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Court : Allahabad

Decided On : Mar-03-2011

Judge : Ferdino I. Rebello, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Section 11(3) (4) (5) (6) (7), (8) and (10), 34, 12; Code of Civil Procedure (CPC) - Section 47

Appeal No. : Arbitration Petition No.9 of 2003

Appellant : Kanpur Development Authority, Kanpur

Respondent : M/S. U.P. Builders, Kanpur and Another

Judgement :

1. This is an application by the petitioner for referring the dispute under **Section 11 of the [Arbitration and Conciliation Act, 1996](#)** (hereinafter referred to as 'the Act') and to appoint, preferably the Chief Engineer, Kanpur Development Authority as the Arbitrator.

2. There is an agreement between the petitioner and opposite party no.1 in which there is a clause, which reads as under:-

"Clause 24. Except where otherwise specified in the contract the decision of the Chief Engineer for the time being shall be final, conclusive and binding on all

parties to the contract upon all question relating to the meaning of the specifications designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out or relating to the contract, designs, drawings specifications, estimates instructions, order or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof the contract by the contractor, shall be final conclusive and binding on the contractor."

3. I do not propose to go into the controversy as to whether **Clause 24** is a clause pertaining to arbitration as the Chief Justice, exercising jurisdiction under **Section 11 of the Act** in several other cases between the petitioner and the opposite parties, as set out in paragraph 10 of this petition, has treated the said clause as an arbitration clause and has appointed the Chief Engineer, Kanpur Development Authority as the sole Arbitrator.

4. The petitioner contends that opposite party no.1 was allotted work for Rs.28,61,709.80, out of which opposite party no.1 claims to have received the payment of Rs.19,56,707.13. According to the petitioner, opposite party no.1 did not complete the entire work allotted to him. The reasons need not be set out herein. Opposite party no.1, however alleged that the work done by him for Rs.2,83,278.54 have not been entered into the Measurement Book. From the records, it appears that opposite party no.1 served a notice dated 28.5.2002 on various officers of the petitioner. According to opposite party no.1, it was in accordance with the agreed procedure for appointment of an Arbitrator. Opposite party no.1 thereafter proceeded to appoint opposite party no.2, as the Arbitrator. In the communication of 28.5.2002, it was also mentioned that opposite party no.1 would file claim before the said Arbitrator. It is the case of the petitioner that they had never given their consent for appointing opposite party no.2 as the sole Arbitrator. Moreover, in terms of the contract, there was no question of appointment of opposite party no.2, as the sole Arbitrator.

5. Opposite party no.2 proceeded to assume jurisdiction as an Arbitrator and issued notice to the petitioner. The petitioner through their counsel submitted an application on 02.09.2002 setting out therein that the petitioner had never appointed opposite party no.2 as the sole Arbitrator, nor had the petitioner consented to appointment of opposite party no.2 as the sole Arbitrator and in terms of agreement between the parties, opposite party no.2 could not have been appointed as an Arbitrator. The petitioner requested opposite party no.2 to drop the alleged arbitration proceedings. Against that, opposite party no.1 requested opposite party no.2 to dismiss the application of the petitioner and to proceed with the arbitration proceedings. Opposite party no.2 on 17.10.2002, dismissed the application of the petitioner and fixed 25.10.2002 for hearing the matter. According to the petitioner, opposite party no.2 then proceeded with the arbitral proceedings. In these circumstances, the petitioner has prayed that the Chief Engineer, Kanpur Development Authority be appointed as the Arbitrator.

6. A reply has been filed on behalf of opposite party no.1. It is contended that the petitioner did not object to the appointment of opposite party no.2 as the Arbitrator, nor proposed any other name and as such, it is not open to the petitioner to challenge the appointment of opposite party no.2 as an Arbitrator as they have waived their rights. The order dated 17.10.2002 dismissing the application/objection of the petitioner has also not been challenged by the petitioner before a superior court. It is also set out that Clause 24 of the agreement is not an arbitration clause. It may be pointed out that opposite party no.1 has moved under **Section 11 of the Act** in other applications based on the same clause has not referred to any other clause in the agreement by which an Arbitrator could have been appointed.

7. Subsequent to this petition, an ex-parte award came to be passed by opposite party no.2 dated 13.12.2002. Opposite party no.1 thereafter applied for execution of the award, which the petitioner contested by filing his objection under **Section 47 of the Code of Civil Procedure** in Execution Case No.69 of 2003. Petitioner at the same time also challenged the award under Section 34 of the Act. Both these challenges were before the District Judge, Kanpur Nagar.

8. During the pendency of the proceedings, on behalf of the petitioner, an additional affidavit has been filed. It is pointed out that the District Judge in the execution proceedings, held that the award is null and void and un-executable. Further, the District Judge proceeded to hold that no findings on objections under Section 34 of the Act are being recorded as the award has been declared null and void ab initio. Both proceedings, i.e. execution and challenge to the award under Section 34 of the Act have been disposed of by that order. A finding has been recorded by the District Judge, that **Clause 24** of the agreement is an arbitration clause and as per this clause, the Chief Engineer of the Kanpur Development Authority could only have acted as the Arbitrator. The said order is in revision before this Court.

9. The law as now declared is that if the parties have not agreed on a procedure for appointment of an Arbitrator/Arbitrators, then in terms of Section 11 (3) of the Act, in a case of arbitration by three arbitrators, each party shall appoint one Arbitrator and the two appointed Arbitrators, shall appoint the third Arbitrator, who shall act as the presiding Arbitrator. Under Section 11 (4) of the Act, if the appointment procedure in **sub-section (3)** applies and the Arbitral Tribunal is not constituted as set out therein, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Under Section 11 (5) in case of failure to agree on a procedure for appointing the arbitrator and arbitration is by a sole arbitrator, if the parties fail to agree for appointment of Arbitrator, as set out therein, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. It would thus be clear that this is a procedural aspect in the matter of constitution of Arbitral Tribunal. Section 11 of the Act is reproduced for appreciating the issue.

