
(2003) 09 SHI CK 0022
In the High Court Of Himachal Pradesh
Case No : O.M.P. (M) No. 94 of 2001

State of H.P. and Another	Vs	APPELLANT
M/s. Inderjeet Singh Avtar Singh		RESPONDENT

Date of Decision : 16-09-2003

Acts Referred:

Arbitration Act, 1940 — Section 3
Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 11, 11(3), 16

Citation : (2004) 1 ShimLC 105

Hon'ble Judges : Kuldeep Chand Sood, J

Bench : Single Bench

Advocate : Ashok Chaudhary, A.A.G, for the Appellant; J.S. Bhogal and Suneet Goel, for the Respondent

Judgement

Kuldeep Chand Sood, J.—The question raised in these objections, u/s 34 of the Arbitration and Conciliation Act, 1996 ("New Act" for short) is:

What is the effect of "new Act" on the validity of the Arbitral Tribunal constituted under the contract agreement prior to the commencement of the new Act which provided for the disputes to be referred to two Arbitrators, one to be appointed by each party and in case of difference of opinion between the two arbitrators, reference to third arbitrator/Umpire appointed by the two Arbitrators before entering into the reference.

Relevant facts may be noticed:

Works relating to construction of a bridge over Ali Khud near village Kothi in the District of Bilaspur, was awarded to the Respondent-firm by the State of Himachal Pradesh, objector herein, on September 21, 1989. The work was to be completed within three years. Dispute arose between the contractor firm and the State. Such disputes were referred to the arbitrators in terms of Clause 16 of the contract agreement. Clause 16 of the contract agreement reads :

16. Arbitration :

Any dispute or difference of question which may at any time arise between the parties herein, touching or arising out of or in respect of the contract, including the scope of the arbitration and jurisdiction of arbitrator/umpires to decide the dispute/difference question referred to him/them and all question matters points referred issued in respect of which decision of any part in this contract is stated to be final shall be referred to two arbitrators, one to be appointed by each party and in case of difference of opinion between the arbitrator appointed by them before entering on the reference and the decision of such arbitrators/umpire(s) as the case may be shall be final and binding on the parties. The arbitration shall be governed by the Indian Arbitration Act, 1940 and as amended from time to time with the over-riding provision that the arbitrator shall have the un-reserved right to enlarge the period for publishing the award as they deem fit. In all cases where the amount of the claim is Rs. 50,000 and above, the arbitrator/umpire will give the reason for the award.

(Emphasis given)

The contractor-Respondent nominated Shri S.N. Mukherjee Advocate is his arbitrator and the objector-State nominated Superintending Engineer (Arbitration) at Solan as arbitrator on behalf of the State. Both the arbitrators appointed Shri R.A. Chaudhary, a retired Chief Engineer, as the Presiding Arbitrator.

The record of the Arbitrator disclose that the Superintendent Engineer (Arbitration), arbitrator, nominee of the State-objector wrote to Mr. S.N. Mukherjee, Arbitrator, nominee of the Contractor on April 25, 2002 saying that he proposes to hold a meeting of Arbitrator on May 2, 2000 in the Himachal Pradesh Public Works Department Rest House at Parwanoo. On May 2, 2000, the arbitrator-nominee of the Contractor addressed a letter to the Superintending Engineer (Arbitration) saying that though he had booked his tickets by Shatabdi Express so as to participate in the hearing on May 2, 2000 and he was at Sr. No. 1 of the waiting list but status of his ticket did not improve and he thus was prevented from attending the hearing. He, however, suggested two names for appointment as Presiding Arbitrator and requested the arbitrator, nominee of the State to choose any one of them and such choice would be deemed to have been done with his express consent. He also requested the arbitrator, nominee of the State, to notify all concerned about it.

It appears that the arbitrator, nominee of the State, chose Mr. R.A. Chaudhary, Retd. Chief Engineer, as Presiding Arbitrator. Mr. R.A. Chaudhary was informed about his appointment by a letter dated May 8, 2000. He specifically asked for the consent of Mr. Chaudhary to act as Presiding Arbitrator. Mr. R.A. Chaudhary by his letter dated May 12, 2000 agreed to act as Presiding Arbitrator in the case. Arbitration proceedings were thereafter held by the three arbitrators from time to time in which both the State and the Respondent-Contractor participated. Ultimately, hearing of the case was closed on January 23, 2001 and case was adjourned for making an award. On May 5, 2001 arbitrator-nominee of the State

wrote to the contractor-Respondent and. the Executive Engineer, Bilaspur Division No. 1 saying that there is no provision for third arbitrator in the arbitration case, therefore, proceedings of the arbitration were required to be started de novo. He took a view that the appointment of the third arbitrator was void and the consequent proceedings were vitiated. On May 10, 2001. Presiding Arbitrator convened a meeting of the arbitrators for June 3, 2001 at Parwanoo for finalizing the award. The arbitrator, nominee of the State (Superintending Engineer Arbitration, Solan) wrote to the Presiding Arbitrator on May 17, 2001 saying that the contract agreement provides only for two arbitrators and that proceedings have to be started de novo. He fixed the first date of hearing for May 23, 2001 in his Office. However, the arbitral Tribunal made the award on June 3, 2001 by majority, the arbitrator nominee of the State having abstained.

