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Yashwitha Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. and anr.

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Court : Andhra Pradesh

Decided On : Nov-25-2005

Reported in : 2006(2)ALT333; 2006(2)ARBLR203(AP)

Judge : D.S.R. Varma Rao and ;G. Rohini, JJ.

Acts : Arbitration and Conciliation Act, 1996 - Sections 11, 11(5), 11(6), 11(10), 12, 13, 14, 15, 15(2), 16 and 16(2); Arbitration Act, 1940 - Sections 8(1); Constitution of India - Articles 136 and 226

Appeal No. : W.P. No. 8458 of 2005

Appellant : Yashwitha Constructions (P) Ltd.

Respondent : Simplex Concrete Piles India Ltd. and anr.

Advocate for Def. : C.B. Ram Mohan Reddy, Adv. for Respondent No. 1

Advocate for Pet/Ap. : C.V. Mohan Reddy, Sr. Adv.

Disposition : Petition dismissed

Judgement :

D.S.R. Varma, J.

1. Heard both sides.

2. This Writ Petition is directed against the order, dated 4-3-2005, passed by the Hon'ble the Chief Justice, High Court of Andhra Pradesh, Hyderabad, in Arbitration Application No. 50 of 2005.

3. The petitioner is a contractor, the respondent No. 1 is the company and the respondent No. 2 is the Registrar (Judicial)/ Designated Officer under Section 11(5) of the Scheme framed by the High Court of Andhra Pradesh, Hyderabad, under the Arbitration and Conciliation Act, 1996 (for brevity 'the new Act').

4. For the sake of convenience, the petitioner, the respondent No. 1 and the respondent No. 2 will be referred to as 'the contractor', 'the company' and 'the Designated Officer', respectively.

5. The undisputed facts are as under:

There is a contract entered into between the contractor and the Company with regard to certain works, the details of which are not relevant. The contract contains an arbitration clause in Clause No. 21. Subsequently, owing to some disputes, one Sri P.R. Dhar was appointed as sole Arbitrator, with judicial intervention, in O.S.No. 72 of 2002 on the file of Senior Civil Judge, Kandukur, Prakasam District. The contractor came to know that Sri P.R. Dhar, Arbitrator, was one of the Directors of the Company. Consequently, an application was filed under Sections 12 and 13 of the new Act expressing doubts regarding independence and impartiality of the Arbitrator. During the pendency of the said proceedings, arbitration proceedings were stalled and, eventually, Sri P.R. Dhar, Arbitrator, resigned on account of his ill-health. Hence, the present application came to be filed before the Hon'ble the Chief Justice invoking the jurisdiction under Section 11(5) read with Section 15(2) of the new Act, seeking appointment of a substitute Arbitrator. During the course of hearing of said application, it was brought to the notice of this Court by way of a counter-affidavit that consequent upon the resignation of the sole Arbitrator, the Company, with due promptitude, appointed one Sri S.K. Biswas, as sole Arbitrator, in accordance with clause 21 of the agreement. The contractor questioned the said action stating that a fresh Arbitrator

is to be appointed under Section 11(5) of the new Act, by the Hon'ble the Chief Justice. Eventually, the said application was dismissed on the ground that the company had already appointed a substitute Arbitrator in the place of original Arbitrator in accordance with the terms and conditions of the agreement and as such nothing survives in the arbitration application. Hence, the present Writ Petition.

6. Though the contentions of the contractor and the company and the case law relied on by both sides before the learned Chief Justice as well as before us are the same, still we feel it necessary to put on record the contentions in nutshell.

7. Sri C.V. Mohan Reddy, learned Senior Counsel appearing for the contractor, contends that clause 21 of the agreement does not authorize the company to appoint a substitute Arbitrator inasmuch as no such power was reserved under the said clause with the company; that the expression 'according to the rules', contained in subsection (2) of Section 15 of the new Act, was erroneously interpreted by the Hon'ble the Chief Justice; that in the absence of such an express intention of the parties authorizing one of them to appoint a substitute Arbitrator under Clause 21 of the agreement and in case of failure of agreement between the parties for substituting the Arbitrator, an application made under Section 11(5) read with Section 15(2) of the new Act, is maintainable and that the 'Rules' referred to under Sub-section (2) of Section 15 of the new Act would become superfluous and the object of having an independent and impartial Arbitrator would get defeated.

