
(2015) 02 RAJ CK 0294

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 112/2015 in Civil Writ Petition No. 15709 of 2011

State of Rajasthan and Others

APPELLANT

Vs

SPML Infra Ltd. and Others

RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 17, 9
Constitution of India, 1950 — Article 226

Citation : (2015) 5 ARBLR 166

Hon'ble Judges : Sunil Ambwani, A.C.J;Prakash Gupta, J

Bench : Division Bench

Advocate : Jag Mohan Saxenam, AAG and Anurag Kalavatiya, for the Appellant;
R.B. Mathur and Sameer Jain, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, Actg. C.J. and Prakash Gupta, J—We have heard learned counsel appearing for the parties. The delay, in filing this special appeal, has been sufficiently explained and is accordingly condoned. The delay condonation application is allowed.

2. By the special appeal the State of Rajasthan has challenged the judgment and order passed by learned Single Judge dated 03.04.2014, by which he has treated Clause 23 of the agreement/contract entered into between the parties as an arbitration clause, and while referring the matter to the Standing Committee to adjudicate the matter as per the provisions of the Arbitration and Conciliation Act, 1996 (for short "the Act of 1996"), directed that in case the Administrative Secretary or the Finance Secretary, who were instrumental and were associated in passing the orders for recovery of the amount, which was paid as price escalation for the delayed period to the respondents, are members of Standing Committee, the matter would be referred to sole arbitrator, Hon'ble Mr. Justice Sunil Kumar Garg (Retired), Rajasthan High Court, and that the petitioners, in

the meanwhile, would be at liberty to take resort to Section 9 of the Act of 1996, or if the dispute is referred to the arbitration, then to make application under Section 17 of the Act of 1996 for interim protection.

3. It is submitted by AAG that learned Single Judge has erred in law in accepting Clause 23 of the agreement/contract as an arbitration clause, and further in directing that if the Standing Committee includes the Administrative Secretary or the Finance Secretary who were instrumental or associated with the decision making process, the matter will be referred to the sole arbitrator Hon"ble Mr. Justice Sunil Kumar Garg (Retired), Rajasthan High Court.

4. The facts, given rise to the special appeal, are that under an agreement dated 01.10.2005, M/s. SPML Infra Limited, the respondent, carried out the work of laying down the pipelines in Chambal Sawai Madhopur Nadauti Water Supply Project; it submitted claims of Rs. 99.72 crores over and above PV clause, and to claim back the recovery of liquidated amount of Rs. 4.17 crores from the respondent. Clause 23 of the agreement/contract provided for Standing Committee for Settlement of Disputes, as follows:

"Clause 23--Standing Committee for Settlement of Disputes--If any question, difference or objection, whatsoever shall arise in anyway, in connection with or arising out of this instrument, or the meaning or operation of any part thereof, or the rights, duties or liabilities of either party then, save insofar, as the decision of any such matter, as hereinbefore provided for, and been so decided, every such matter constituting a total claim of Rs. 50,000 or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated or has been rightly terminated, and as regards the rights or obligations of the parties, as the result of such termination, shall be referred for decision to the empowered Standing Committee, which would consist of the following:

- (i) Administrative Secretary concerned.
- (ii) Finance Secretary or his nominee, not below the rank of Deputy Secretary.
- (iii) Law Secretary or his nominee, not below the rank of Joint Legal Remembrancer.
- (iv) Chief Engineer-cum-Addl. Secretary of the concerned department.
- (v) Chief Engineer concerned (Member-Secretary).

The Engineer-in-charge, on receipt of application along with non-refundable prescribed fee (the fee would be 2% of the amount in dispute, not exceeding Rs. One lakh) from the contractor, shall refer the disputes to the committee, within a period of one month from the date of receipt of application.

Procedure and application for referring cases for settlement by the Standing Committee shall be, as given in Form RPWA 90."

5. The writ petition was filed alleging that the Administrative Secretary and the Finance Secretary were associated in making a decision to recover the price escalation, allowed in favour of the respondent-contractor, and thus their inclusion in the Standing Committee will prejudice the proceedings in settlement of disputes. An interim order was passed by learned Single Judge.

6. The writ petition was pending in the court for last four years. At the time of hearing, a preliminary objection was taken by learned Advocate General regarding the maintainability of the writ petition. He submitted that in view of the Clause 23 of the agreement/contract, which is in the nature of an arbitration clause, the committee is required to decide the matter under the provisions of the Act of 1996. He further submitted that the questions, involved in the writ petition, are question of facts, which cannot be adjudicated in the writ jurisdiction of the court.

