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Court : Andhra Pradesh

Decided On : Mar-23-2011

Judge : G.Rohini, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11 (6), 34, 13

Appeal No. : ARBITRATION APPLICATION No.2 OF 2011

Appellant : M/S. V.V.S. Constructions, Engineering Contrators

Respondent : M/S.ivrcl Infrastructure and Projects Limited

Advocate for Def. : Sri S. Niranjan Reddy, Adv.

Advocate for Pet/Ap. : Sri Venkat Reddy Donthi Reddy, Adv.

Judgement :

:ORDER :

1. This application is filed under Section 11 (6) of the [Arbitration and Conciliation Act, 1996](#) seeking removal of the sole arbitrator and appoint a former judge of this Court to assume the office of Arbitrator for resolution of the disputes between the applicant and the respondent arising out of the Agreement dated 23.11.2005.

2. I have heard the learned counsel for both the parties.

3. The applicant herein was awarded civil works of 765 KV Switch Yard for ALSTOM - AREVA, NTPC, SITAT by the respondent company vide work order dated 23.11.2005. When certain disputes arose between the parties with regard to the execution of the works awarded, the applicant by letter dated 1.3.2010 called upon the respondent to settle its disputes and pay a sum of Rs.8,9,03,406/- together with interest at 18% failing which to appoint an arbitrator as agreed between the parties. The respondent company by letter dated 20.03.2009 agreed for appointment of an arbitrator and accordingly the Chief Operating Officer - PMC by name R. Venkata Raghavan was appointed as the sole arbitrator. The arbitrator so appointed after notice to both the parties held a preliminary meeting on 19.05.2010 and the schedule of arbitration proceedings was fixed. The applicant filed its claim statement within the stipulated time. However the respondent did not file its reply/counter-claims and sought extension of time. The applicant by letter dated 2.12.2010 while opposing grant of extension of time, alleged that the arbitrator was biased towards the respondent company. A doubt was also expressed about the independency and impartiality of the arbitrator on the ground that he being the subordinate of the respondent company, is directly involved with the claims under the dispute. The arbitrator by letter dated 16.12.2010 while informing the applicant that his appointment was made strictly as per the arbitration clause and that he was discharging his duties as per law, directed the respondent to submit its counter-statement on or before 20.01.2011 with a copy to the applicant.

4. At that stage, the present application came to be filed seeking removal of the sole arbitrator and appointment of a new arbitrator under Section 11 (6) of the [Arbitration and Conciliation Act, 1996](#) (for short, 'the Act') contending that the letter dated 16.12.2010 addressed by the arbitrator itself shows the biased attitude of the arbitrator.

5. In response to the notice ordered by this Court, appearance has been entered on behalf of the respondent. Though no counter-affidavit is filed, the learned counsel for the respondent at the outset raised a preliminary objection as to the maintainability of the application. While relying upon ACE PIPELINE CONTRACTS (P) LTD. v. BHARAT PETROLEUM CORPN LIMITED¹, the learned counsel

contended that the only remedy available to the applicant is to prefer an appeal under Section 34 of the Act after an award is passed.

6. I have also heard the learned counsel for the applicant, who, while relying upon a Division Bench Judgement of this Court in SAI PRIYA CONSTRUCTION COMPANY v. K. ANANTHA KUMARI², vehemently contended that the application is maintainable under Section 11 (6) of the [Arbitration and Conciliation Act, 1996](#).

7. It is not disputed before this Court that as per the arbitration clause contained in the special conditions of contract, subject to which the Work Order was issued to the applicant, the officer of the respondent company as nominated by its Managing Director shall be the sole arbitrator. The said clause reads as under:

"Clause 28. DISPUTES: In the event of any dispute arising out of this Sub-Contract, the parties hereto agree that the matter shall be referred to the Sole Arbitrator who is the officer of M/s.IVRCL Infrastructures & Projects Limited (other than concerned with this Sub-Contract), nominated by Managing Director of IVRCL. The award of the Arbitrator so nominated shall be final conclusive and binding on all parties to the dispute. The venue of Arbitration is at Hyderabad. All the expenses of Arbitration shall be borne by the party who has invoked the Arbitration."

8. Having entered into the agreement, the applicant is bound by all the terms and conditions contained therein including the arbitration clause. In fact, the petitioner agreed for appointment of the sole arbitrator and accordingly the officer of the respondent was appointed as the sole arbitrator. Thereafter the applicant filed its claim statement and participated in the proceedings before the arbitrator. At that stage, if a party to the proceedings feels that the arbitrator has not been acting impartially, what is the procedure to be followed has been provided under Section 13 of the Act which reads as under:

"13. Challenge procedure:-

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral Tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral Tribunal.

(3) Unless the arbitrator challenged under sub-section (2), withdraws from his office or the other party agrees to the challenge, the arbitral Tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."

9. A plain reading of the above provision shows that in case the parties have not agreed upon a specific procedure for challenging an arbitrator, a party who intends to challenge an arbitrator has to submit in writing to the arbitral tribunal the reasons for the challenge. On receipt of such objections/challenge, unless the arbitrator withdraws from his office or the other party agrees to the objections, the arbitral tribunal shall decide on the objections. If the arbitrator does not accept the objections so raised by one of the parties, the arbitrator shall continue the arbitral proceedings and make an arbitral award. Thereafter it is open to the party who raised the objections to make an application for setting aside the arbitral award so made in accordance with Section 34.

10. Thus it is clear that the challenge, if any, as to the competency of the arbitrator has to be decided by the arbitrator himself and if such challenge is not successful,

the arbitral proceedings shall be continued before the same arbitrator and an award shall be passed and only thereafter the party challenging the arbitrator has to make an application for setting aside such an arbitral award in accordance with Section 34.

11. In the light of the procedure prescribed under Section 13 of the Act, the present application under Section 11(6) of the Act for removal of the arbitrator already appointed and to replace him with a new arbitrator is not maintainable.

12. In SAI PRIYA CONSTRUCTION COMPANY case (2 supra) relied upon by the learned counsel for the applicant, the Division Bench was dealing with a case where the arbitrators appointed failed to perform their duties without undue delay. The said case is clearly distinguishable on facts and therefore the ratio laid down by the Division Bench has no application to the present case.

13. Another decision of the High Court of Delhi in VISHNU PROMOTORS PRIVATE LIMITED v. HOLTEC CO-OPERATIVE GROUP AND OTHERS³ cited by the learned counsel for the applicant is also of no assistance since the said case was not decided on merits.

14. For the aforesaid reasons, the Application is dismissed. However, this shall not preclude the applicant to make an application under Section 34 of the Act to set aside the Award on the ground that the arbitrator acted with bias or malice. No costs.

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