

(2014) 11 DEL CK 0189

In the Delhi High Court

Case No : Writ Petition (Civil) 7970/2012 and CM 19942/2012

Steel Authority of India Ltd.

APPELLANT

Vs

Engineers Project India Ltd.

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 11 DEL CK 0189

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Yashraj Singh Deora, Advocate for the Appellant; J.P. Sengh, Sr. Advocate and Manoj K. Das, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—The petition has been filed by the petitioner-M/s. Steel Authority of India Ltd. (hereafter "SAIL") impugning an appellate award dated 17.02.2011 passed by the Appellate Authority whereby the appeal filed by SAIL against an award dated 10.01.2008 passed by the Sole Arbitrator, in terms of the proceedings initiated under Permanent Machinery of Arbitrators (hereafter "PMA"), was dismissed.

2. The relevant facts necessary for examining the controversy in the present petition are that SAIL awarded a contract (No. P/Proj/Modn/4011999106.1/340008) dated 25.01.1993 to Engineers Project India Ltd. (hereafter "EPIL") for commissioning of Walking Beam Reheating Furnaces in the Plate Mill and for dismantling of the Existing Furnaces at its steel plant at Rourkela, Odisha on turnkey basis. Certain disputes arose between SAIL and EPIL in relation to this contract, which could not be resolved amicably.

3. The contract dated 25.01.1993 entered into between SAIL and EPIL contained an arbitration clause, which read as under:-

"If at any time any dispute relating to this contract arises between the parties, the parties concerned may forthwith give to the other party a notice in writing of

the existence of such a dispute. Both the parties shall mutually try to resolve the dispute amicably. If however, the dispute remains unresolved, the same shall be settled in accordance with the guidelines of the Govt. of India."

4. SAIL and EPIL are Central Public Sector Enterprises. Concededly, in terms of the aforesaid arbitration agreement the dispute resolution mechanism under the PMA was applicable. Accordingly, EPIL initiated proceedings under the PMA and filed its claim before the Sole Arbitrator - Joint Secretary, Ministry of Heavy Industries and Public Enterprises inter alia claiming contractual payments with interests. The Sole Arbitrator passed an award dated 10.01.2008 whereby the claims of EPIL were allowed. SAIL filed an appeal (No. 4/LS/2008) before the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India challenging the award dated 10.01.2008. Shri T. K. Vishwanathan, Advisor, Ministry of Law & Justice passed an award dated 17.02.2011 whereby the appeal filed by SAIL was dismissed.

5. SAIL submitted that in terms of Clause X of the Office Memorandum (hereafter "OM") dated 22.01.2004, issued by the Government of India, an appeal challenging the award of the Sole Arbitrator would lie before the Law Secretary/ Special Secretary/Additional Secretary, Ministry of Law & Justice, Government of India. It was contended that Shri T. K. Vishwanathan (Advisor, Ministry of Law & Justice), was neither Law Secretary nor Special/Additional Secretary as on 17.02.2011 and accordingly the award dated 17.02.2011 passed by Shri T. K. Vishwanathan, was void ab-initio and non est as being without jurisdiction.

6. EPIL contended that in terms of the PMA mechanism an appeal challenging the award of the Sole Arbitrator was filed by SAIL before the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India, on 07.04.2008. At the relevant time Shri T. K. Vishwanathan was the Law Secretary. He was subsequently appointed as Advisor, Ministry of Law & Justice, Government of India (which is equivalent in rank to Law Secretary). It was further pointed out that the first order listing the case for hearing clearly disclosed the designation of T. K. Vishwanathan, the Appellate Authority. It is submitted that SAIL having pursued its appeal before the said authority cannot be permitted to assail the appellate award under Article 226 of the Constitution of India, thereafter. This contention is disputed on behalf of SAIL and it was contended that jurisdiction cannot be vested by consent of parties where none exists and, therefore, the impugned appellate award is void.

