
(2014) 02 CAL CK 0069
In the Calcutta High Court
Case No : AP Nos. 1398 and 1439 of 2013

Union of India

APPELLANT

Vs

Panihati Rubber Limited

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(7), 11(8), 11(8)(a)

Constitution of India, 1950 — Article 136, 226

Citation : (2014) 3 ARBLR 232 : (2014) 2 CALLT 232

Hon'ble Judges : S. Banerjee, J

Bench : Single Bench

Advocate : Malay Kumar Das and Aparna Banerjee and Partha Sarathi Bose, Sr. Adv, Advocate for the Appellant; Jishnu Saha, Sakya Sen, Manali Bose, Ashis Mukherjee, Surabhi Banerjee and Jishnu Chowdhury, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Sanjib Banerjee, J.—The common question of law that arises in these two petitions may have to be differently answered in the light of a perceived judicial aberration. The primary ground urged by the railways in challenging the arbitral award in either case is that the constitution of the arbitral tribunal was at variance with the arbitration agreement and, as such, upon objection taken in such regard, the concerned arbitrator ought to have relinquished the authority to adjudicate upon the disputes that had arisen under the arbitration agreement.

The arbitration agreement in either case is similar. Since the agreements in these two matters were executed at different points of time, the earlier agreement is governed by the old set of general conditions governing railway contracts. But the relevant sub-clauses of the arbitration clauses in both sets of general conditions governing railway contracts are identical. Sub-clause (c) of clause 2900 of the present set of general conditions governing railway contracts is set out:

2900. Arbitration.

(a)...

(b)...

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all....

2. In the earlier of the two petitions, a request u/s 11 of the Arbitration and Conciliation Act, 1996 was carried to the Chief Justice of this Court or his designate in 2010 upon the apparent failure of the appointing authority designated under the arbitration agreement to constitute an arbitral tribunal. As was the practice in this court at the relevant point of time, the adjudication of the request was made by the arbitration Judge and the naming of the arbitrator was by the Chief Justice or another designate of the Chief Justice. The arbitration Judge found the request to be in order and the appointing authority having forfeited the right to constitute the arbitral tribunal. By an order of November 13, 2010 the matter was referred to the other designate of the Chief Justice for constituting the arbitral tribunal. On January 14, 2011, a retired judicial officer was appointed arbitrator to adjudicate upon the disputes between the parties covered by the arbitration agreement. An objection was taken before the arbitrator by the railways on the ground that the appointment of the arbitrator was not in consonance with clause 2900 of the general conditions governing railway contracts. It was pointed out that the appointing authority could only appoint a gazetted railway officer as arbitrator and since the appointment in that case was to a person other than a gazetted railway officer, such arbitrator did not have the authority to take up the reference. The arbitrator noticed such objection and held, upon referring to the Constitution Bench judgment in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, that an appointment made by the Chief Justice or his designate u/s 11 of the 1996 Act could not be challenged before the arbitrator so appointed.

3. In the second matter, the request u/s 11 of the 1996 Act was lodged in 2005. By an order of July 11, 2005 the arbitration Judge found the request to be in order and referred the matter for constitution of the arbitral tribunal to the Chief Justice. On August 25, 2005 a retired Judge of this Court was appointed as arbitrator to adjudicate upon the disputes covered by the arbitration agreement. Before the arbitrator, clause 64 of the previous set of general conditions governing railway contracts was cited by the railways to protest the appointment. Despite the pointed objection as to the authority of the arbitrator as evident from the counter-statement, the arbitrator did not specifically deal with such aspect in the award, though it appears from the minutes of the ninth sitting held before the arbitrator on June 9, 2006 that the preliminary objection was urged and the arbitrator recorded that the "preliminary objection on the issue of composition,

maintainability and jurisdiction of the Arbitral Tribunal shall be dealt with at the time of disposing of the arbitration proceeding on merit." The award of July 31, 2013 records no more on the objection than the arbitrator having been appointed by the Chief Justice to adjudicate upon the disputes between the parties.

4. The railways rely on several judgments in support of their contention that the arbitral tribunal constituted in either case was illegal and, as a consequence, the awards passed have to be set aside upon being adjudged null and void on the ground of inherent lack of jurisdiction. In the first of the judgments cited, one reported at Union of India (UOI) Vs. Builders Corporation Pvt. Ltd., the appointment of the arbitrator was made by the Chief Justice of this court or his designate on September 26, 2002 as would appear from paragraph 6 of the judgment. The Division Bench in that case set aside the judgment in appeal on the basis of several Supreme Court judgments. Two of such judgments, one reported at (2004) 10 SCC 504 (Union of India v. M.P. Gupta) and the other Union of India v. Krishna Kumar (Civil Appeal No. 6324 of 2004 decided on July 19, 2007) which is unreported, have also been carried by the railways in support of their contention herein.

