

Sharda Construction Vs. State of Jharkhand and ors.

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Court : Jharkhand

Decided On : Aug-20-2004

Reported in : 2004(3)BLJR1684; [2004(4)JCR104(Jhr)]

Judge : P.K. Balasubramanyan, C.J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11(6)

Appeal No. : A.A. 3 and 5 of 2004

Appellant : Sharda Construction

Respondent : State of Jharkhand and ors.

Advocate for Def. : Advocate General

Advocate for Pet/Ap. : D.K. Dubey, Adv.

Disposition : Application dismissed

Judgement :

P.K. Balasubramanyan, C.J.

1. These are applications by a contractor under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#). According to the petitioner-firm, it had been allotted three contracts relating to the widening of National High Way No. 23 at three different stretches. They were identified as Job Nos. 515. 516 and 538. Claiming

that the contractor had failed to perform his part of the contract in terms of the three independent agreements, the respondents made an adjustment from the amounts payable to it in one of the works and also refused to release the securities offered by the contractor. Claiming that it had completed the work covered by Job Nos. 515 and 516 and that those contracts must be closed, the petitioner approached this Court with a writ petition. The petitioner also questioned the attempted adjustment made by the respondents of the amounts allegedly due to the petitioner towards Job Nos. 515 and 516. towards Job No. 538. The respondents having disputed the claims of the petitioner and having contended that they were entitled to make the adjustments and that the contractor had breached the agreement, the learned Single Judge took the view that the disputes springing out of the contracts were of such a nature that they could not be satisfactorily resolved in a proceeding under Article 226 of the Constitution of India, Thus, interference was declined. The petitioner filed an appeal before this Court as Letters Patent Appeal No. 119 of 2003. That appeal was dismissed. In that appeal, an alternative plea was sought to be raised that in view of the existence of an arbitration clause in the agreement, being Clause 23 in all the agreements, this Court could appoint an Arbitrator for resolution of the disputes in terms of that clause. Apart from contending that such a course was not permissible in a proceeding originating under Article 226 of the Constitution of India, the respondents also contended that the arbitration clause stood deleted by a Government order duly published and the mere fact that the concerned clause in the agreement entered into was not struck out specifically at the time of entering into the agreement, would not enable the contractor to seek an arbitration. The Division Bench agreed with the learned Single Judge that the contractual disputes had to be left to be decided elsewhere. It also took the view that. the appeal was not an occasion for considering whether an Arbitrator was liable to be appointed in exercise of the power of the Chief Justice or his nominee under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#). The appeal was thus dismissed. It was thereafter that the petitioner filed A.A. No. 3 of 2004 and WP No. 694 of 2004, which was got converted into A.A. No. 5 of 2004 under Section 11(6) of the Act seeking the appointment of an Arbitrator.

2. According to learned counsel for the petitioner, since Clause 23 of the contract between the parties contained an arbitration clause and disputes have arisen between the parties, the Chief Justice was bound to appoint an Arbitrator and refer the dispute for adjudication by that Arbitrator. The decision of the Supreme Court in *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.*, 2002 (2) SCC 388, was relied on to emphasize that no adjudication by the Chief Justice, or his nominee, was contemplated in such an application and even the question whether there did exist an arbitration clause had to be left to the Arbitrator to arbitrate upon. In the counter affidavit filed on behalf of the respondents, it has been submitted that the arbitration clause stood deleted by virtue of a Government order dated 18.11.1992 which was duly published in the Gazette dated 18.11.1992. The notification provided that with effect from the date of the notification. Clause 23 of all the contracts in Form F-2 will stand deleted. The Contracts involved here are also Form F-2 contracts and the fact that old forms were used and Clause 23 was not individually struck out therefore made no difference, in view of the Gazette notification duly published and, therefore, there existed no arbitration clause and the Chief Justice, or his nominee could not exercise power or perform a duty, of appointing an Arbitrator under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#). On behalf of the petitioner, it was sought to be contended that even though there was a decision to do away with Clause 23 in all Form F-2 contracts, the said notification was never published and in view of this and In view of the failure to strike out Clause 23 from the Form F-2 contracts involved in these cases, the Chief Justice was bound to appoint an Arbitrator, at best, leaving the question whether the arbitration clause did survive or exist, to be decided by the Arbitrator. It was also contended that there was no Gazette notification of the decision to do away with the arbitration clause, Clause 23 in Form F-2 contracts. It was to meet this contention that the respondents produced Annexure-6 Gazette notification dated 18.11.1992 showing that there was, in fact, a due notification of the deletion of Clause 23 of Form F-2 contracts.

3. Confronted with this situation, learned counsel for the petitioner contended that mere printing of the notification in the Gazette was not enough, as it was not circulated. It was also contended that this was not brought to the notice of the contractor. A decision of the Patna High Court in Request Case No. 22 of 2003

was brought to my notice wherein an Arbitrator was appointed inspite of a contention being raised that there was no arbitration clause in view of this deletion leaving it to the Arbitrator to decide the question.

