

Neelachakra Constructions Vs. State of Orissa and anr.

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Court : Orissa

Decided On : Feb-15-2008

Reported in : AIR2008Ori69; 2008(2)ARBLR400(Orissa)

Judge : A.K. Ganguly, C.J.

Appellant : Neelachakra Constructions

Respondent : State of Orissa and anr.

Disposition : Petition dismissed

Judgement :

ORDER

A.K. Ganguly, C.J.

1. Both these matters were heard together as common questions of fact and law are involved.
2. Both the applications under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter called the 'said Act') were filed by the petitioner for appointment of an Arbitrator by the Chief Justice.
3. The relevant facts are that the petitioner which is a Proprietorship concern was awarded the work of 'New Construction, One Time Repair and Renovation of CHC-1 at Belguntha including variations'. Another work which was given to the

petitioner, which is the subject matter of ARBP No. 24 of 2005, is 'New Construction, One Time Repair and Renovation of CHC-1 at Polsara including variations'.

4. Petitioner's case is that both the said works were completed in time and completion certificates were also issued to the petitioner by the concerned Engineer and thereafter the authorities have inaugurated the project. It is also the case of the petitioner that opposite parties took over the site after completion was duly certified and the concerned Engineer certified for final payment. But the same did not include various outstanding dues of the petitioner in spite of various reminders and request by the petitioner. However, the bill certified for payment to the petitioner has not been paid. Petitioner's case is that since the accounts of the petitioner were not finalized, it issued several notices for appointment of an Arbitrator to resolve the dispute between the parties. But the opposite parties did not do the same and as such both these petitions were filed before this Court on 11-5-2005.

5. In this matter the Arbitration Clauses are as follows:

24.1. If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision.

25.1. The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2. The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.3. The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract.

6. The special condition of contract relating to Arbitration is as follows:

25.3(a) In case of dispute or difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with this agreement such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of the Institution of Engineers (India).

XXX XXXX XXXX(f) Where the value of the contract is Rs. 50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties; failing such agreement, by the appointing authority, namely the President of the Institution of Engineers (India)/for Alternative Disputes Resolution (India).

7. In the counter affidavit which has been filed in this case by one Pradipta Kumar Sahoo, the Executive Engineer-in-Charge, Orissa Health System Development Project, the stand taken is that the demand for arbitration Proceeding is misconceived. It has been stated that the claim of the petitioner is beyond the amount certified by the Engineer and is without any basis and although the work was completed on 31-8-2003 as per the assertion of the petitioner, but the final bill has been submitted on 18-12-2004. This stand is also taken in ARBP No. 25 of 2005. But in ARBP No. 24 of 2005, it has been stated that the petitioner submitted the final bill on 7-12-2004 even though the work was completed on 31-8-2003.

8. In both the cases, the stand of the opposite parties is that the bill has been passed and the bill of the petitioner does not contain any escalation nor any claim

for interest. The stand of the opposite parties in both the cases is that the final measurement has been done in the presence of the petitioner and the petitioner accepted the said final measurement without any protest and since the final measurement has been accepted without any protest, there is no arbitrable dispute to be referred to the arbitration.

9. The further stand of the opposite party which is very vital and which is taken in both the cases is that in terms of Clause 24.1 of the condition of the Contract, if the Contractor believes that a decision taken by the Engineer was either outside the authority give to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision. Thereafter, the Adjudicator has to give a decision within 28 days of the receipt of a notification of a dispute in terms of Clause 25.1 of the said Clause. Thereafter, if either party to the contract feels aggrieved with the decision of the Adjudicator, then the decision shall be referred to the Arbitration.

10. The stand of the opposite parties in both the cases is that the Contractor has not referred any decision of the Engineer concerned to the Adjudicator for a decision in terms of the contract. Therefore, the stand of the opposite party is that without complying with the condition of the agreement namely, first approaching the Adjudicator for a decision, approaching the High Court for appointment of arbitrator under Section 11 of the said Act is not maintainable.

11. In ARBP No. 24 of 2005, the petitioner has filed a rejoinder. The aforesaid stand which has been taken by the opposite parties in their affidavit namely that the petitioner has not approached the Adjudicator before filing this petition under Section 11 of the said Act has not been denied. This stand has been taken by the opposite parties in paragraph 9 of the counter affidavit filed in ARBP No. 24 of 2005 and is sought to be dealt in paragraph-9 of the rejoinder. But the aforesaid stand of the opposite parties has not been controverted. In ARBP No. 25 of 2005, no rejoinder appears to have been filed. Therefore, the aforesaid stand has not been controverted.

12. Therefore, this Court is of the view that before approaching for arbitration in terms of Clauses referred to above, the Contractor should have approached the Adjudicator under Section 24.1 and thereafter if the decision of the Adjudicator which is to be given within 28 days of receipt of a notification of a dispute does not satisfy the Contractor, then only the matter can be referred for arbitration.

13. Since the aforesaid requirement of approaching the Adjudicator under the agreement has not been complied with by the petitioner, the petitioner cannot ask for appointment of an Arbitrator in the aforesaid manner bypassing the clauses in the contract. In other words, the petitioner cannot go beyond the bargain in the contract itself.

14. For the aforesaid reason, both the Arbitration petitions are misconceived and are accordingly dismissed. No costs.

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