

(2002) 01 GAU CK 0004
In the Gauhati High Court
Case No : Writ Petition (C) No. 6157 of 2000

Subash Projects and Marketing Ltd. and Another	APPELLANT
Vs	
Assam Urban Water Supply and Sewerage Board and Others	RESPONDENT

Date of Decision : 22-01-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(3), 11(4), 11(5), 11(6)
Constitution of India, 1950 — Article 136, 32

Citation : (2002) 1 GLT 335

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : P.C. Markanda, G.N. Sahewalla, N. Markanda, A.K. Goswami and P. Bora, for the Appellant; C.K. Sarma Barua, B. Mahanta and N. Rajkhowa, for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, J.—This petition by M/s Subhash Projects & Marketing Ltd. has in its array the Chief Justice of Gauhati High Court along with Assam Urban Water Supply and Sewerage Board and Shri K.D. Lahkar, Arbitrator. It is a case in which the arbitration proceedings in motion was interrupted in its midway at the instance of the Managing Director of the Respondent No. 1 and also because of resignation submitted by the arbitrator, the Respondent No. 3.

2. I have heard Mr. P.C. Markanda, learned senior counsel assisted by Shri G.N. Sahewalla, learned senior counsel for the Petitioners and Mr. C.K. Sarma Barua, learned senior counsel assisted by Mr. B. Mahanta and Mr. N. Rajkhowa for the Respondents.

3. In this petition, the judgment passed by the learned Chief Justice of the Gauhati High Court in his administrative capacity dismissing the application of the Petitioner-Company for appointment of an arbitrator in place of Respondent No. 3 is in challenge. The Respondent No. 3 nominated by the Respondent No. 1 took part in the arbitral proceedings, but withdrew from the same pursuant to

the letter dated 18.5.98 issued by the Respondent-Board.

4. The Petitioner-Company succeeded in the tender process initiated by the Respondent Corporation/Board and secured three work orders for three different items of works under the Corporation. The items of works are - (i) Intake Structure and Laying and Testing of Pumping Systems at Zoo Road, (ii) Town Water Supply Scheme for Goalpara, and (iii) Design and Execution of Jorhat Town Water Supply Scheme. During the course of execution, disputes cropped up between the parties and eventually it was decided to refer the disputes to arbitration of two arbitrators, one to be nominated by the Petitioner-Company and the other by the Respondent-Board. The decision to refer the matter to arbitration was taken in a meeting held between the representative of the Company and the Managing Director of the Respondent-Board. It was further decided that the decision of the Arbitrators would be final and binding and the arbitration proceedings would be in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The Petitioner-Company nominated Sri S.K. Jain, advocate as its arbitrator and the Board appointed the Respondent No. 3 as the arbitrator. The appointment was made by Sri K.C. Barthakur, the then Managing Director of the Board vide letter dated 12.12.96. The arbitrators met on 2.1.97 for the first time followed by a few sittings to facilitate submission of statement of defence by the Board. The Board was marking time on different pretexts and, eventually, the arbitrators decided to proceed ex-parte and by an interim direction called upon the Board to pay Rs. 35,00,000/- to the Petitioner-Company. Amidst such development, the Board issued a notification on 5.5.98 notifying that the Board of Directors in its meeting held on 25.2.98 decided to cancel the reference to arbitration. On such notification the Respondent No. 3 by a letter issued on 18.5.98 intimated his decision not to act as arbitrator.

5. On this background, the Petitioner-Company approached the learned Chief Justice u/s 11 of the Act of 1996 in Arbitration Case No. 15/98 for appointment of an arbitrator in place of the Respondent No. 3. The said application was rejected by the learned Chief Justice by an order passed on 2.9.99 (Annexure XVI) after deliberating upon the contentious issues. The Petitioner-Company preferred a SLP being SLP(C) No. 19549/99 before the Hon'ble Supreme Court. The Petitioner-Company also filed a writ petition under Article 32, of the Constitution being W.P.(C) No. 81/2000. The Supreme Court disposed of the aforesaid SLP and the writ petition along with other cases of similar nature by the judgment and order dated 21.8.2000. Thereafter, the instant writ petition has been filed by the Petitioner-Company for directions to allow the arbitral proceedings to continue after appointment of arbitrator in place of Respondent No. 3 by the learned Chief Justice u/s 11(6).

6. The judgment delivered by the Apex Court has been reported in Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., The relevant part of the judgment reads as follows:

2. To basic questions which really arise for consideration are, (1) what is the

nature of the order that is passed by the Chief Justice or his nominee in exercise of power under Sub-section (6) of Section 11 of the Act? and, (2) even if said order is held to be administrative in nature what is the remedy open to the person concerned if his request for appointment of an arbitrator is to (sic) down by the learned Chief Justice or (sic) nominee, for some reason or other?

3. In deciding the latter question it would be necessary to find out the true intention of the legislature in substituting 1940 Act by the present Act and bearing in mind" the object of enactment of the new Act what should be approach of the learned Chief Justice or his nominee when an application for appointment of an arbitrator is made invoking the jurisdiction u/s 11(6) of the 1996 Act.