5. In M.P. Gupta, the Supreme Court noticed in a matter under the Arbitration Act, 1940 that the arbitration agreement specifically provided for the appointment of two gazetted railway officers of equal status as arbitrators and held that the High Court erred in appointing a retired Judge as the sole arbitrator. Clause 64(3)(a)(iii) of then general conditions governing railway contracts, which is identical to clause 2900(c) quoted above, was considered and the judgment merely said, "In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator." In Krishna Kumar the Supreme Court relied on the same observation as quoted above in M.P. Gupta to hold that the appointment of the arbitrator was at variance with clause 64 of the general conditions governing railway contracts.

6. The railways also refer to a judgment reported at Union of India (UOI) and Another Vs. Sohan Lal Puglia, where a question arose as to whether an arbitrator ought to have been appointed in terms of the arbitration agreement on a petition u/s 20 of the 1940 Act. The Supreme Court modified the order impugned before it by directing the parties to appoint arbitrators in tune with the arbitration clause contained in the contract. All three Supreme Court judgments were rendered prior to the SBP & Co. decision; and, two of them were in respect of matters governed by the 1940 Act.

7. An unreported judgment of a Division Bench of this Court in Supriya Kumar Sana v. Union of India (APOT No. 520 of 2013 decided on December 24, 2013) has finally been placed by the railways where the Division Bench set aside the arbitral awards in the matters before it on the ground of improper constitution of the arbitral tribunals. The appointments made in the two cases before the Division Bench were on August 14, 2003 and on March 27, 1998.

8. The award-holders rely on the Constitution Bench judgment of seven judges in *SBP & Co. reported at S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, which overruled the previous Constitution Bench judgment of five judges in *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, In course of discussing the nature of the authority available to the Chief Justice or his designate in assessing a request u/s 11 of the 1996 Act, the majority opinion was that it would "be incongruous to say that after, the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice." However, there is the use of the expression "prima facie" in course of such discussion at paragraph 12 of the report though paragraph 32 of the report is the more definitive pronouncement on such aspect as it refers to section 11(7) of the 1996 Act which confers finality on a decision of the Chief Justice or his designate. The Constitution Bench has recognised the remedy of a party aggrieved by an order of the Chief Justice or his designate to be by way of a petition under Article 136 of the Constitution before the Supreme Court. The following passage from paragraph 32 of the report is apposite in the context:

Once this Court declines to interfere with the adjudication of the "Chief Justice to the extent it is made, it becomes final. This reasoning is also supported by sub-section (7) of section 11, making final, the decision of the Chief Justice on the matters decided by him while constituting the Arbitral Tribunal. This will leave the Arbitral Tribunal to decide the dispute on merits unhampered by preliminary and technical objections. In the long run, especially in the context of the judicial system in our country, this would be more conducive to minimising judicial intervention in matters coming under the Act. This will also avert the situation where even the order of the Chief Justice of India could be challenged before a Single Judge of the High Court invoking Article 226 of the Constitution or before an Arbitral Tribunal, consisting not necessarily of legally trained persons and their coming to a conclusion that their constitution by the Chief Justice was not warranted in the absence of an arbitration agreement or in the absence of a dispute in terms of the agreement.

Finally, in summing up the majority opinion in *SBP & Co.* it was, inter alia, concluded as follows:

47....

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of section 11(8) of the Act if the need arises but the

order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* and orders u/s 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided u/s 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications u/s 11(6) of the Act.

9. The award-holders rely on two other Supreme Court judgments reported at *A.P.S. Kushwaha (SSI Unit) Vs. Municipal Corporation and Others*, and *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, In *APS Kushwaha* the issue was whether the sole arbitrator appointed by the designate of the Chief Justice u/s 11(6) of the 1996 Act lacked inherent jurisdiction to decide the disputes under the arbitration agreement. The Court referred to *SBP & Co.* and held at paragraph 8 of the report that "once the Chief Justice or his designate appoints an arbitrator in an application u/s 11 of the Act, after satisfying himself that the conditions for exercise of power to appoint an arbitrator are present, the Arbitral Tribunal could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause." In rendering such opinion, the Supreme Court construed the dictum in *SBP & Co.* and it is such interpretation which has to be regarded as the law of the land. In *Northern Railway Administration* the Supreme Court opined that though it is not mandatory for the Chief Justice or his designate to appoint the named arbitrator or arbitrators, yet due regard has to be given to the qualifications required by the agreement and other considerations.

10. Another judgment of the Supreme Court construing the relevant dictum in *SBP & Co.* has also been placed by the award-holders. In such judgment reported at *Vipin Kumar Gadhok Vs. Ravinder Nath Khanna and Others*, the expression "prima facie" in the relevant discussion in *SBP & Co.* was specifically referred to but, on the aspect of arbitrability of the disputes, it was held that the arbitrator could no longer examine such question.

