4. It is stated in the counter that the applicant failed to cooperate with the Respondent for finalization of the plan to be approved by the GHMC and failed to vacate the scheduled house and thereby, further course of action pursuant to the development agreement-cum-General Power of Attorney came to be frustrated. The allegation in the application that the applicant executed development agreement as a security for the loan availed by him from the Respondents is denied. The arbitrators appointed by each of the parties have to hold preliminary meeting to enter on reference and to issue programme to conduct the arbitration proceedings in connection with the Registered Development Agreement-cum-GPA dated 12.02.2009. The arbitration clause clearly indicates intention of the parties that in case of any differences of opinion between the arbitrators appointed by both parties, they shall nominate a common umpire. The applicant has filed the present application in deviation of the procedure contemplated in the agreement with regard to the appointment of the common umpire and therefore, the application is liable to be dismissed.

5. Heard learned Counsel appearing for the applicant and learned Counsel appearing for the Respondents.

6. Learned Counsel appearing for the applicant submits that the disputes between the parties relatable to Development Agreement-cum-GPA dated 12.02.2009 are required to be settled by taking recourse to arbitration clause provided in the agreement. A further submission has been made that the procedure for appointment of an arbitrator has been stated in Clause (13) and as per the said procedure, the applicant has nominated an arbitrator on his behalf and whereas the Respondents have also appointed an arbitrator on their behalf and as the arbitrators appointed by each of the parties have not chosen to nominate a common umpire, it has become imminent for the applicant to approach this Court seeking appointment of a common umpire for the arbitral tribunal and therefore, the application deserves to be allowed. A further submission has been made that the arbitral tribunal shall not comprise of even number of arbitrators as provided u/s 10 of the Act and as on this day, the arbitral tribunal comprises even number, and it necessitated appointment of a Presiding Arbitrator so that the number of arbitrators in the arbitral tribunal is in tune with Section 10 of the Act. In support of his submissions, apart from referring Section 10 of the Act, learned Counsel placed reliance on the judgment of this Court in Ashok Engineering company, Engineers and Contractors v. General Manager, South Central Railway 2001 ALT (2) 449. A learned Single Judge of this Court while interpreting Clause 64 of the General Conditions of Contract, which forms part of the contract relatable to railway works, has held that the arbitral tribunal by virtue of Sub-section (2) of Section 10 of the Act shall not be of an even number.

7. Learned Counsel appearing for the Respondents submits that Clause (13) of the development agreement-cum-General Power of Attorney stipulates procedure for appointment of a common umpire and unless and until the procedure contemplated under the said clause is exhausted, the applicant cannot invoke the provisions of Sub-section (6) of Section 11 of the Act. He would also submit that merely because an arbitration agreement specifying an even number of arbitrators, it cannot be held invalid under the provisions of the Act. The arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire, in case of any difference of opinion. The arbitration agreement is valid as it satisfies the requirement of Section 7 of the Act. In support of his submissions, reliance has been placed on the decision of Supreme Court in M.M.T.C. Limited Vs. Sterlite Industries (India) Ltd., wherein the Supreme Court held that the validity of an arbitration agreement does not depend on the number of arbitrators specified in Section 7. The number of arbitrators is dealt with separately in Section 10, which is a part of machinery provision for the working of the arbitration agreement. Therefore, an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the Arbitration and Conciliation Act, 1996.

8. The relevant provisions of the Act and their analysis is as follows:

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 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) of 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.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by Sub-section (4) of Sub-section (5) of Sub-section (6) to him.

(11) Where more than one request has been made under Sub-section (4) or Sub-section (5) or Sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant Sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in Sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those subsections shall be construed as a reference to the "Chief Justice of India"

(b) Where the matters referred to in Sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "chief Justice" in those Sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal civil Court referred to in Clause (e) of Sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

9. An analysis of the scheme of Section 11, which relates to appointment of arbitrators shows that in terms of Sub-section (1) thereof, a person of any nationality can be appointed as an arbitrator unless there is a contra agreement between the parties. Sub-section (2) lays down that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. This is subject to the provision contained in Sub-section (6). Sub-section (3) lays down that if there is no agreement between the parties in arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators appointed by the parties shall appoint the third arbitrator who shall act as the presiding arbitrator. Sub-section (4) lays down that if a party fails to appoint an arbitrator within 30 days from the date of receipt of request to do so from the other party or the two arbitrators fail to agree on the third arbitrator within 30 days from the date of appointment, then the Chief Justice or any person or institution designated by him can be approached for appointing an arbitrator or the third arbitrator, as the case may be. The procedure prescribed in Sub-section (4) also applies to a case involving appointment of sole arbitrator. Sub-section (6) enumerates the contingencies in which a party may request the Chief Justice or any person or institution designated by him to take necessary measure unless the agreement

on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in Sub-section (6) are-

- i) if a party fails to act as required under the agreed procedure; or
- ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under such procedure; or
- iii) a person including an institution fails to perform any function entrusted to him or it under the procedure.

Sub-section (8) requires that in appointing an arbitrator, the Chief Justice or any person or institution designated by him shall have due regard to any qualification required of the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

10. What is significant to be noticed in the aforementioned provisions is that the legislature has repeatedly laid emphasis on the necessity of adherence to the terms of agreement between the parties in the matter of appointment of arbitrators and procedure to be followed for such appointment. The need for adherence to the terms of agreement which provide for resolution of differences or disputes by arbitration was highlighted in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, In Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, ; the Supreme Court held that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of Sub-section (8) of Section 11 of the Act are kept in view. This would mean that invariably the Court should first appoint the arbitrators in the manner provided for in the arbitration agreement. When the parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause. Sub-sections (3) to (5) of Section 11 refer to cases where there is no agreed procedure. Sub-section (2) provides that subject to Sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The crucial expression in Sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures". This expression has to be read along with requirement in Sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. A bare

reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted.

11. Indisputably, the development agreement contains an arbitration clause, i.e., Clause (13), which deals with resolution of disputes between the parties by way of arbitration, and it reads as hereunder:

13. In case of any disputes arises between the parties hereto touching these presents the matter shall be referred to the Arbitrators one chosen by each party and in case of any differences of opinion between such Arbitrators, they shall nominate a common umpire and their award shall be final and binding on both the parties and the relevant provisions of the Arbitration Act shall apply.

12. The applicant by notice dated 24.01.2011 nominated Mr. K. Venkateshwar Rao, Chartered Accountant as arbitrator on his behalf. of course, notice sent by the applicant has not been served on the Respondents. Be that as it may, the Respondents also nominated one Mr. T. Ravi Krishna, Legal Consultant as arbitrator on their behalf under notice dated 28.01.2011.

13. As on this day, the applicant has nominated his arbitrator and Respondents have nominated their arbitrator. Under Clause (13) of the arbitration clause in the development agreement, the question of appointing a common umpire arises only in case of any differences of opinion between the two arbitrators. As on this day, the arbitrators have not yet entered reference. It is for the applicant and the Respondents to pursue the matter with their respective arbitrators to see that the arbitral proceedings are expedited. There seem to be no such effort made by either of the parties. The question of appointment of a common umpire/Presiding Arbitrator under Clause (13) of the development agreement arises only when there is difference of opinion between the two arbitrators nominated by the parties. Such a situation has not arisen as on this day. Therefore, the instant application seeking appointment of a presiding arbitrator is premature.

14. Accordingly, the Arbitration Application is dismissed as premature. No costs.