

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : ARBITRATION AND CONCILIATION ACT, 1996

ARB.P. No.123/2008

Date of decision : 04.12.2008

IN THE MATTER OF :

M/S S.P. SINGLA CONSTRUCTIONS Petitioner
Through : Mr. Amit Aggarwal, Adv.

Versus

U.O.I. and ORS. Respondents
Through : Mr. Prakash Gautam with
Mr. Rakesh Tikku, Advs.

HIMA KOHLI, J. (O R A L)

1. The present petition is filed by the petitioner under Section 11(6), read with Sections 14 and 15 (2) of the Arbitration and Conciliation Act, 1996 (in short the Act) praying inter alia to appoint an independent and impartial arbitrator in terms of Section 11(6) read with Section 15(2) of the Act.

2. The case of the petitioner is that the petitioner is a contractor engaged in the business of carrying out government contracts. On 31.12.2005, the petitioner was awarded the work of constructing sub-structure on well foundation, pier/abutment, pier cap, bearing pedestals, earth work on approach embankments and other associated works of Bridge No.52 for double line track over river Ganga at Garhmuktesar bridge on Ghaziabad-Moradabad Section of Northern Railway. In the course of execution of the contract, disputes and differences arose between the parties. The petitioner issued a letter dated 19.2.2007 to the respondents calling upon them to refer all the disputes and claims raised by the petitioner to an arbitrator, in terms of the arbitration clause governing the parties, namely, Clause 64(1)(i) of the General Conditions of the Agreement.

3. Counsel for the petitioner states that as the claims were for a sum above Rs.10.00 lacs, three arbitrators were required to be appointed in terms of Clause 64(3)(a)(ii). The aforesaid clause is reproduced herein below for ready reference : 64(3)(a)(ii) In cases not covered by clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Rly. officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments of the Rly., to the contractor who will be asked to suggest to General Manager upto 2 names out of panel for appointment as contractors nominee. The General Manager shall appoint at least one out of them as the contractors nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from

outside the panel, duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.

4. Another clause referred to by the counsel for the petitioner is clause 64(3)(a)(v), which is also reproduced herein below for ready reference : 64(3)(a)(v) While appointing arbitrator(s) under sub-clause (i), (ii) and (iii), above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

5. Counsel for the petitioner states that in terms of the aforesaid clause governing the parties, the respondent was required to appoint such of the arbitrators who did not have any opportunity to deal with the matter relating to the contract out of which disputes and differences had arisen between the parties. He states that despite the same, the respondent, vide letter dated 14.1.2008, appointed an arbitral tribunal, which included the name of one Shri Y.P. Singh, Chief Engineer (Gen.), Northern Railway as the Presiding Arbitrator. Aggrieved by the appointment of the aforesaid Presiding Arbitrator on the ground that he was a party to the decisions taken in respect of the contract out of which the present disputes and differences had arisen between the parties, the petitioner wrote a letter dated 6.2.2008 to the respondents requesting them to substitute the aforesaid Presiding Arbitrator.

6. As the petitioner did not receive any response from the respondents, the petitioner preferred the present petition on 17.3.2008. The aforesaid petition was listed in the Court on 28.3.2008, on which date, an adjournment was sought by the counsel for the petitioner. As a result, the matter was renotified to 9.4.2008, on which date none appeared for the petitioner. Consequently, the petition was dismissed for non-prosecution. Thereafter, an application was filed by the petitioner under the provisions of Order 9 Rule 4 CPC registered as I.A. No.5433/2008 seeking restoration of the petition. The said application was allowed vide order dated 5.5.2008. On the same date, counsel for the petitioner, after addressing arguments in the main petition, sought time to place on record certain documents. At his request, the matter was renotified for 21.7.2008. On 21.7.2008, the petitioner was directed to serve a complete set of the paper book on the nominated counsel for the respondents and the matter was renotified for 16.9.2008, when appearance was entered on behalf of the respondents, who stated that the reply to the petition had been filed.

7. In the meantime, in the month of April 2008, the respondents, vide letter dated 11.4.2008, substituted the earlier Presiding Arbitrator, Shri Y.P. Singh with one Shri Ved

Pal. In the aforesaid letter, the respondents also mentioned the factum of the resignation of Shri Y.P. Singh, who was previously nominated to act as the Presiding Arbitrator.

8. In the course of arguments, counsel for the petitioner has raised two-fold grievance. The first grievance is that appointment of the subsequent Presiding Arbitrator, Shri Ved Pal is not permissible in view of the fact that the respondents have not appointed a new Arbitrator within the prescribed period and 30 days had expired from the date of the notice issued by the petitioner to the respondents i.e., w.e.f. 06.02.2008, calling upon them to appoint a substitute arbitrator. In this regard, counsel for the petitioner relies on the judgments in the cases of Datar Switchgears Ltd. vs. Tata Finance Ltd. and Anr., 2000 VIII AD (S.C.) 50 and UOI vs. R.R. Industries and Ors., 120 (2005) DLT 572 (DB).