7. Learned counsel appearing for the claimant-respondent submitted before learned Single Judge that the formation of the Standing Committee involves Administrative Secretary as well as the Finance Secretary, who were instrumental in passing the impugned orders of recovery of the amount, which was paid for the price escalation in the delayed period of contract to the respondents, and thus the reference of the matter to the Standing Committee for arbitration, will not only be illegal, but also that the petitioners did not expect impartial decision in the hands of the same officers.

8. Learned Single Judge accepted the objections raised by learned Advocate General that the question of facts cannot be determined in the writ petition filed under Article 226 of the Constitution of India, 1950. He found that the dispute as to whether there was any delay on account of re-phasing and the same is attributable to the contractor and the claim for price escalation can be determined only by an arbitrator. Learned Single Judge was of the opinion that Clause 23 is an arbitration clause, and that since there were disputes, which can be referred to arbitration under Section 11 of Act of 1996, the matter should be referred to the arbitration. In view thereof, he gave the directions as follows:

"In view of the above, the Standing Committee would adjudicate the dispute as per provisions of the Act of 1996. It is, however, made clear that if the Administrative Secretary or the Finance Secretary who were instrumental or associated with the decision making process of the impugned order, are members of Standing Committee, then it would be referred to Hon"ble Mr. Justice Sunil Kumar Garg, Judge (Retired), Rajasthan High Court, for arbitration. The petitioners, in the meanwhile, would be at liberty to take resort to Section 9 of the Act of 1996 or if the dispute is referred to the arbitration, as directed above, then to make application under Section 17 of the Act for interim protection. The government would be expected to complete the exercise for sending the matter for settlement of disputes to the Standing Committee or an independent arbitrator in given circumstances explained above, within a period of one month from the date of receipt of copy of this order. For a period of one month, interim

order to continue.

With the aforesaid directions/observations, all the writ petitions so as the stay applications are disposed of."

9. Learned Additional Advocate General appearing for the State of Rajasthan-the appellants submits that Clause 23 of the agreement/contract is not an arbitration clause. Learned Advocate General had not given any concession before Single Judge to treat Clause 23 as an arbitration clause. He had raised an objection to the effect that the petitioner had failed to invoke the jurisdiction of the Standing Committee, which is provided under the agreement to decide the matter. He submits that Clause 23 of the agreement/contract provides a decision of the Standing Committee consisting of the officers of the State Government. The said clause is not an arbitration clause. It does not refer to arbitration as a mode of settlement of dispute and that the decision of the Administrative Committee has not been made binding under the clause on either of the parties. It does not provide or refer to any procedure of reference, or disclose an intention to make Standing Committee an arbitrator to decide the dispute, which may arise between the parties. The decision of the Standing Committee could be further challenged under Clause 51 of the agreement/contract, which provides as follows:

"Clause 51--Jurisdiction of court--In the event of any dispute arising between the parties hereto, in respect of any of the matters comprised in this agreement, the same shall be settled by a competent court having jurisdiction over the place, where agreement is executed and by no other court, after completion of proceedings under Clause 23 of this contract."

10. Learned AAG has relied on State of Orissa and Others Vs. Bhagyadhar Dash, AIR 2011 SC 3409 : (2011) 3 ARBLR 139 : (2011) 112 CLT 648 : (2012) 1 CTC 778 : (2011) 7 JT 283 : (2012) 1 RCR(Civil) 160 : (2011) 7 SCALE 71 : (2011) 7 SCC 406 : (2011) 8 SCR 967 : (2011) AIRSCW 5303 in support of his contention, and stated that Clause 23 is not an arbitration clause as contemplated under the Act of 1996, and further that in absence of any officer named in Clause 23, the matter could not have been referred, in the alternative, to a sole arbitration of a retired judge of the High Court. He submits that appointment of an arbitrator, in case of neglect or refusal, is the prerogative of the Chief Justice or the judge, to whom powers are delegated under Section 11 of the Act of 1996. The powers of Hon"ble Chief Justice cannot be used by any judge sitting under Article 226 of the Constitution of India. A remedy under Article 226 of the Constitution of India is not in substitution or in addition to Section 11 of the Act of 1996.

11. It is further submitted that the special appeal has been preferred by the State of Rajasthan only as against the claim of M/s. SPML Infra Limited, which has referred the matter to the arbitrator Hon"ble Mr. Justice Sunil Kumar Garg (Retired), Rajasthan High Court, on which Mr. Justice Sunil Kumar Gerg has issued notices to the State of Rajasthan.