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5. An analysis of different sub-sections of Section 11 would indicate the character of the order, which the Chief Justice or his nominee passes under Sub-section (6) of Section 11. Sub-section (3) and Sub-section (4) deals with cases, in which a party fails to appoint an arbitrator or the arbitrators fail to agree on the third arbitrator and thus seeks to avoid frustration or unreasonable delay in the matter of constitution of the Arbitral Tribunal. It authorises the Chief Justice of India or the Chief Justice of a High Court concerned, or any person or institution designated by him to make the appointment upon request of a party, if the other party has failed to appoint an arbitrator within thirty days from the receipt of a request to that end. Sub-sections 4, 5 and 6 designedly use the expression "Chief Justice" in preference to a Court or other authority as in paragraphs (3) and (4) of Article 11 of the Model Law, obviously for the reason that the Chief Justice acting in his administrative capacity, is expected to act quickly without encroaching on the requirements that only competent persons are appointed as arbitrators. Sub-section (4) does not lay down any time limit within which the Chief Justice or his nominee, designated by him, has to make the appointment. It however expects that these functionaries would act promptly. While Sub-sections (4) and (5) deal with removal of obstacles arising in the absence of agreement between the parties on a procedure for appointing the arbitrator or arbitrators, Sub-section (6) seeks to remove obstacles arising when there is an agreed appointment procedure. These obstacles are identified in Clauses (a), (b) and (c) of Sub-section (6). Sub-section (6) provides a cure to these problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary measure i.e. to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment. Sub-section (6), therefore, aims at removing any dead-lock or undue delay in the appointment process. This being the position, it is reasonable to hold that while discharging the functions under

Sub-section (6), the Chief Justice or his nominee will be acting in his administrative capacity and such a construction would subserve the very object of the new Arbitration Law.

6. The nature of the function performed by the Chief Justice being essentially to aid the Constitution of the Arbitration Tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order, as has been held by this Court in Ador Samia's case and the observations of this Court in Sundaram Finance Ltd. Case also is quite appropriate and neither of those decisions require any reconsideration. This being the position even an order refusing to appoint an arbitrator will not be amenable to the jurisdiction of this Court under Article 136 of the Constitution. Needless to mention such an order refusing to appoint an arbitrator after deciding the contentious issues would be an act of non-performance of duty and in view of what has been stated earlier the concerned authority could be directed by mandamus to perform its duty.

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8. SLP (Civil) No. 19549/99 is directed against the order of the learned Chief Justice of Gauhati High Court, refusing to appoint an arbitrator, after entertaining contentious issues and deciding the said issues by elaborate consideration, on a finding that there is no valid agreement for arbitration. Even if, it was not open for the learned Chief Justice to entertain the contentious issues and deciding the same, but since the ultimate order is administrative in nature, as has been held by us and since learned Chief Justice does not function as a Court or Tribunal, the order, cannot be subject to judicial scrutiny of this Court under Article 136 of the Constitution. The aggrieved party however, has a remedy to approach the High Court for issuance of a "writ of mandamus, if so advised, in accordance with law. It is clarified that the learned Chief Justice not having functioned as a Court or Tribunal and the order being administrative in nature, the observations and findings are not binding and will not be taken into consideration by the Arbitral Tribunal, if an objection to validity or existence of Arbitration Agreement is taken before it. Such objection, if taken, shall be decided on its own merits. The SLP stands rejected.

9. Writ Petition (Civil) No. 81/2000 is a petition under Article 32 of the Constitution, against the very order of the learned Chief Justice of Gauhati High Court, which was the subject matter of challenge in SLP (C) No. 19549/99. We fail to understand how a petition under Article 32, at all is entertainable against the order of the learned Chief Justice, refusing to appoint an arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996. This petition under Article 32, accordingly stands dismissed.

7. It would appear from the aforesaid judgment of the Supreme Court that the

Petitioner-Company has a remedy by way of issuance of a Writ of Mandamus to direct the learned Chief Justice to appoint arbitrator in accordance with the provisions of Sub-section (6) of Section 11. The provisions in Sub-section (6) reads as follows:

(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 proceeding; 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.

8. The provisions above provide a remedy to the problem by allowing the aggrieved party to request the learned Chief Justice or any person or institution designated by the learned Chief Justice to make the appointment, unless the agreement on the procedure provides other means for securing the appointment. It is for the learned Chief Justice to make a decision under the given circumstances and the provisions of Sub-section (6) of Section 11. In the instant case, the learned Chief Justice decided the contentious issues between the parties and, thereafter, rejected the request. The learned Chief Justice held as follows:

