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Court : Delhi

Decided On : Jul-01-1988

Reported in : 1988(2)ARBLR236(Delhi); 35(1988)DLT250; 1988(15)DRJ243

Judge : B.N. Kirpal, J.

Acts : [Arbitration Act, 1940](#) - Sections 20(4)

Appeal No. : Suit No. 2686A of 1986 and Interim Application No. 7185 of 1986 and 5133 of 1987

Appellant : Arvind Construction Co. (P) Ltd.

Respondent : Engineering Projects India Ltd.

Advocate for Pet/Ap. : Kapil Sibal,; Arun Jaitley,; Urmila Kapoor and;

Judgement :

B.N. Kirpal, J.

(1) The petitioner has filed the present application under Section 20 of the Arbitration Act, inter alia, praying that disputes which have arisen between the parties should be referred to arbitration. Along with the said application, the petitioner has also filed an application under Section 41 of the Arbitration Act read with Order 39 Rules 1 and 2 in which the prayer is that the respondent should be restrained from encashing the bank guarantees which had been furnished by the

petitioner.

(2) Briefly stated, the facts are that the respondent was awarded a contract by the Government of Iraq for the construction of Council of Ministers Building at Baghdad. The respondent then, on 5th March, 1980, entered into a sub-contract with the petitioner whereby the petitioner was required to undertake some civil works on labour contract basis.

(3) According to the petitioner, this contract which was awarded to it required the approval of the Industrial Development Bank of India (hereinafter referred to as 'the IDBT'). This approval was accorded by Idbi and the approval envisaged the constitution of the working group which was to consist of the representatives of the petitioner, respondent Idbi and the Reserve Bank of India. In terms of the contract entered into between the petitioner and the respondent the petitioner was required to submit a bank guarantee for due performance of the contract for a sum of Rs. 12.75 lacs and another bank guarantee to secure the mobilisation advance which had been accorded to the petitioner for a sum of Rs. 25.50 lacs. The Idbi, however, had, while according the approval, postulated that respondent would not invoke the guarantees without obtaining prior approval of the working group.

(4) According to the petitioner it had carried out the work in the manner it could best execute and the delay which had occurred in execution of the work was on account of action or inaction of the respondent. The petitioner raised a claim to the Chairman of the respondent on 18th March, 1985. The respondent stated that the accounts should be settled by reconciliation but on 26th June, 1986 and 8th July, 1986 the respondent wrote to the State Bank of India invoking the two bank guarantees which had been furnished by the petitioner. The State Bank of India refused to make the payment and wrote back to the respondent stating that in the absence of prior approval of the working group, payment could not be made.

(5) On 5th December, 1986 a meeting of the working group took place. Other members of the working group desired that the bank guarantees should not be invoked till the arbitration proceedings were concluded or the accounts reconciled. The respondent was not agreeable to this. The working group did state that the unconditional guarantees should be encased but, at the same time, advised that

the respondent should act cautiously. On 6th December, 1986 the respondent again approached the Bank for realisation of the bank guarantees. It is a common ground that on 6th January, 1987 the bank guarantees were encashed.

(6) In the reply which has been filed by the respondent it is not denied that there is a valid arbitration agreement between the parties. The respondent has also stated that disputes have arisen which could be referred to arbitration. The question which, however, arises is as to who can appoint the arbitrator and who can be the arbitrator. The relevant portion of Clause 5 of the agreement, which contains the arbitration clause, inter alia, provides that the disputes which are directly or indirectly connected with the agreement

'SHALL be referred to the sole arbitration of the Chairman & Managing Director/General Manager (accepting authority) of Engineering Projects (India) Limited and if the Chairman & Managing Director/General Manager is unable or unwilling to act as such then the matter shall thereafter be referred to the sole arbitration of some other person, appointed by the Chairman and Managing Director/General Manager. There will be no objection if the Arbitrator, so appointed is an employee of Engineering Projects (India) Ltd., but such person shall be other than the officer/officers who have been directly connected with the execution of the work'. It is also a term of this sub-contract that no person other than a person appointed by such Chairman & Managing Director/General Manager as aforesaid should act as arbitrator.

(7) The submission of the learned counsel for the petitioner is that though the arbitrator has to be appointed by the Chairman & Managing Director, it is open to the Court to indicate as to what background the arbitrator should have. Mrs. Kapur, on the other hand, submits that it is left to exclusive discretion of the Chairman & Managing Director to decide as to who should be the sole arbitrator.