The contention of the State is that Clause 16 of the contract agreement provides only for two arbitrators, one each to be nominated by the Contractor and the State and it was only in case of difference between the arbitrators, that third arbitrator/Umpire was to be appointed.

It is admitted position that "New Act" is application in the present case. The appointment of the third arbitrator, contended learned Additional Advocate General, was not valid. The argument is that Section 11 of the new Act does not contemplate appointment of an Umpire, whereas, under the contract agreement, it was an Umprie who was contemplated to be appointed and not the third Arbitrator.

It is true that the contract agreement provides for the appointment of two arbitrators and reference to the third Umpire/arbitrator in case of difference of opinion between them. Section 10(1) of the New Act provides that parties are free to determine the number of arbitrators but such number shall not be an even number. First schedule to Section 3 of Arbitration Act, 1940, hereinafter referred to as "1940 Act", provided that if a reference is to an even number of arbitrators, then Arbitrators shall appoint an Umpire not later than one month from the latest day of their respective appointments.

In the present case, it is noticed both the contractor and the State participated in the arbitration proceedings till the conclusion of the proceedings. No objection was raised that the arbitral Tribunal was not validly constituted. Section 4 of the "New Act" stipulates that if a party who knows that requirement under the Arbitration Act had not been complied with and proceed with arbitration, without raising objection to such noncompliance, without undue delay, then such party would be deemed to have waived his right to so object. Sub-section (2) of Section 16 of the "New Act" stipulates that objection as to the jurisdiction of the arbitral Tribunal cannot be raised after the submission of the statement of defence. Section 11(3) of the new Act provides that in an 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. Interpreting and construing the provisions of Sections 10, 11(3) and

34 of the "New Act", the Apex Court in Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, held that challenge to the jurisdiction must be made before the arbitral Tribunal itself. A party can challenge the composition of the arbitral Tribunal u/s 16(2) not later than the submission of the statement of defence. Such challenge can be made even if the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. However, party may not raise such challenge and if it chooses not to object to the jurisdiction of the arbitral Tribunal. Such party, in the circumstances, would be deemed to have waived its objection. In para 16 of the judgment. Their Lordships held:

16. It has been held by a Constitution Bench of this Court, in the case of Konkam Rly. Corpn. Ltd. v. Rani Construction (P) Ltd., that Section 16 enables the Arbitral Tribunal to rule on its own jurisdiction. It has been held that u/s 16 the Arbitral Tribunal can rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the Arbitral Tribunal's authority u/s 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend that, u/s 16, a party cannot challenge the composition of the Arbitral Tribunal before the Arbitral Tribunal itself. Such a challenge must be taken u/s 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if it so chooses, not to raise such a challenge. Thus a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver u/s 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

(Emphasis given)

Thus having participated in the arbitration proceedings till its conclusion without demur, it is not open to the Respondent-State to raise objection at this stage that Arbitral Tribunal was not validly constituted.

This apart, the question raised has been put to rest in MMTC Limited v. Sterlite Industries (India) AIR 1997 S C 605. In that case, similar question arose. The contract agreement, in MMTC, provided that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceeding with the reference. This contract agreement was executed before coming into force of the New Act and, therefore, was governed by the "New Act". The Apex Court held that arbitration agreement was valid as it satisfied the requirement of Section 7 of the "New Act" and in view of the arbitration clause in the contract

agreement, providing for two arbitrators and two arbitrators in turn to appoint Umpire or third arbitrator would satisfy the requirement of Sub-section (1) of Section 10 of the new Act and Sub-section (2) will have no application. Their Lordships observed:

10. The arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceeding with the reference. The arbitration agreement is valid as it satisfies the requirement of Section 7 of the New Act. Section 11(3) requires the two arbitrators to appoint the third arbitrator or the umpire. There can be no doubt that the arbitration agreement in the present case accords with the implied condition contained in para 2 of the First Schedule to the Arbitration Act, 1940 requiring the two arbitrators, one each appointed by the two sides, to appoint an umpire not later than one month from the latest date of their respective appointments.

The Court proceeded to hold:

11. The question is : Whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceedings in the present case commenced after the New Act came into forces and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of Sub-section (1) of Section 10 is satisfied and Sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the Act and, therefore, is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by Section 11 of the New Act.

Taking into consideration the fact that each of the party appointed its own arbitrator, namely, Mr. S.N. Mukherjee Advocate and Superintending Engineer (Arbitration), Section 11(3) of the New Act comes into play and these two arbitrators were required to appoint third arbitrator as Presiding Arbitrator, which they did by appointing Mr. R.A. Chaudhary, Chief Engineer (Retd.) as presiding Arbitrator. The Arbitral Tribunal thus constituted was intra vires of the contract agreement and Section 11(3) of the New Act. The award cannot be set-aside on this ground.

However, as the third arbitrator nominee of the State-objector did not participate in the finalisation of the award, assuming that the proceedings earlier held were non-est, it will be fair and reasonable to set aside the award and direct the Arbitral Tribunal to make a fresh award after discussing the case in a joint meeting.

In result, the impugned award is set-aside. The Presiding Arbitrator Mr. R.A. Chaudhary shall convene a meeting, within six weeks from today, of the arbitrators to deliberate upon the passing of the final award and the arbitrators thereafter shall proceed to pass award in accordance with law.

No costs.