12. It is submitted that the other five contractors have accepted the correct legal

position, and have approached the Standing Committee, which has been reconstituted, and in which the Administrative Secretary and the Finance Secretary are not members. Learned AAG appearing for the State of Rajasthan has placed before us an order of the Standing Committee, which now consists of following members, of which para 1 reads as follows:

"Office of the Secretary PHED and Ex. Officio Chairman Empowered Standing Committee, Rajasthan

Order

To settle the disputes under the contract for Chambal Sawai Madhopur Naudati Water Supply Project, in respect of recovery of LD amount of Rs. 4.14 crores from the contractor M/s. SPML Infra Limited and claims of Rs. 99.72 crores of contractor over and above PV clause, the matter was put up before the Empowered Standing Committee, as per Clause 23 of the General Conditions of Contract, the meeting of the Empowered Standing Committee was held on 12.02.2015 at 2:30 p.m.

Following members of the Standing Committee were present in the meeting:

13. The newly constituted Standing Committee does not include the Principal Secretary looking after the department of PHED, who is the Administrative Secretary and the Finance Secretary. In any case, the Administrative Secretary and the Finance Secretary, against whom it was alleged that they were parties to decision making process of the orders, against which the contractor has made a reference to the Standing Committee, have either been transferred or retired. They are not the members of the Standing Committee, as it is constituted now to decide the disputes.

14. Learned counsel appearing for the respondent submits that Clause 23 of the agreement/contract is in the nature of an arbitration clause, and that since the Administrative Secretary and the Finance Secretary were party to the decision making process, in which the amount of escalation paid was directed to be deposited, there was likelihood of official bias in deciding the matter under Clause 23 of the agreement/contract. It is submitted that the Standing Committee had referred the matter to the Law Department, seeking opinion on an objection taken by the respondent, to the constitution of the committee. With reference to one of the orders of the High Court and the interim order passed in the writ petition, giving rise to the special appeal, the matter was referred by the Standing Committee for legal opinion, which was not given, and that for last four years, the matter is pending. It is submitted that the reference for arbitration to a retired judge of this court, can be made by this court under Article 226 of the Constitution of India also, which is a remedy in substitution to the powers of the High Court under Section 11 of the Act of 1996.

15. We have considered the respective submissions and do not find that Clause 23 of agreement/contract providing for settlement of disputes by the Standing

Committee is an arbitration clause. It does not provide for reference for settlement of dispute by an arbitrator. It also does not provide for any finality to the decision taken by the Standing Committee of the department.

16. In *State of Orissa and others vs. Bhagyadhar Dash* (supra) a similar clause, in which it was provided that in the event of dispute between the parties, as claimed for increase or reduction of certain items, the matter will be decided by the Superintending Engineer, it was held by Supreme Court, after considering its previous decisions, as follows (paras 15 to 17, pages 337-339 of SCACTC=pages 151-153 of Arb. LR):

"22. We may next examine whether the last sentence of the proviso to Clause 10 could be considered to be an arbitration agreement. It does not refer to arbitration as the mode of settlement of disputes. It does not provide for reference of disputes between the parties to arbitration. It does not make the decision of the Superintending Engineer binding on either party. It does not provide or refer to any procedure which would show that the Superintending Engineer is to act judicially after considering the submissions of both parties. It does not disclose any intention to make the Superintending Engineer an arbitrator in respect of disputes that may arise between the Engineer-in-charge and the contractor. It does not make the decision of the Superintending Engineer final on any dispute, other than the claim for increase in rates for non-tendered items. It operates in a limited sphere, that is, where in regard to a non-tendered additional work executed by the contractor, if the contractor is not satisfied with the unilateral determination of the rate there for by the Engineer-in-charge the rate for such work will be finally determined by the Superintending Engineer. It is a provision made with the intention to avoid future disputes regarding rates for non-tendered items. It is not a provision for reference of future disputes or settlement of future disputes. The decision of Superintending Engineer is not a judicial determination, but decision of one party which is open to challenge by the other party in a court of law. The said clause can by no stretch of imagination be considered to be an arbitration agreement. The said clause is not, and was never intended to be, a provision relating to settlement of disputes.

23. That Clause 10 was never intended to be an arbitration agreement is evident from the contract itself. It is relevant to note that the standard conditions of contract of the State Government, as originally formulated, consisted of a provision (Clause 23) relating to settlement of disputes by arbitration, which is extracted below:

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in anyway arising out of or relating to the contract, designs, drawing, specifications, estimates, instructions, orders or/these conditions, or otherwise concerning the work, or the execution, or failure to execute the same,

whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. If there be no such Superintending Engineer, it should be referred to the sole arbitration of Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this contract."

(emphasis supplied)

24. The said clause was deleted by the State Government from the standard conditions of contract by official memorandum dated 24.12.1981. Contracts entered by the State Government thereafter did not have the said arbitration clause, though the other conditions of contract remained the same. The contracts in all these cases are of a period subsequent to 24.12.1981 and the conditions of contract forming part of these contracts do not contain the arbitration clause. When the State Government has consciously and intentionally deleted the provision for arbitration from its contracts, it will be a travesty of justice to read another clause in the contract providing for execution of non-tendered items and the method of determination of the rates therefor, as a provision for arbitration.

