

The State of Bihar Vs. Texmaco Limited

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Court : Patna

Decided On : Jan-08-2007

Judge : S.N. Hussain, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 10, 11, 11(4), 16, 34 and 37

Appeal No. : CWJC No. 3512 of 2002

Appellant : The State of Bihar

Respondent : Texmaco Limited

Advocate for Def. : Manik Vedsen and Vikas Kumar, Adv.

Advocate for Pet/Ap. : Tarakant Jha, Sr. Adv and Kaushal Kishore Jha, Adv.

Disposition : Petition allowed

Judgement :

S.N. Hussain, J.

1. Heard learned Counsel for the petitioner (State of Bihar) and learned Counsel For the respondent (Texmaco Limited).
2. This writ petition has been filed for quashing order dated 20.04.2000 (annexure-9) passed by the learned designated Judge of this Court in Request Case No. 16

of 1999 under the provision of Section 11 of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as 'the Act' for the sake of brevity) appointing Sri Md. Anisur Rahman, Chief Engineer, Water Resources Department, Darbhanga as an arbitrator on behalf of the State of Bihar (petitioner) and Mr. Justice S.B. Sanyal, a retired Judge of this Court as Arbitrator on behalf of Texmaco Limited (respondent) and also for quashing order dated 30.01.2001 (annexure-11) passed by the said court in MJC No. 2131 of 2000 modifying the above mentioned order to the extent that the said order be treated to have been reiterated as a fresh order of appointment of arbitrators as on 30.1.2001 and further for quashing order dated 02.01.2002 (annexure-15) passed by the said Court in Request Case No. 16 of 2001 by which Mr. Justice Uday Sinha, a retired Judge of the Patna High Court was appointed as a 3rd arbitrator under the provision of Section 11(a)(b) of the Act.

3. Learned Counsel for the petitioner submitted that tender notice was issued on 05.11.1984 (annexure-1) by the office of the Superintending Engineer, North Koel Barrage Circle, Mohammadganj (Palamau), Bihar, inviting tenders for the design, manufacture, supply and installation of all necessary equipments for the gates of North Koel Barrage and its right Head Regulator at Mohammadganj coupled with all the necessary hoisting accessories and arrangements, tools and equipments for regulating gates etc. in continuation with earlier notices issued in that regard. It is also stated that in compliance of the aforesaid tender notice, the respondent (Texmaco Limited) sent its offer on 20.01.1985 (annexure-2) whereafter the petitioner (authorities of the State of Bihar) conditionally accepted the said offer on 21.07.1987 (annexure-3), whereafter an agreement/concluded contract was executed by the respondent and the Executive Engineer, North Koel Division, Mohammadganj, on behalf of the petitioner on 01.02.1988 (annexure-4).

Learned Counsel for the petitioner further averred that subsequently the respondent sent a letter to the petitioner dated 28.02.1999 (annexure-5) claiming that the work has been completed, but the payment of bills was being delayed due to which interest, renewal charges, commissions and other expenses have accrued and a total amount of Rs. 100.67 lacs have become due and payable inspite of repeated requests and demands, hence there was a serious dispute and

difference between the two parties and thus invoking the arbitration clause in the agreement, the respondent appointed Mr. S.B. Sanyal, a retired Judge of the Hon'ble Patna High Court as its arbitrator calling upon the petitioner to appoint its arbitrator immediately.

4. Learned Counsel for the petitioner also submitted that it intimated the respondent vide letter dated 23.03.1999 (annexure-6) that its claim for appointing Mr. Justice S.B. Sanyal, a retired Judge of this Court as arbitrator was rejected as the dispute can be referred only to the concerned Chief Engineer as the sole arbitrator according to the provisions of the agreement. In the said circumstances, the respondent filed Request Case No. 16 of 1999 before the learned designated Judge of this Court under the provision of Section 11 of the Act to which the petitioner filed a counter affidavit reiterating its stand that only the Chief Engineer can be appointed as the arbitrator according to the provision of the Act.

5. By order dated 20.4.2000 (annexure-9), the learned designated Judge appointed Justice S.B. Sanyal, a retired Judge of this Court and Sri Md. Anisur Rahman, Chief Engineer, Water Resources Department, Darbhanga, arbitrators, as nominees of the supplier (Texmaco Limited) and the purchaser (State of Bihar), respectively and also allowed the said two arbitrators to appoint an umpire in accordance with their requirement and law. Learned Counsel for the petitioner also stated that after the said order, the respondent filed a petition for modification bearing MJC No. 2131 of 2000 (annexure-10) of the aforesaid order dated 20.4.2000 (annexure-9) for either appointing Mr. Justice S.B. Sanyal as sole arbitrator or to appoint another arbitrator in place of Mr. Md. Anisur Rahman, but this modification petition was disposed of by the learned designated Judge vide order dated 30.01.2001 (annexure-11) refusing to change the said arbitrators. Learned Counsel for the petitioner further averred that the said arbitrators could not agree upon any third arbitrator or umpire for composition of the Arbitral Tribunal as per the order of the learned designated Judge and hence the respondent (Texmaco Limited) filed a fresh petition bearing Request Case No. 16 of 2001 for appointment of a third arbitrator and the said petition was disposed of by this Court on 02.01.2002 (annexure-15) exercising its power under Section 11(4)(b) of the Act and appointing Mr. Justice Uday Sinha, a retired Judge of this

Court as the third arbitrator.