4. In the light of the decision in Konkan Railway referred to above, this Court may have to proceed on the basis that the Chief Justice has no adjudicatory power when a request is made for appointment of an Arbitrator. But, for exercising the power to appoint an arbitrator, the Chief Justice has to satisfy himself, whatever may be the nature of the function performed by him, in an application under the Act that the parties have agreed upon the procedure for the appointment of an Arbitrator and one of the parties had failed to Act as required under that procedure. For this, the Chief Justice has necessarily to look into the question whether there is an arbitration agreement between the parties and the parties have agreed upon a procedure. It appears to me that even within the limited jurisdiction available to the Chief Justice under Section 11(6) of the Act, the Chief Justice cannot appoint an Arbitrator, merely because one of the contracting parties had demanded it asserting that there is an arbitration clause and he is entitled to have an Arbitrator appointed. The duty to see whether the parties have agreed upon a procedure would necessarily mean a duty to see whether there is an arbitration clause and going by that clause, one of the parties had failed to perform any function entrusted to him or had failed to Act as required under the procedure. It also appears to me that the existence of an arbitration agreement is the source from which a Chief Justice can derive his power to appoint an arbitrator, no doubt, leaving it to the Arbitrator to decide all manners of dispute as contemplated by Section 16 of the Act. But to say that even the question whether there existed an arbitration clause must be left to the Arbitrator to decide, appears to me to be not warranted, even going by the ratio of the decision in Konkan Railway case. When the jurisdiction of a chief Justice or his nominee to appoint an Arbitrator is questioned by raising a contention that there was no arbitration clause that question has necessarily to be looked into by the Chief Justice, or his nominee, before exercising his jurisdiction or performing his duty under Section 11(6) of the Act. The question whether the Chief Justice has the jurisdiction to appoint an arbitrator cannot be left to the Arbitrator for decision. Even if the power be administrative--I have my own reservations, but that has no relevance since I am

bound by the Constitution Bench decision of the Supreme Court in that regard-- The administrative power conferred by a statute cannot be exercised unless the conditions for exercising that power as contemplated by the statute are satisfied or are shown to exist. It appears to me that this is the fundamental principle of exercising power by any authority who has to exercise it on the existence of the conditions prescribed by the statute. Whether that decision which may possibly be called a decision on the existence of the jurisdictional fact, may or may not be final depending upon the relevant statute, but that is different from saying that a Chief Justice or his nominee called upon to make the appointment of an Arbitrator based on the application of a clause alleged to exist, which is brought to his notice has been validly deleted is still obliged to appoint an Arbitrator. Unless the Chief Justice or his nominee is able to find that there is an arbitration clause, there will be no right in the Chief Justice or his nominee to appoint an Arbitrator. The exercise of administrative power may also involve satisfaction of a condition precedent or a limited adjudication on a matter that is brought forward before the Administrative authority as a dispute. Therefore, I am not in a position not agree with the submission of learned counsel for the petitioner that it is not for the Chief Justice to see whether the arbitration clause. Clause 23 in these contracts, existed or not and all that the Chief Justice has to do or can do is to appoint an Arbitrator and leave it to the Arbitrator to decide that question. ,

5. The question then is whether there is an arbitration agreement in these cases and the parties have agreed on the procedure for resolution of the disputes and one of the parties had failed to Act, justifying my interference by appointing an Arbitrator under Section 11(6) of the Act. I find that the contract entered into by the petitioner with the respondents is Form F-2 contract. In this Form F-2 contract, there was a clause for arbitration, which was Clause 23. But pursuant to the decision taken in that behalf by the Government Clause 23 was deleted from all Form F-2 contracts. This was done by issuing an appropriate Gazette notification at the appropriate time. The notification was on 18.11.1992. The contracts relied on by the petitioner were all entered into in the year 1998-1999, long after the deletion of Clause 23 from all Form F-2 contracts. Merely because in the Form F-2 contract signed by the petitioner and the concerned Engineer, Clause 23 had not been struck out, in my view would not make any difference. That Clause 23 left in

the old forms used and left un-struck has no efficacy in view of the Gazette notification deleting Clause 23 from all Form F-2 contracts. The petitioner as a contractor is bound by that deletion. Therefore, I am inclined to agree with the submission of counsel for the respondents that there was no valid or live arbitration clause in the contracts entered into by the petitioner and, therefore, there was no question of this Court postulating that one of the parties had failed to perform the obligation cast on him by the arbitration clause. I am not impressed by the argument of learned counsel for the petitioner that there was no Gazette notification or a due publication by way of a Gazette notification. When a notification is duly published in the official Gazette, in the absence of any communication to the contrary in the notification itself, it shall come into force with effect from the date of that notification. There is no obligation on the part of the Government to communicate the Gazette notification to each and every individual, who might be affected by the notification. Here, when the petitioner entered into the agreement in Form F-2 with the Government, he being an experienced contractor is normally expected to know of the notification published in the year 1992 in the official Gazette deleting the arbitration clause in all Form F-2 agreements. Apart from this as I have noticed, I am not in a position to accept the case that the publication of the Gazette notification in the due manner is not enough notice of the deletion of the arbitration clause to the public in general. Publication in the official Gazette is normally the mode of publication of any Government notification. Therefore, the argument that this Court must proceed on the basis that the arbitration clause continues to subsist cannot be accepted.

6. Thus, since I find in these requests under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#), that there was no arbitration clause and one of the contracting parties had not failed to act as required under the procedure agreed upon by the parties or has failed to perform any function entrusted to him or under a procedure, I am not in a position to appoint an Arbitrator as requested by the petitioner before me. I, therefore, reject the prayer for appointment of the Arbitrator.

I dismiss these applications.