It is, however, a Division Bench judgment of this Court reported at *Niraj Kumar Bohra Vs. Union of India (UOI)*, cited by the railways, that gives the closest answer to the legal question by interpreting *SBP & Co.* as follows:

17....

The Apex Court further made it clear that from the date of delivery of judgment

in the case of Patel Engineering the order appointing Arbitrator by the Hon''ble Chief Justice would be final and binding upon the parties and neither party would be entitled to question the same before the Arbitrator in case any of the parties is aggrieved by such appointment only recourse left open to him is to apply before the Apex Court under Article 136 of the Constitution.

11. There is, therefore, a clear distinction by virtue of the majority opinion in the Constitution Bench judgment of SBP & Co., that appointments made u/s 11 of the 1996 Act till October 26, 2005, which were governed by the decision in Rani Construction, could be challenged before the arbitral tribunal; but the appointments made by the Chief Justice or his designate subsequent to the judgment in SBP & Co. could no longer be assailed before the arbitral tribunal. In the light of such obvious distinction, the appointments of arbitral tribunals made u/s 11 of the 1996 Act prior to SBP & Co. in derogation of the qualifications of the members required by the arbitration agreements would be invalid in the light of the judgment in Krishna Kumar as accepted by the Division Bench of this court in Builders Corporation. But the appointment of arbitral tribunals made u/s 11 of the 1996 Act from October 27, 2005 by the Chief Justice or his designate disregarding the qualifications of the members of the arbitral tribunal could not be assailed before the arbitral tribunal.

12. The law as laid down by the Supreme Court and judgments of the Supreme Court as interpreted by the Division Bench of a High Court are binding on the single Judge. In such context it may be out of place to suggest that there is distinction between qualification and status; but the point must be made for development of the law in the field. It is submitted that the arbitration clause in the general conditions governing railway contracts refers to the status of the arbitrators and, possibly, not to their qualifications. Section 11(8) of the 1996 Act refers to qualifications and not status. While it is possible to appreciate that by virtue of being a gazetted railway officer a person may possess some experience in railway contracts which may be regarded as a qualification, the expression "any qualifications required of the arbitrator" in section 11(8)(a) of the 1996 Act may be seen more in the context of the expertise of the arbitrator to adjudicate upon the special nature of disputes that may arise under a particular arbitration agreement and not merely reflecting the status of the arbitrator in an organisation or elsewhere.

13. In the light of the law as it stands now, the challenge to the arbitral award on the ground of inherent lack of jurisdiction of the arbitrator in AP No. 1398 of 2013 fails since the appointment of the arbitrator in such case was on January 14, 2011 which was long after the SBP & Co. judgment on October 26, 2005. But the challenge to the arbitral award in AP No. 1439 of 2013 is upheld as the appointment of the arbitrator in such case was made in August 25, 2005. The award impugned in AP No. 1439 of 2013 is set aside and the parties are left free to take appropriate steps in accordance with law, including pursuing any claims afresh.

The second ground urged in challenging the award in AP No. 1398 of 2013 is the grant of interest by the arbitrator apparently in derogation of clauses 2401 and 2403 of the general conditions governing railway contracts. The operative parts of clause 2401 and clause 2403 are set out:

2401....

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Purchaser will be kept withheld or retained as such by the Purchaser till the claim arising out of or under the contract is determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent Court as prescribed under clause 2703 hereinafter provided, as the case may be, and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the Contractor.

2403. Lien in respect of Claims in other Contracts-...

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Purchaser or Government will be kept withheld or retained as such by the Purchaser or Government till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitrator, if the contract is governed by the arbitration clause or by the competent court under Clause 2703 hereinafter provided, as the case may be, and that the Contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the Contractor.

14. The parties have referred to a judgment reported at Union of India (UOI) Vs. Krafters Engineering and Leasing (P) Ltd., . The relevant clause in that case stipulated that no interest would be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract but provided for interest on government securities deposited by the contract. The Court held that where there was a contract between the parties expressly prohibiting the grant of interest, the arbitrator could not grant pendente lite interest ignoring the terms of the contract. The judgment was rendered in a matter arising out of the 1940 Act.

In the impugned award, the arbitrator has referred to section 31(7) of the 1996 Act in the context of the grant of interest but has not noticed the clauses relied upon by the railways to assess whether interest could be granted at all. Though it does not appear from the award that the relevant clauses were relied upon by the railways before the arbitrator, it is evident that there is an element of embargo on the award of interest in certain circumstances as evident from clauses 2401 and 2403 of the general conditions governing railway contracts. Since the arbitrator did not notice such clauses at all, the award on account of interest cannot be sustained and the award is set aside only to such extent and

the issue remanded for fresh adjudication before the arbitrator. The remainder of the award dated August 2, 2013 is upheld.

There will be no order as to costs in either case.

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