9. The other grievance raised on behalf of the petitioner is that the respondents have unilaterally deleted 12 of its claims from being referred to the arbitrators for adjudication on the ground that the same are excepted matters. In support of his submission that the aforesaid claims are also liable to be referred to the arbitral tribunal for consideration, he relies on the judgment in the case of Earnest Builders Pvt. Ltd. vs. UOI and Ors., 2007 (3) ALR 183 (Delhi).

10. Per contra, counsel for the respondents submits that the present case is not covered by the judgments relied on by the counsel for the petitioner inasmuch as it is not a case where a first time appointment was to take place, but a case where a substituted Presiding Arbitrator was to be appointed. He, therefore, states that the Petitioner cannot insist on strict compliance of Section 11(6) of the Act. He further states that in any case, the respondents did not lose much time to substitute a Presiding Arbitrator as the request made by the petitioner dated 6.2.2008 was acted upon by the respondents in April 2008, by issuing letter dated 11.4.2008 naming a substitute Presiding Arbitrator. He contends that in the case of Northern Railways Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd., 2008 (4) JCR 16 (SC), the Supreme Court has emphasized the fact that the court must try to adhere to the terms of the agreement between the parties and give effect to the same as closely as possible and hence this court ought not to revoke the appointment made by the respondents as the same is strictly in terms of clause 63 (3)(a)(ii) of the General Conditions of Agreement.

11. Insofar as the issue with regard to the excepted matters is concerned, counsel for the respondents relies on a judgment in the case of General Manager Northern Railways and Anr. vs. Sarvesh Chopra, (2002) 4 SCC 45 to state that the excepted matters could not have been referred by the respondents to the arbitral tribunal.

12. I have heard learned counsels for both the parties and have carefully considered their respective submissions. At the outset, it is pertinent to note that the present petition filed by the petitioner is not one filed only under Section 11(6) of the Act, but one filed under Section 11 (6) of the Act read with Sections 14 and 15 of the Act. Section 14 of the Act stipulates the circumstances under which the mandate of an arbitrator shall terminate.

Section 15 of the Act stipulates the action to be taken in case of termination of mandate and substitution of an arbitrator.

13. Strictly speaking, the present case is one of substitution of the arbitrator and not of appointment of an arbitrator. Counsel for the petitioner relies on the provision of Section 11(6)(c) to state that it is a case where the institution has failed to perform the function entrusted to it as per the prescribed procedure and hence, the time prescribed in the judgment rendered in the case of Datar Switchgears Ltd. (supra) ought to be followed. This submission is to be considered in the light of the facts and circumstances of the present case.

14. In the present case, it is not disputed that initially the arbitral tribunal was constituted by the respondents as per the provisions of the contract governing the parties. It is also an admitted position that immediately after constitution of the arbitral tribunal by the respondents, under letter dated 14.1.2008, the petitioner conveyed its objection to the appointment of the Presiding Arbitrator, vide its letter dated 6.2.2008, which was followed by the respondents letter dated 11.4.2008 informing the Petitioner about the appointment of a substitute Presiding Arbitrator, Shri Ved Pal and referring to the resignation of the previous Presiding Arbitrator, Shri Y.P. Singh.

15. It is also relevant to note that the present petition as originally filed by the Petitioner, was listed on 28.03.2008, when at the request of the counsel for the Petitioner, the same was renotified for 09.04.2008. On the said date, the Petition was dismissed in default. In the meantime, the respondents issued the aforesaid letter dated 11.04.2008, appointing a substituted Presiding Arbitrator and intimating the Petitioner about the said appointment. The application seeking restoration of the petition came to be filed by the Petitioner only on 25.04.2008. The said application was listed in the Court on 05.05.2008 and duly allowed. While restoring the petition, the matter was adjourned to 21.07.2008, on the request of the Counsel for the Petitioner, to enable him to place on record certain documents, including the letter dated 11.04.2008 issued by the respondents in the meantime. Hence, strictly speaking, as on 11.04.2008, the date of issuance of the letter by the respondents naming the substitute Presiding Arbitrator, there was no pending petition under Section 11 (6) of the Act.

16. In these circumstances, this Court is not inclined to interfere with the appointment of the substitute Presiding Arbitrator, Shri Ved Pal. The provisions of Section 15(2) require that when the mandate of an arbitrator terminates either by his withdrawal from Office for any reason or by or pursuant to an agreement by the parties, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. In the present case, the respondents/UOI have done just that. The requirements of Section 15(2) have been duly complied with by the respondents and they cannot be faulted for the same. Same was the prayer of the petitioner in the present petition as well. Hence, this Court does not propose to set aside the appointment of the substituted arbitrator, as named in the letter dated 11.04.2008.