6. Learned Counsel for the petitioner submitted that in the aforesaid facts and circumstances, the petitioner has challenged all the three aforesaid orders dated 20.04.2000 (annexure-9), 30.01.2001 (annexure-11) and 02.01.2002 (annexure-15) by way of filing this writ petition on 08.03.2002 on the ground that the learned designated Judge or the Request Court cannot go beyond the agreement dated 01.02.1988 (annexure-18) according to which only the Chief Engineer could have been appointed arbitrator under Clause 5.41 thereof. He further stated that the petitioner (State of Bihar) had never agreed for appointment of either two arbitrators or a third arbitrator and hence there was no occasion for the said court to go beyond the agreed arbitrator unless bias or malafide was proved which was not the case of the respondent. In support of the aforesaid submission, learned Counsel for the petitioner relied upon two decisions of the Hon'ble Apex court in case of the Secretary to the Government, Transport Deptt. Madras v. Manuswamy Mudaliar and Ors. reported in : AIR 1988 SC2232 and in case of Nav Bharat Construction Co. v. State of Rajasthan and Ors. reported in : (1996)7SCC89 .

7. On the other hand, learned Counsel for the respondent submitted that after the order passed by the learned designated Judge dated 02.01.2002 (annexure-15), arbitral proceeding commenced before the arbitrators so appointed and the petitioner filed objection petition before the Tribunal under Section 16 of the Act challenging its jurisdiction to act as arbitrator in view of the specific provision in the agreement, whereafter arbitral tribunal decided the said objection on 21.03.2003 (Annexure-C) and rejected the said claim. He further stated that the said order of the arbitral Tribunal was never challenged by the petitioner and it can be challenged after preparation of the award under the provisions of Sections 34 and 37 of the Act. He also averred that Clause 5.41 in the agreement is only with respect to notice inviting tender, but according to the final agreement (annexure-4) it has been specifically mentioned that arbitrator has to be chosen by both the parties. Learned Counsel for the petitioner further submitted that in Clause 17 of letter of offer dated 20.01.1985 (annexure-2) sent by the respondent, it had been specifically mentioned that arbitrators will be appointed according to the provision of law by the parties, whereupon the Engineer-in-Chief issued a letter of

acceptance of the said offer dated 21.03.1987 (annexure-3) in Clause 11 of which it had been mentioned that for arbitration, the provision of the Act would be applicable. Hence, learned Counsel for the respondent submitted that the entire claim of the petitioner is absolutely frivolous, misconceived and cannot be allowed.

8. From the arguments of the parties and the materials on record, it is quite apparent that the impugned orders dated 20.04.2000 (annexure-9), 30.01.2001 (annexure-11) and 02.01.2002 (annexure-15) were passed by the learned designated Judge without any objection having been raised by the petitioner rather in order dated 20.4.2000 (annexure-9), it has been mentioned that since the matter is clear, the arbitration should proceed as agreed between the parties and for that purpose names of two persons have been supplied by the concerned Executive Engineer present in court, whereas in order dated 30.1.2001 (annexure-11), it has specifically been stated that arbitrator on behalf of the petitioner specifically mentioned before the court that he was willing to be one of the arbitrators. Similarly from order dated 02.01.2001 also it does not appear that the learned Counsel for the petitioner raised any objection regarding appointment of two or three arbitrators, rather the only dispute was with respect to the name of third umpire due to which the court in exercise of its power under Section 11(4)(b) of the Act appointed a third umpire. In the said circumstances, no error or illegality can be validly pointed out in any of the said three orders.

9. From perusal of Clause 5.41 of the Annexure-18, it appears that the same is not an agreement, rather it is a notice inviting tender, whereas the final agreement is dated 01.02.1988 (annexure-4) in Clause 19 of which it had been specifically stated that arbitrator has to be chosen by both the parties to the contract. This agreement has been reached on the basis of the specific offer and acceptance by the petitioner and respondent which is clear from Clause 11 of the memo (annexure-3) issued by the State Government (petitioner) and Clause 17 of letter (annexure-2) sent by the respondent in that regard. According to the said offer, acceptance and agreement, arbitration had to be done according to the provisions of law and no specific arbitrator had been mentioned in either of them.

10. Section 10 of the Act specifically provides that in case of difference between the parties regarding appointment of an arbitrator, more arbitrator can be appointed, but the number shall not be an even number. Hence, in the aforesaid circumstances, appointment of one arbitrator each for both the parties and also the appointment of a third arbitrator cannot be held to be unjustified or against the provision of law specially when the parties did not agree upon the sole arbitrator.

11. It is not in dispute that after the last impugned order dated 02.01.2002 (annexure-15), the arbitral proceeding commenced and the petitioner filed objection petition before the Tribunal under Section 16 of the Act challenging its jurisdiction and the Tribunal decided the said petition on 21.03.2003 (annexure-C) rejecting the same. According to law settled by the Hon'ble Apex Court in case of *Konkan Railway Construction Ltd. v. Rani Construction Pvt. Ltd.* reported in : [2002]1SCR728 , it is open to the aggrieved party to require the arbitral proceeding to rule on its jurisdiction under the provision of Section 16 of the Act, according to which the arbitral proceeding may rule on its own jurisdiction and the arbitral proceeding may also rule on any objection with respect to the existence or validity of the arbitration agreement which shows that the arbitral tribunal's authority under Section 16 of the Act is not confined to the width of its jurisdiction, but goes to its very root of jurisdiction.

12. Furthermore, since the matter has reached the Arbitral Tribunal which has already decided the question of its jurisdiction, this writ petition is clearly infructuous according to the decision of the Hon'ble Apex Court in case of *S.B.P. & Co. v. Patel Engineering Ltd. and Anr.* reported in 2006 (1) PLJR (SC) 74. However, it will be open to the petitioner to challenge the aforesaid order of Tribunal dated 21.03.2003 (annexure-C) after the preparation of the award under the provisions of Sections 34 and 37 of the Act.

13. Accordingly, this petition is without any merit and is thus dismissed, but in the facts and circumstances of the case, there will be no order as to costs.