8. Percontra, Sri C.B. Ram Mohan Reddy, learned Counsel appearing for the company, however, supported the action of the company in appointing of a substitute Arbitrator in view of the fact that the same is not barred as per Clause 21 of the agreement.

9. Having regard to the contentions of both parties, as referred to above, we deem it necessary to notice the relevant provision of the new Act.

10. Section 15 of the new Act, which deals with 'termination of mandate and substitution of Arbitrator', reads as under:

15. Termination of mandate and substitution of arbitrator:- (1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

11. From a reading of the above provision, it is obvious that the mandate of Arbitrator shall terminate under two more situations mentioned under clauses (a) and (b) of subsection (1) of Section 15 of the new Act. These two circumstances are in addition to the circumstances mentioned under Sections 13 and 14 of the new Act.

12. The present situation falls within the scope of clause (a) of Sub-section (1) of Section 15 of the new Act i.e., withdrawal of Arbitrator from the office.

13. Sub-section (2) of Section 15 of the new Act deals with the procedure of appointment of a substitute Arbitrator. It is clear from the very language of said subsection (2) that upon termination of the mandate of Arbitrator, substitute Arbitrator shall have to be appointed in accordance with the Rules.

14. But, indisputably, it is to be noticed that neither the rules are defined nor framed. Therefore, we are of the view that in the absence of any such rules, this

Court has to necessarily, initially, fall back upon the terms and conditions of the agreement and then Sub-section (2) of Section 15 of the new Act.

15. However, it is to be noticed that the Hon'ble the Chief Justice of a High Court is empowered under Sub-section (10) of Section 11 of the new Act to frame a scheme while dealing with certain provisions of the new Act. Accordingly, a scheme had been formulated authorising the Hon'ble the Chief Justice of High Court to appoint an Arbitrator, upon an application made or to nominate an officer.

16. It is necessary to read clause 21 of the agreement, which is as under:

In the event of any difference or dispute arising out of or in connection with this work order (including interpretation of the terms thereof), the same shall be referred to arbitration. The arbitration proceedings shall be conducted by a single arbitrator appointed by the Managing Director of Simplex Concrete Piles (India) Limited and the award/ decision of such arbitration shall be final and binding upon both the parties. The venue of the arbitration shall be at Calcutta. However, you will not stop the work during the pendency of the proceedings and shall ensure that such work is proceeded un-interruptedly.

17. From the above clause, it is clear that the parties had agreed to have the differences or disputes referred firstly to arbitration; secondly the arbitration proceedings shall be conducted by a single Arbitrator and thirdly and most significantly the appointment of such an Arbitrator shall be by the Managing Director of the Company. The other conditions are not relevant to be dealt with.

18. Now, it is to be examined as to whether this clause has been strictly complied with or not.

19. In this context, it is to be seen that consequent upon the disputes, the sole Arbitrator, by name, Sri P.R. Dhar, had been appointed by the Managing Director of the Company, and having noticed that the said sole Arbitrator was a Director of the Company, objections have been raised, as contemplated under Sections 12 and 13 of the new Act. Further, during the pendency of the said objections, the sole Arbitrator i.e., Sri P.R. Dhar, had resigned on personal grounds and

consequently and promptly, another sole Arbitrator had been appointed by the Managing Director of the Company under intimation to the contractor.

20. The learned Senior Counsel appearing for the contractor relied on the judgments rendered by the apex Court in P. G. Agencies v. Union of India : [1971]2SCR564 wherein their Lordships, while dealing with the scope of Section 8(1)(b) of the Arbitration Act, 1940 (for brevity 'the old Act'), observed that 'if the agreement is silent as regards supplying the vacancy, it is to be presumed that the parties intended to supply the vacancy.'