17. Furthermore, having regard to the observation of the Supreme Court in the case of Patel Engineering Company Ltd. (supra), this Court has to give due regard to the qualifications required by the agreement and other considerations for appointment of an arbitrator. The Supreme Court observed in the aforesaid case as below : 11. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. 12. The expression due regard means that proper attention to several circumstances have been focused. The expression necessary as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken. (emphasis added)

18. Insofar as the other issue with regard to non-inclusion of the purported excepted matters by the respondents in the terms of reference forwarded to the arbitral tribunal is concerned, counsel for the petitioner is justified in stating that it is not for the respondents to on its own exclude the claims of the petitioner in respect of the contract, from the consideration of the arbitral tribunal and that the said issues ought to be left open for the arbitral tribunal to decide. The judgment referred to by the counsel for the respondent in the case of Sarvesh Chopra (supra) was in the context of an order passed under Section 20 of the Arbitration Act, 1940.

19. The scope of consideration of a petition under Section 11(6) of the Act has been well delineated by a number of judgments in this regard, the most relevant one being in the case of S.B.P and Co. vs. Patel Engineering Ltd., 2005 (3) Arb. LR 285 (SC). While discussing the functioning and duties of a Chief Justice or the person or institution designated by him under Section 11(6) of the Act, the Court observed as below: 9 While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty exist. Therefore, unaided by authorities and going by general principles, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final. Xxx 11. The appointment of an arbitrator against the opposition of one of the parties on the ground that the Chief Justice had no jurisdiction or on the ground that there was no arbitration agreement, or on the ground that there was no dispute subsisting which was capable of being arbitrated upon or that the conditions for exercise of power under Section 11(6) of the Act do not exist or that the qualification contemplated for the arbitrator by the parties cannot be ignored and has to be borne in mind, are all

adjudications which affect the rights of parties. It cannot be said that when the Chief Justice decides that he has jurisdiction to proceed with the matter, that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon, he is not adjudicating on the rights of the party who is raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power, gets all the more emphasized, when sub- Section (7) designates the order under sub-sections (4), (5) or (6) a decision and makes the decision of the Chief Justice final on the matters referred to in that sub-Section. Thus, going by the general principles of law and the scheme of Section 11, it is difficult to call the order of the Chief Justice merely an administrative order and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist. Xxx 17Where a Chief Justice designates not a Judge, but another person or an institution to nominate an Arbitral Tribunal, that can be done only after questions as to jurisdiction, existence of the agreement and the like, are decided first by him or his nominee Judge and what is to be left to be done is only to nominate the members for constituting the Arbitral Tribunal. Looking at the scheme of the Act as a whole and the object with which it was enacted, replacing the Arbitration Act of 1940, it seems to be proper to view the conferment of power on the Chief Justice as the conferment of a judicial power to decide on the existence of the conditions justifying the constitution of an Arbitral Tribunal(emphasis added)

20. In a subsequent judgment rendered by the Supreme Court in the case of Shree Ram Mills Ltd. vs. Utility Premises Pvt. Ltd., 2007(4) SCC 599, while discussing the aforesaid case of Patel Engineering (supra), particularly para 39 thereof, the Supreme Court observed as below: .. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed questions of law and facts. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation. (emphasis added).

21. As per the aforesaid judgment, the Court has to prima facie come to a conclusion that there is a live dispute between the parties, that the said dispute is not barred by limitation and that there is no full and final accord between the parties. This Court is inclined to concur with the view expressed in the case of Earnest Builders Pvt. Ltd.

(supra), wherein it was observed that it cannot be said that the excepted matters are not liable to be referred to arbitration and it would be for the arbitrator to rule whether he has the jurisdiction to decide a particular dispute or claim. Even in the present case, the respondents ought to have referred all the claims raised by the petitioner to the arbitral tribunal and it should have been left to the arbitrators to decide as to whether certain claims raised by the petitioner come under the category of excepted matters or not.

22. In view of the foregoing discussion, the present petition is disposed of with the observation that as during the pendency of the present proceedings, the respondents have already appointed a substitute Presiding Arbitrator, no further orders are required in this regard. However, the respondents are directed to refer all the claims of the petitioner as raised by it, in respect of the contract, to the arbitral tribunal for adjudication in accordance with law. The respondents shall however be at liberty to raise a plea before the arbitral tribunal that some of the claims raised by the petitioner fall under the category of excepted matters and cannot be adjudicated upon by the tribunal.

23. The petition is disposed of. There shall be no orders as to costs.

Sd./-
HIMA KOHLI,J

DECEMBER 04, 2008