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Nirman SIndia Vs. Indal Electromelts Ltd., Coimbatore and ors.

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Court : Kerala

Decided On : Jul-06-1999

Reported in : AIR1999Ker440

Judge : K.A. Mohamed Shafi, J.

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

Appeal No. : Arbitration Request No. 6 of 1999

Appellant : Nirman SIndia

Respondent : indal Electromelts Ltd., Coimbatore and ors.

Advocate for Def. : V. Giri,; V. Philip Mathew,; Mathew John,;

Advocate for Pet/Ap. : G. Hariharan, Adv.; R.K. Venu Nayar, S.C.

Disposition : Petition dismissed

Judgement :
ORDER

K.A. Mohamed Shafi, J.

1. This arbitration request is filed by the applicant under Section 11(6) of the Arbitration and Conciliation Act to appoint an arbitrator to resolve the entire disputes between the applicant and the 1st respondent as per the agreement

entered into between the applicant and the 1st respondent dated 10-5-1997. It is contended by the applicant that while the execution of the work was in progress the 1st respondent illegally and unilaterally terminated the agreement on 5-1-1999, It is also contended that the 1st respondent did not resort to the decision of the adjudicator specified under Clause 36(1) of the agreement or referring the matter to the arbitrator as specified in Clause 25(1) of the agreement and unilaterally terminated the contract. Therefore it is necessary to appoint an arbitrator to adjudicate the entire disputes between the applicant and the 1st respondent relating to the contract.

2. The respondents have resisted this arbitration request on several grounds. The main objection raised by the 1st respondent is that the applicant has filed this arbitration request without complying with the procedure laid down in Clauses 24 and 25 of the agreement and therefore, this arbitration request is not maintainable being premature.

3. Clause 24 of the agreement deals with disputes which reads as follows :

'24. Disputes.

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.'

Therefore, it is clear that the contractor has right to refer the decision taken by the Engineer to the adjudicator within 14 days of the notification of the Engineer's decision, if he believes that the decision taken by the Engineer is either outside the authority given to the Engineer by the contract or the decision was wrongly taken by the Engineer. In this case, though the Engineer as well as the adjudicator are named in the agreement, it is the common case that no decision was rendered by the Engineer and no dispute was referred to the adjudicator as provided under Clause 24(1) of the agreement.

4. Clause 25 of the agreement deals with procedure for disputes, which reads as follows :

'25. Procedure for Disputes':

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 Date 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 published by the institution named and in the place shown in the Contract Data.'

Therefore, it is clear that Clause 25 lays down that when the dispute is referred to the adjudicator and he has given a decision, either party has the right to refer the decision of the adjudicator to an arbitrator within 28 days of the adjudicator's decision in writing. Clause 25.3 stipulates that the arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and the place shown in the contract data. In the contract data which forms part of the agreement it is stipulated that the arbitration will take place in accordance with the Indian Arbitration and Reconciliation, Act 1996.

5. The counsel for the applicant submitted that even though provisions are made in the agreement to refer the dispute first to the Engineer, if dissatisfied with the Engineer's decision reference of the dispute to the adjudicator and if dissatisfied with the findings of the adjudicator, to refer the dispute to the arbitrator, the petitioner is entitled to move this Court to appoint an arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 without resorting to take

steps for a decision by the Engineer and then decision by the adjudicator with regard to the disputes involved in this case, since the provisions of the Arbitration and Conciliation Act with regard to the appointment of arbitrator are specifically made applicable as per the terms of the agreement. Therefore, according to him, the above arbitration request filed by the applicant under the Arbitration and Conciliation Act is perfectly maintainable as it is in compliance of the provisions of Arbitration and Conciliation Act, 1996 and the scheme framed thereunder.

6. As already noted, the scheme provided under the agreement Ext. P4 is reference of the dispute to the decision of the Engineer, if not satisfied by the Engineer's decision, to refer the same to the adjudicator and if dissatisfied with the decision of the adjudicator, to refer the dispute to the arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The contract data appended to the agreement which form part of the agreement shows that the Engineer as well as the adjudicator are named in the contract. The adjudicator named in the contract is the 3rd respondent in this arbitration request and he has filed a counter-affidavit along with certain documents. In the counter-affidavit filed by the 3rd respondent it is stated that the applicant has not so far sought for a decision by the adjudicator and therefore, he had no occasion to render, any decision in the matter. It is also stated that the applicant has taken a stand repudiating his authority as the adjudicator to adjudicate upon the dispute arising out of the termination of the contract. The letter dated 25-1-1999 sent by the applicant to the 3rd respondent is produced along with the counter-affidavit and marked as Ext. R3(a). Ext. R3(a) shows that it is a reply to the letter dated 19-1-99 sent by the 3rd respondent, marked as Ext. R3(c) intimating the parties to co-operate to proceed with the measurements etc. for the adjudication of the disputes involved in this case. In Ext. R3(a) it is stated that there is no dispute regarding the decision of the Engineer in the matter so as to empower the adjudicator to interfere in the matter and since no such contingencies has arisen the 3rd respondent should not intervene in the contractual matters. By Ext. R3 (a) letter the applicant has virtually questioned the authority of the adjudicator and admittedly no decision is rendered by the adjudicator. Obviously the stand taken by the applicant is that there was no decision by the engineer and therefore, there is no dispute to be adjudicated by the adjudicator. Therefore, according to the