7. The controversy that is to be addressed is, whether the present petition ought to be entertained in view of the alternate dispute resolution mechanism as provided under OM dated 22.01.2004 (i.e. the PMA). And, whether the petitioner can be permitted to challenge the jurisdiction of the Appellate Authority after participating in proceedings before the said authority without protest or any reservation.

8. Undisputedly, PMA is a mechanism for settlement of disputes through

arbitration and, accordingly, Arbitration and Conciliation Act, 1996 would apply. The question whether parties could exclude the application of Arbitration and Conciliation Act, 1996 by agreement was considered by a division bench of this court in *Ircon International Limited v. National Building Construction Corporation Limited*: EFA (OS) No. 22/2006, decided on 28.11.2008 and this court held that:-

"28. So far as the part in the arbitration clause in the said agreement regarding the non-applicability of the Act of 1996 is concerned, we consider that it is void and the parties cannot by themselves exclude the statute itself which is being drafted by the Legislature to look after the arbitration matters."

In this view, the intervention by courts is limited and in the normal course, a writ petition would not be maintainable.

9. In the present case, SAIL preferred an appeal before the Appellate Authority and pursued its appeal before Shri T. K. Vishwanathan. The contention that SAIL was not aware of the designation of Shri T. K. Vishwanathan cannot be accepted as the same was clearly indicated in the communications issued by the said Authority for holding hearings. A notice for hearing before the Appellate Authority that was issued on 23.02.2010, has been produced by EPIL which conspicuously mentions that the hearing is before "T. K. Vishwanathan, Adviser to Minister of Law and Justice, Ministry of law and Justice". It is also not disputed that Shri T. K. Vishwanathan held a rank equivalent to a Secretary, Government of India. It is also clear that SAIL pursued its remedy before the said Appellate Authority willingly and without any reservation. SAIL filed an appeal against the award of the Sole Arbitrator on 07.04.2008 and the appellate award was passed on 17.02.2011. Notably, SAIL preferred the present petition on 18.12.2012, that is, twenty two months after the appellate award and more than four and a half years after filing its appeal before the Appellate Authority. SAIL's challenge to the jurisdiction of the Appellate Authority has to be viewed in this factual context.

10. In my view, SAIL cannot be permitted to impugn the jurisdiction of the Appellate Authority in these circumstances. It would be manifestly unfair to EPIL, if SAIL is permitted to do so after having availed of its chance before the Appellate Authority. The principle that the jurisdiction cannot be vested by consent of parties has limited application to alternate dispute resolution mechanisms, principally for the reason that such mechanisms are consensual and acquire their validity from agreement between parties.

11. In *Inder Sain Mittal Vs. Housing Board, Haryana and Others*, , the parties agreed for appointment of Superintending Engineer, ADB, Branch Circle, PWD (B&R) Branch, Faridabad as arbitrator for settlement of certain disputes. Shri R. K. Jain who was posted as Superintending Engineer at the material time, was later on transferred and was posted as Superintending Engineer, Construction Circle No. 1, Union Territory, Chandigarh, however, he continued with the arbitration proceedings and passed an award. The said award was challenged as being without jurisdiction. The Supreme Court held that; "We find that the point

raised in this case is no longer res integra as the same has been considered by this Court times without number." After referring to a number of decisions, the Supreme Court set aside the decision of the Punjab and Haryana High Court holding the award to be without jurisdiction. The Supreme Court further explained that: "In case the ground of attack flows from agreement between the parties which would undoubtedly be a lawful agreement, and the same is raised at the initial stage, the court may set it right at the initial stage or even subsequently in case the party objecting has not participated in the proceedings or participated under protest. But if a party acquiesced to the invalidity by his conduct by participating in the proceedings and taking a chance therein cannot be allowed to turn round after the award goes against him and is estopped from challenging validity or otherwise of reference, arbitration proceedings and/or award inasmuch as right of such a party to take objection is defeated."

12. Accordingly, the petition and the application are dismissed.