"11. Appointment of arbitrators.- (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by

him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to -

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7) (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate, and, where the High Court itself is the

Court referred to in that clause, to the Chief Justice of that High Court."

The section thus does not provide for removal of Arbitrator/Arbitrators. Could, therefore, the Chief Justice or his delegate remove the Arbitrator even if wrongly nominated once he assumed jurisdiction or his appointment itself was a nullity at law.

10. When the petition was filed, according to the petitioners' own case, opposite party no.2 had been appointed as the sole Arbitrator by opposite party no.1. The petitioner has come to this court with the prayer to refer the matter in dispute preferably to the Chief Engineer, Kanpur Development Authority when opposite party no.2 had assumed jurisdiction. Thus admittedly, an Arbitrator had been appointed when the petition was filed. Merely because the procedure followed was arbitrary or illegal or appointment of opposite party no.2 was itself illegal, can the Chief Justice or his nominee assume jurisdiction under Section 11 of the Act and is there power in the Chief Justice or his nominee to remove an Arbitrator, who is appointed and has assumed office. Can a subsequent event of the Arbitrator passing an award and thereby ceasing to act as an Arbitrator or the award being set aside, gives jurisdiction to the Chief Justice or his nominee to appoint another Arbitrator in the present application. It is in that context, that I proceed to answer the issue.

11. The question, therefore, before me is whether it is open under **Sections 11 (4) or 11 (5) of the Act** to appoint a sole Arbitrator. Clause 24 of the agreement, no doubt has made the Chief Engineer an authority to decide the disputes arising between the petitioner and opposite party no.1 and his decision shall be final, conclusive and binding on the contractor. Such a clause normally is understood to mean excepted claims. This clause, however, has been treated as an arbitration clause by both the parties. In the order passed in Arbitration Petition No.28 of 1999, in an application by respondent no.1, both the parties had agreed that the Chief Engineer, Kanpur Development Authority would be acting as the sole Arbitrator. This order was passed on 16.08.2002. There is, therefore, an agreement between the parties, though may be in a different context, that the said clause is a clause pertaining to arbitration.

12. In these circumstances, the question for my consideration is whether in this application, the Chief Engineer of the petitioner should be appointed as the sole Arbitrator. There is nothing on record to show that the petitioners have invoked the arbitral clause or had given notice to opposite party no.1 to appoint an Arbitrator. Section 11 (5) of the Act itself requires that in an arbitration with the sole Arbitrator, if the parties fail to agree to appoint an Arbitrator within thirty days from receipt of a request by one party to the other party, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. There is no averment in the petition that the petitioner had given notice to opposite party no.1 for appointment of Arbitrator and that opposite party no.1 had not agreed to the appointment of the said Arbitrator, though it may be pointed out that on the date of filing of the petition, opposite party no.1 had already appointed opposite party no.2, as an Arbitrator. Thus the condition precedent for appointment of an arbitrator does not exist. As such the present application would not be maintainable.

13. This petition would raise another issue, namely, whether opposite party no.1 without consent of the petitioner could have appointed opposite party no.2 as the sole Arbitrator in the absence of any clause other than clause 24 of the agreement and an agreed arbitral procedure. If opposite party no.1 had made a demand for appointment of Arbitrator and on failure of consent by the petitioner herein, as there was no arbitral procedure, opposite party no.1 could have applied under **Section 11 (5) of the Act**, which opposite party no.1 has failed to do. Opposite party no.2 then proceeded to pass an award. The petitioner challenged the said award under **Section 34 of the Act** and had also filed their objection under **Section 47 of C.P.C.** Instead of deciding the challenge under Section 34 of the Act, the objections under **Section 47** raised by the petitioner to the appointment of opposite party no.2 as an Arbitrator were decided by the learned District Judge, who held that the Arbitrator could not have been appointed and consequently, the award was a nullity at law. It is not necessary to further comment on that issue, as the matter is not directly in issue in this petition.

14. The arbitration petition when filed was not maintainable, as it was open to the petitioner to proceed under **Section 13 of the Act** considering the grounds

available for challenge under **Section 12 of the Act**. The fact that subsequently during the pendency of the petition the arbitrator become functus officio because of passing of the award or the award being set aside would not make the petition maintainable. Apart from that, as already pointed out, there is nothing in **Section 11 (5) of the Act**, which confers powers on the Chief Justice to exercise jurisdiction in a case where no request was made by opposite party no.1 for appointment of an Arbitrator.

15. Another question which arises for consideration is, what is the claim the petitioner has against opposite party no.1, to invoke the provision of **Section 11 of the Act**, for appointment of an arbitrator. The entire application is based on the claim of opposite party no.1 against the petitioner. Under **clause 24** of the agreement, it is the petitioner, who had to appoint the arbitrator, as the arbitrator is the Chief Engineer of the petitioner. If the petitioner failed to make the appointment for whatever reason, can the petitioner move under **Section 11 of the Act**, because opposite party no.1 named an arbitrator. In my opinion, in such circumstances, the petition by the petitioner is not maintainable. The Chief Justice can only exercise jurisdiction under Section 11 of the Act, only in the circumstances set out therein. If **Clause 24** of the agreement, is the procedure for appointment of a sole arbitrator, it is opposite party no.1, who could have applied under Section 11 (6) of the Act and not the petitioner. On this count also, the petition must fail.

16. For the aforesaid reasons, in my opinion, the present arbitration petition is not maintainable and consequently, it is dismissed. No order as to costs.

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