(8) A question had arisen in this Court, where the arbitration clause was similar, that where the appointing authority does not appoint an arbitrator, can the Court direct the appointment of an arbitrator. A Full Bench of this Court in *Ved Prakash Mithal v. The Union of India and others*, : AIR1984 Delhi325 answered the aforesaid query in the affirmative by invoking the provisions of Section 20(4) of the

Arbitration Act and observed that 'the intention of Section 20(4) is to confer power on the Court to make an appointment where the machinery of appointment has broken down. This is a sensible meaning to give to the clause and the statute'. The Court then directed the Chief Engineer, in that case, to appoint an arbitrator and it was further ordered that if the arbitrator was not appointed within two months, a person named by the Court was to be the arbitrator.

(9) As I read the arbitration clause, relevant extract of which has been set out hereinabove, it is clear that the disputes are to be referred to the sole arbitration of the Chairman & Managing Director/General Manager of the respondent. If the said authority is unwilling to act then it is open to that authority to appoint some one else as the sole arbitrator. The arbitration clause does not state that it is only an employee of the respondent- Corporation who can be the sole arbitrator. It only states that if the person who is appointed happens to be an employee of the respondent-corporation then his appointment cannot be objected to. This clause does not mean that there is any direction contained in the arbitration clause to the appointing authority to appoint only a person who is an employee of the respondent- Corporation. When, therefore, a dispute is sought to be referred, it is open to an appointing authority either to adjudicate upon the dispute itself as the arbitrator or to nominate any other person, including an employee of the Corporation, as the arbitrator. In the present case, no such appointment has been effected by the appointing authority. It is clear that the Court cannot nominate the person who is to be the arbitrator. The decision as to who is to be the arbitrator has to be left to the Chairman & Managing Director. In terms of the clause, the Chairman & Managing Director himself can act as the sole arbitrator but I think the Court, while exercising powers under Section 20(4) of the Arbitration Act, can direct that if the Chairman & Managing Director does not himself act as the sole arbitrator and decides to appoint another person as the sole arbitrator then the person to be so appointed should belong to a profession or a category suggested by the Court. Such a direction by the Court would not, to my mind, be contrary to the provisions of the arbitration clause because the arbitration clause postulates the selection of the arbitrator by the Chairman & Managing Director and as long as this discretion remains with the appointing authority merely suggesting or directing the appointment of a particular type of arbitrator would not be contrary to the

arbitration clause.

(10) At this stage it will be relevant to refer to an order which was passed by the Supreme Court in Special Leave Petition (Civil) No. 12320 of 1986, V. K. Construction Works Pvt.Ltd'. v. F.C.I, and another. The arbitration clause there was similar to the one as in the present case and it postulated disputes being referred to the sole arbitration of a person appointed by the Managing Director of the Food Corporation of India. The sole arbitrator not being appointed, the matter came up before the Supreme Court and it passed the following order:

'HEARD,learned counsel for the parties. In the facts appearing in this case, we leave it open to the Mg. Director to make his choice of the arbitrator but that choice should be of any retired High Court Judge who will act as an arbitrator to dispose of the dispute in this case. Whether in view of the arbitration clause it is open to the court to direct any arbitrator to be appointed is left open to be decided in an appropriate case. The Managing Director shall make the appointment within 4 weeks from today. This disposes of the Special 'Leave Petition'.

IT is true that the Supreme Court did observe that whether it was open to the Court to direct any arbitrator to be appointed was left open to be decided in an appropriate case but it must be presumed that the order of the Supreme Court was a legal and valid order. The Supreme Court could have only given a direction restricting its choice of the arbitrator to be a retired High Court Judge if it thought that it was permissible to do so under the said arbitration clause. As I have indicated hereinabove, the power which is being exercised by the Court is under Section 20(4) of the Arbitration Act when the respondents have failed to appoint an arbitrator and the petitioner has been constrained to approach the Court under Section 20 of the Arbitration Act.

(11) Following the aforesaid order of the Supreme Court and in view of what has been observed by me hereinabove, I direct the Chairman & Managing Director of the respondent either to decide the dispute between the parties himself as the sole arbitrator or to appoint any retired High Court Judge to act as the sole arbitrator. The appointment shall be made within two months from today.

(12) As has already been observed earlier, the bank guarantees have already been encashed by the respondent. The counsel for the petitioner has submitted that the respondent should be directed to restore the bank guarantee?. I am unable to agree with this submission. Once the bank guarantees are encashed, it would not be lawful to require restoration of the same. It is, loss accounts of the respondent. As far as the respondent is concerned, it has already realised the moneys by encashing the bank guarantees. In view of the financial ill-health of the respondent some provision should be made to secure the petitioner in the event of arbitration award being made in its favor.

(13) I therefore, direct the respondent to furnish, within 4 months from today, to the satisfaction of the Registrar of this Court, security for a sum of Rs. 38.25 lacs being the amount of bank guarantees which had been encashed by the respondent.

(14) The petition and 1.As. stand disposed of. Parties to bear their own costs.