21. But, it is to be remembered that the aforesaid case in P.G. Agencies (1 supra) before the apex Court arose under Section 8(1)(b) of the old Act, which is not very equivalent to or in pari materia with Section 15 of the new Act. However, the observations of the apex Court, in that case, were made particularly in view of the language employed in Section 8(1)(b) of the old Act. Such a language, particularly dealing with the intention of parties, in order to supply the vacancy of the Arbitrator, does not appear in Section 15 of the new Act. Therefore, we are of the view that the observations made by the apex Court in P.G. Agencies case though unexceptionable, are not applicable to the present set of facts, especially in the light of the change in the legal position.

22. In Food Corporation of India v. Indian Council of Arbitration 2000 (3) Arb.L.R. 550 (Delhi) the Delhi High Court held that the question of invocation of subsection (6) of Section 11(5) of the new Act would arise only on the failure of the party to act as required under the procedure agreed to by the parties. The said conclusion of Delhi High Court is obvious from the very language employed in Section 11(5) of the new Act.

23. In other words, the quintessence of Section 11(5) of the new Act is the failure of either party to the agreement to appoint an Arbitrator would be the cause of action to invoke the jurisdiction of the High Court under Sub-section (6) of Section 11(5) of the new Act.

24. Now, reverting back to the facts of the present case, the significant factor to be noticed is that in arbitration clause 21 of the agreement, the Managing Director of

the Company was authorised to nominate an Arbitrator. But, the situation as to what should follow in the event of termination of the mandate of the Arbitrator was not referred to. At the same time, there is no change in the authority of the Managing Director of the Company to appoint an Arbitrator.

25. Therefore, we are of the view that the intention of both parties is to have an Arbitrator in order to have the disputes settled through an Arbitrator, as appointed by the Managing Director of the Company. When there is no change in the authority of the Managing Director of the Company to appoint an Arbitrator since the original arbitrator had resigned and in the absence of a specific clause to invoke the jurisdiction of the Hon'ble the Chief Justice of the High Court under Section 11(5) of the new Act, the question of appointment of a substitute arbitrator need not necessarily arise.

26. In other words, what should be done is impliedly left to the discretion of the Authorised Officer i.e., Managing Director of the Company.

27. It is to be further noticed that the object of the new Act is to have the disputes settled expeditiously and in an atmosphere minimizing the scope for controversies. If the kind of present disputes are permitted to be raised and to go on, the same would occupy the front seat relegating the original dispute for arbitration to the back, resulting in enormous loss of money and valuable time of the disputing parties as well as the Courts.

28. Having regard to the aforementioned, we are of the considered view that the contractor should first try to resolve the controversy basing on the language of clause 21 of the agreement and understand the purpose of authorising the Managing Director of the Company to appoint an Arbitrator in a right perspective, before approaching the Court.

29. Furthermore, insofar as the contention of the learned Senior Counsel appearing for the contractor that the Hon'ble the Chief Justice, High Court of Andhra Pradesh, Hyderabad, was in error in interpreting the expression 'Rules' as the conditions incorporated under Clause 21 of the agreement, which authorizes the Managing Director to appoint an arbitrator, is concerned, it is to be noticed that

the Hon'ble the Chief Justice, in the impugned order, as already pointed out, was of the opinion that 'Rules' are not defined nor framed. The only legal position is that existence of the scheme framed by the Hon'ble the Chief Justice, as authorised under Sub-section (10) of Section 11(5) of the new Act, also does not deal with the present controversy.

30. Perhaps, this is one peculiar case where both parties under Clause 21 of the agreement authorised the officer of the Company to appoint an Arbitrator and such authorised officer, with all wisdom at his disposal, appointed another Arbitrator, in the light of resignation of the original Arbitrator. Furthermore, the settled principle now is that under Section 16(2) of the new Act, the Arbitrator is empowered to decide all the questions, raised before him by the disputing parties, including his own jurisdiction.

31. Further, insofar as the maintainability of the writ petition is concerned, it is relevant to notice the decision of the apex Court in State of Orissa v. Gokulananda Jena : AIR 2003 SC4207 , wherein a two-judge Bench of the apex Court, while referring to the decision of the Constitution Bench of the apex Court in Konkan Railway Corporation Ltd v. Rani Construction Pvt. Ltd. : [2002]1SCR728 , explained the jurisdiction of the apex Court and the High Courts, under Articles 136 and 226 of the Constitution of India respectively, in relation to appraising of the issue of appointment of Arbitrator by the designated Court, on merits, and held that appointment of Arbitratoris amenable to the writ jurisdiction of the High Courts under Article 226 of the Constitution of India. However, it was further held that all the areas of dispute, including the appointment of Arbitrator and the jurisdiction of the Arbitrator to decide the dispute can be decided by the Arbitrator himself and the High Court under Article 226 of the Constitution of India is not obliged to go into the same. This is obviously in view of the specific provisions contained in Section 16(2) of the new Act, which postulates that the Arbitrator himself can decide his own jurisdiction.