applicant the only remedy available to the applicant is to resort to arbitration proceedings under the provisions of the Arbitration and Conciliation Act as provided under Clause 25 of the agreement and there is no necessity for the applicant to comply with the other requirements of decision by the Engineer, if dissatisfied, refer the dispute to the adjudicator and move for the appointment of an arbitrator, if dissatisfied with the decision of the adjudicator. This contention of the applicant cannot be accepted. When the parties to a contract agree to any special mode for resolution of the disputes arising out of the agreement and they are bound to comply with the mode prescribed under the agreement. Without resorting to the first step provided for the resolution of the dispute in the agreement they cannot jump to the second step or to the final step to settle the disputes between the parties. The contention of the applicant that since the contract is unilaterally and illegally terminated by the 1st respondent the Clause s in the contract with regard to the decision by the Engineer and then by the adjudicator named in the contract also came to an end with the termination of the contract, is not sustainable. Even after the execution of the contract or termination of the contract before the execution of the contract if there is any dispute with regard to the amounts due and payable under the contract between the contractor and the employer and those disputes are alive the clause in the agreement with regard to arbitration will be alive, valid and binding upon the parties irrespective of the completion of the work or unilateral termination of the contract before the execution of the contract.

7. It has to be noted that if there is any dispute between the applicant and the 1st respondent with regard to the execution of the work, payments to be made etc. as per the terms of the contract, the same should have been referred to the engineer for his decision and if dissatisfied with the decision of the Engineer, should have been referred to the adjudicator named in the agreement. In this case the applicant has not only not referred the disputes to the decision of the Engineer and then to the adjudicator, but they have prevented the adjudicator from proceeding with the adjudication, questioning the very authority of the adjudicator. Therefore, it is clear that the applicant did not refer the dispute for decision by the Engineer and prevented the adjudicator from adjudicating the disputes as per the terms of the agreement. The applicant has no case that the 1st respondent has waived the

steps provided in the agreement preceding the coming into operation of the arbitration clause in the agreement. On the other hand, the contentions raised by the applicant and the 1st respondent establish that the 1st respondent has been asserting that the applicant should follow the preceding steps before enforcing the clause regarding arbitration incorporated in the agreement.

8. Therefore, it is clear that the applicant either refused to comply or prevented compliance of the procedure laid down or the preceding steps to enforce the arbitration clause in the agreement. The applicant who has been responsible for preventing or frustrating the operation of the earlier or preceding steps for enforcing the arbitration clause in the agreement, cannot seek arbitration by contending that the 1st respondent has not complied with the request for appointment of arbitrator as provided in the agreement. A scrutiny of the Clause s 24 and 25 of Ext. P4 agreement clearly establishes that the applicant and the 1st respondent agreed to settle the disputes through arbitration and such reference to arbitration should be preceded by a decision by the Engineer and a challenge to that decision before the adjudicator by the aggrieved party within the time prescribed under those clauses. Without resorting to those essential or preceding steps for arbitration, or the parties to the contract waiving those steps, the provisions of Ext. P4 agreement prohibits either party from enforcing the arbitration clause.

9. The principle laid down by the apex Court in the decision in M.K. Shah Engineers & Contractors v. State of M. P., (1999) 2 SCC 594 : (AIR 1999 SC 950) is squarely applicable to the facts of this case. In that judgment the Supreme Court has observed as follows (At p. 957, para 17 of AIR):

'A closer scrutiny of Clause 3.3.29 clearly suggests that the parties intended to enter into an arbitration agreement for deciding all the questions and disputes arising between them through arbitration and thereby excluding the jurisdiction of ordinary civil Courts. Such reference to arbitration is required to be preceded by a decision of the Superintending Engineer and a challenge to such decision within 28 days by the party feeling aggrieved therewith. The steps preceding the coming into operation of the arbitration clause though essential are capable of being

waived and if one party has been its own conduct or the conduct of its officials, disabled such preceding steps being taken, it will be deemed that the procedural prerequisites were waived. The party at fault cannot be permitted to set up the bar of non-performance of prerequisite obligation so as to exclude the applicability and operation of the arbitration clause.'

10. In that case the party at fault for non-compliance of the preceding steps enshrined in the agreement to enforce the arbitration clause contended that the opposite party is not entitled to enforce the arbitration clause in the agreement since the prerequisites or preceding steps provided in the agreement for enforcing the arbitration clause were not complied with. The Supreme Court held that a party cannot be permitted to take advantage of his own wrong and therefore he cannot be heard to contend that non-compliance of the preceding steps to enforce the arbitration clause in the agreement is a bar to the opposite party. The facts and circumstances obtaining in this case are converse of that obtained in that reported case.

11. The petitioner herein who successfully prevented or frustrated the steps prescribed in the agreement to precede the enforcement of the arbitration clause, has come forward seeking to enforce' the arbitration clause without resorting to or complying with the preceding steps prescribed in the agreement. The contention of the applicant that since the agreement specifically provided that the arbitration should be in accordance with the Indian Arbitration and Reconciliation Act, 1996, they are entitled to enforce the arbitration clause without resorting to the earlier steps, is absolutely untenable.

12. Therefore, in view of the fact that the applicant has filed this arbitration request to appoint an arbitrator in accordance with the arbitration clause provided in Ext. P4 agreement without resorting to or complying with or exhausting the prerequisites for the enforcement of the arbitration clause provided in the agreement, the same is not maintainable as premature. Therefore, this Arbitration Request is dismissed. However, this order will not preclude the applicant from enforcing the arbitration clause in the agreement after due compliance of the prerequisites for enforcing the arbitration clause provided in the agreement.

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