25. In fact, in Executive Engineer, R.E.O. Vs. Suresh Chandra Panda (Dead) Through Lrs, (1999) 10 JT 555 : (1999) 9 SCC 92 , this court considered the effect of the said clause relating to execution of non-tendered items, vis-a-vis Clause 23 in a pre-1981 contract. This court held that the said clause (then numbered as Clause 11, numbered as Clause 10 in subsequent contracts) was a provision which excluded the issue relating to finality of rates, from the scope of arbitration agreement contained in Clause 23 on the following reasoning (para 4, page 569 of Arb. LR):

"4. Under Clause 11 of the contract, there is an elaborate provision dealing with the power of the Engineer-in-charge to make any alterations or additions to the original specifications, drawings, designs and instructions. It, inter alia, provides that if for such alterations or additions no rate is specified in the contract, then the rates which are entered in the sanctioned schedule of rates of the locality during the period when the work is being carried out, would be paid. However, if this class of work is not provided for in the sanctioned schedule of rates, then the contractor has the right, in the manner specified in that clause, to inform the Engineer-in-charge of the rate at which he intends to carry out that work. If the Engineer-in-charge does not agree to this rate he is given the liberty to cancel his order and arrange to carry out such class of work in such manner as he may consider advisable. The clause further provides that if the contractor commences such additional work or incurs any expenditure in respect of it before the rates are determined as specified in the clause, then the rate or rates shall be as fixed by the Engineer-in-charge. In the event of a dispute, the decision of the Superintending Engineer of the circle will be final. Under Clause 23, except as

otherwise provided in the contract, all disputes are arbitrable as set out in that clause. The finality of rates, therefore, under Clause 11 is a provision to the contrary in the contract which is excluded from Clause 23."

Thus, even when the standard conditions of contract contained a provision for arbitration (vide Clause 23), Clause 10 was considered to be a provision dealing with a matter excepted from arbitration. Be that as it may. The proviso to Clause 10, which provides that the decision of the Superintending Engineer is "final", merely discloses an intention to exclude the rates for extra items decided by the Superintending Engineer from the scope of arbitration, as an excepted matter, when there was an arbitration agreement (Clause 23) in the contract. When the arbitration agreement was deleted, provision dealing with non-tendered items cannot be described as an arbitration agreement. Be that as it may."

17. In the present case, the language of Clause 23 of the agreement/contract is almost the same as it was in Clause 10 of the conditions of agreement contract referred to in *State of Orissa and others vs. Bhagyadhar Dash* (supra), in which it was found by Hon'ble Supreme Court that the clause does not refer to arbitration as a mode of settlement of assessment. In the present case also, Clause 23 does not provide for reference, to settle the dispute between the parties, as an arbitration. The decision of the Administrative Committee is not a mode, binding under the clause on either of the parties. It does not provide for such procedure, which may show that the Superintending Engineer is to act judicially, which is attribute of the arbitration, after considering the submissions of the parties. The clause does not disclose any intention to make Standing Committee as an arbitrator in respect of dispute, which may arise. The decision of the Standing Committee is not a judicial determination, but a decision of one party. It is open to challenge by either party in the court of law under Clause 51 of the agreement/contract. Clause 23 of the agreement/contract, therefore, cannot be considered as an arbitration clause under the agreement. We further find that the direction given by learned Single Judge, firstly to the Standing Committee to adjudicate the dispute, was beyond the provisions of Clause 23 of the agreement/contract, and further the direction that if the Administrative Secretary and the Finance Secretary are the members, then the matter will be referred to the retired judge, is also wholly without jurisdiction. A writ court under Article 226 of the Constitution of India cannot take away the jurisdiction vested under Section 11 of the Act of 1996 on the Chief Justice or the judge designated by him. Such powers are to be exercised only by the Chief Justice or the judge designated by him and cannot be exercised indirectly or by reference in exercising jurisdiction under Article 226 of the Constitution of India. Ordinarily, the High Courts under Article 226 of the Constitution of India do not exercise powers which are vested under the special Act on either the Chief Justice or any judge nominated or designated under the Act. It is well settled that when something is required to be done under the statutory Act in a particular manner, it should be done in the same manner and not otherwise. Learned Single Judge could not have, even in the alternative, directed the matter to be decided by a

retired judge of the court by nominating the judge. The directions issued by learned Single Judge are clearly contrary to the scheme of the Act of 1996 for nominating an arbitrator, in case parties fail or neglect to appoint an arbitrator in accordance with the arbitration clause contained in the agreement. For the aforesaid reasons, the special appeal is allowed. The judgment and order of learned Single Judge dated 03.04.2014 is set aside.