32. Further, in Gokulananda Jena, their Lordships of the apex Court precisely held thus (at paragraphs 7 and 8):

The Constitution Bench in the case of Konkan Rly., itself has held that an order which is the subject of the petition for special leave to appeal under Article 136 must be an adjudicatory order, that is, an order which has adjudicated upon the rival contentions of the parties. In that context, this Court in Konkan Rly. case has held that an order made by the Designated Judge under Section 11(5) of the Act is not an order in which the Designated Judge adjudicates parties' rights, hence, it is in the nature of an administrative order against which an appeal under Article 136 does not lie. This Court in that judgment has not stated that an order being an administrative order, the same cannot also be challenged under Article 226 of the Constitution for good and valid reasons. Therefore, in our opinion, the High Court was wrong in coming to the conclusion that an order made by the Designated Judge under Section 11(5) of the Act is not amenable to the writ jurisdiction of the High Court.

However, we must notice that in view of Section 16(2) read with Sections 12 and 13 of the Act, as interpreted by the Constitution Bench of this Court in Konkan Rly. : [2002]1SCR728 , almost all disputes which could be presently contemplated can be raised and agitated before the arbitrator appointed by the Designated Judge under Section 11(5) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy is available before the arbitrator, a writ Court normally would not entertain a challenge to an order of the Designated Judge made under Section 11(5) of the Act which includes considering the question of jurisdiction of the arbitrator himself. Therefore, in our view, even though a writ petition under Article 226 of the Constitution is available to an aggrieved party, ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself.

33. Reverting back to the instant writ petition, since the Arbitrator had already been appointed by the authorised officer i.e., the Managing Director of the Company, the Hon'ble the Chief Justice, High Court of Andhra Pradesh, Hyderabad, had dismissed the Arbitration Application No. 50 of 2005, through the impugned order, dated 4-3-2005. Hence, the same question need not be gone into

by this Court once again in exercise of its jurisdiction under Article 226 of the Constitution of India.

34. For the foregoing reasons and having regard to the decision of the apex Court in Gokulananda Jena (3 supra) and also in view of the facts and circumstances of the case on hand, we are of the opinion that the writ petition is not maintainable.

35. Yet another important aspect, which cannot be ignored, is that the contractor has not raised any objections so far either under Section-12 or Section-13 of the new Act, as was done before against the appointment of Sri P.R. Dhar as an Arbitrator.

36. Therefore, having regard to the totality and peculiar facts and circumstances of this case, we do not find any merit in the Writ Petition and the impugned order does not call for any interference by this Court.

37. To-day, (25-11 -2005) i.e., on the date of pronouncement of this order, we are conscious of the decision of the apex Court in SBP& Co. v. Patel Engineering Ltd. 2005 (7) SCJ 461 : (2005) 8 SCC 61, whereby while overruling the decision of a Constitution Bench of the apex Court in Konkan Rly. Corporation Ltd. v. Rani Construction (P) Ltd. : [2002]1SCR728 , it was held that the order of the Hon'ble the Chief Justice or the designated Court would be a judicial order. However, all the appointments made on or before the date of the said decision i.e., 26-10-2005, were saved, attaching only prospectivity of the said decision.

38. It is to be noticed that, in the present case, the impugned order is dated 4-3-2005 and, therefore, the principles laid down by the apex Court in Konkan Rly. Corporation Ltd. v. Rani Construction (P) Ltd., : [2002]1SCR728 would apply.

39. For the foregoing reasons, we hold that the writ petition fails and is liable to be dismissed.

40. In the result, the Writ Petition is dismissed, at the stage of admission. However, there shall be no order as to costs.

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