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In any case it may be observed that looking to the conduct of the parties and whatever little correspondence as may be available on the record, there could be an occasion to construe that inference of existence of arbitration agreement could be drawn; but the big question which still comes in the way is that it should have been by the competent authority, legally entitled to enter into the agreement. No amount of consent or agreement by an officer of authority, howsoever high it may be, would confer any jurisdiction upon any forum or upon the arbitrators to settle the disputes through arbitration proceedings, where such authority has no right to enter into any such agreement in accordance with the provisions of the Act and the Rules. It has already been found that it was only the Board of Directors which could enter into any agreement of arbitration under 16(2)(vii) of the Act and the acts and actions on the part of the Managing Director relating to alleged arbitration agreement and appointment of arbitrators, etc., were without authority of law. Hence the Petitioner cannot insist for appointment of an arbitrator for deciding dispute in arbitration ousting the jurisdiction ordinarily available to the parties for settlement of disputes. In

absence of any valid agreement for arbitration, no relief can be granted to the Petitioner for appointment of arbitrator, or due to cancellation of appointment of arbitrators and the proceedings by the Board.

In view of the discussions held above, the petition for appointment of an arbitrator, as prayed by the Petitioner, is dismissed. Costs easy.

9. The provisions of Section 11(6) can be invoked by the learned Chief Justice only on satisfaction that there exists an appointment procedure agreed upon by the parties. This is a precondition for which the learned Chief Justice may undertake an exercise to draw the satisfaction as to the existence of an agreed appointment procedure. In *Wellington Associates Ltd. Vs. Mr. Kirit Mehta*, the Supreme Court in para 15 held as follows:

15. The more important question however is whether Section 16 excludes the jurisdiction of the Chief Justice of India or his designate in this behalf if a question as to the existence of the arbitration clause is raised by the Respondent in his reply to the petition filed u/s 11. (I am not concerned with the question of the validity or effect of the arbitration clause, in the present case). In my view, Section 16 does not take away the jurisdiction of the Chief Justice of India or his designate, if need be, to decide the question of the "existence" of the arbitration agreement. Section 16 does not declare that except of Arbitral Tribunal, none else can determine such a question. Merely because the new Act permits the arbitrator to decide this question. It does not necessarily follow that at the stage of Section 11 the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause.

10. It emerges from *Wellington Associates (supra)* that there is no constraint on the learned Chief Justice or his designate to decide the question as to the existence of arbitration clause. In fact, the provisions of Section 11(6) empowers the learned Chief Justice to take the necessary measure only when there is an appointment procedure agreed by the parties. From the judgment dated 2nd September, 1999 passed by the learned Chief Justice in O.J. (Arbitration) Case No. 15 of 1998 it would appear that despite arbitration proceedings having been commenced after a consensus was arrived at by the parties to settle the disputes through arbitration, the learned Chief Justice dealt with the question as to whether the Managing Director of the Board had the authority to enter into such agreement on behalf of the Board to settle the disputes through arbitration.

11. In the instant case, admittedly the arbitration proceedings commenced and it had met as many as five times and adjourned on the prayer of the Respondent-Board to enable them to file the statement of defence. Eventually, the Arbitral Tribunal had to pass an ex-parte interim order directing payment of Rs. 3,50,000/-. The arbitration proceedings was already in motion on being initiated by the two arbitrators appointed by the Petitioner-Company and the Respondent-Board. It was therefore, beyond the scope and ambit of provisions of Section 11(6) to deliberate upon the question of existence of a valid arbitration

agreement in view of the provisions of Section 16 which provides for resolution of such issues by the Arbitral Tribunal only. Undoubtedly, the Board has the right to raise such a question before the statement of defence is filed and this having been raised, was within the competence and jurisdiction of the Arbitral Tribunal to dispose of the same. Once the Managing Director of the Board, whether duly authorised or not, agreed to a consensus to settle all the disputes through arbitration and, in pursuance thereof, the arbitration proceedings in fact had commenced, it was the Arbitral Tribunal which alone had the authority to decide the question with respect to the existence or validity of the Arbitration Agreement and to rule on its own jurisdiction. Therefore, in the given situation of the case, the learned Chief Justice had no option but to appoint an arbitrator in accordance with the provisions of Sub-section (6) of Section 11.

12. The learned Chief Justice while acting u/s 11(6) acts in administrative capacity. In the given situation, the only course open to the learned Chief Justice was to appoint the arbitrator. Non-appointment amounted to refusal to exercise the powers vested with him. This have otherwise relegated the order of refusal a nullity in the eye of law.

13. Accordingly, the writ petition is allowed and the Respondents are directed not to give effect to the impugned notification dated 5.5.98 (Annexure-XIV) and the letter dated 18.5.98 issued by the Respondent No. 3 (Annexure-XV). The order dated 2.9.99 (Annexure-XVI) passed by the learned Chief Justice is hereby set aside. The learned Chief Justice is hereby called upon to pass appropriate orders in the matter of appointment of arbitrator in Arbitration Case No. 15/98 in the light of the observations made hereinbefore. The Respondent No. 3, if he agrees to continue as Arbitrator or, alternately, any other person eligible to act as arbitrator may be appointed. The parties are accordingly directed to approach the learned Chief Justice on 22.2.2002 and the learned Chief Justice shall on such appearance pass appropriate orders.