

SUPREME COURT OF INDIA

Grid Corporation of Orissa Ltd.

Vs.

AES Corporation

(R.C.Lahoti J.)

01.10.2002

ORDER

R.C. Lahoti, J.

1. This is a petition under Section 11(6) and Section 14 of the *Arbitration and Conciliation Act, 1996* (hereinafter 'the Act', for short) filed on 11.2.2002. The principal relief sought for in the petition is:-

"appoint the third and presiding arbitrator to constitute the arbitral tribunal to adjudicate upon the disputes and differences between the parties."

2. Let it be stated at the very outset that a conjoint petition under Section 11(6) and Section 14 of the Act would not lie for the simple reason that the petition under Section 11(6) is to be heard and decided by the Chief Justice or any person or institution designated by him while a petitioner under Section 14 of the Act lie to the Court. With the decision of the Constitution Bench in *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*¹, it is settled that the Chief Justice or his designate does not discharge any judicial function under Section 11(6). The Chief Justice or his designate, though a Judge, does not sit as a Court. The two fora, contemplated by Section 11(6) and Section 14(2) are different, and therefore, no single forum can grant such reliefs as are contemplated by the two provisions.

3. The facts in brief. The petitioners and the respondents entered into a shareholders agreement dated 31st August 1999 which contains an arbitration clause. The relevant clauses of the agreement are as under:-

"28.2 This agreement shall be governed by, and construed in accordance with Indian law and, subject to Clauses 28.3 and 28.4, the parties hereby irrevocably submit to the jurisdiction of the appropriate courts in Orissa.

28.3 Any dispute, question or difference arising between GRIDCO (Petitioner) and the Investors (respondents 1 and 2) in connection with this agreement or otherwise in regard to the relationship of the parties pursuant to the terms of this agreement, including the construction and scope of the agreement, shall be first

referred to the Chief Executive (by whatever name called) of the Investors and GRIDCO not by way of arbitration but with a view to amicably resolving the issue by discussions and conciliation.

28.4 All and any disputes or differences arising out of or in connection with this agreement, which cannot be resolved in accordance with Clause 28.3 or the breach, termination or invalidity of this Agreement shall be submitted to arbitration in accordance with the *Arbitration and Conciliation Act, 1996*. The number of arbitrators shall be three.

28.5 The place of the arbitration shall be Bhubaneswar, Orissa and the language of the arbitral proceedings shall be English."

4. Disputes and differences have arisen between the parties referable to the shareholders agreement as arising therefrom. On 27.11.2001, the petitioners addressed a fax message to the respondents nominating Shri Kailash Bihari Verma, IAS (Retd.), resident of Bhubaneswar as an Arbitrator and calling upon the respondents to nominate their Arbitrator for arbitration of the disputes. The respondents vide their fax dated 27.12.2001 nominated Mr. Donald F. Donovan, resident of New York as their Arbitrator in the proposed arbitration proceedings.

5. On 18.1.2002, Mr. Donovan informed the parties that on behalf of Mr. Verma and himself he was acknowledging the respective appointments of the two as arbitrators and that the two were conferring on the appointment of a third Arbitrator. The communication stated inter alia

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"We have agreed that the third Arbitrator should be a national of neither India nor the United States."

6. On 23.1.2002, Mr. Donald Francis Donovan sent a fax message to both the parties which is reproduced hereunder:-

"By telecopy and international courier_M/s Amarchand & Mangaldas Company Secretary & Suresh A. Shroff & Co. Grid Corporation of Orissa Ltd. 13, Abul Fazal Road Janpath, Bhubaneswar-751 022 Bengali Market India New Delhi - 110 001 India

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Dear Representatives:

Pursuant to our authority under Section 11(3) of the Arbitration and Conciliation Act, 1996, Mr. Verma and I hereby appoint David A.R. Williams, Q.C., of New Zealand as the presiding arbitrator in this proceeding.

Mr. Williams was a litigation partner of the Russell McVeagh firm in Auckland until 1987, when he was appointed Queen's Counsel. He served as Judge of the High Court of New Zealand from 1991 through 1994. He presently maintains chambers in Auckland and London. He is, among other positions, a Member of the ICC Court of International Arbitration in Paris and the LCIA Court of Arbitration in London.

Mr. William's contact information is:

(details Omitted)

We are pleased to report that Mr. Williams has advised that he accepts appointment.

Very truly yours,

Donald Francis Donovan

Copy: David A.R. Williams, Q.C. Mr. K.B. Verma, IAS (Retd.)"

7. According to the petitioners they made enquiries from Shri Verma, the Arbitrator, on the morning of 24.1.2002 and learnt that there was no written communication from Mr. Verma agreeing to appoint Mr. David A.R. Williams as the third Arbitrator and the presiding Arbitrator; that there were only telephonic conversations between Mr. Verma and Mr. Donald regarding the appointment of the third and presiding Arbitrator; that it appears that Mr. Verma was led by Mr. Donald into forming an impression and believing that the appointment of an Indian national as the presiding Arbitrator was not permissible in law; and that Mr. Donovan had telephonically communicated to Mr. Verma on the night of 23.1.2002 the consent of Mr. David Williams having agreed to act as the presiding Arbitrator which oral conversation was followed by a letter dated 23.1.2002 but this was without any written communication or confirmation in writing from Mr. Verma regarding his agreement to the appointment of Mr. David Williams as the presiding Arbitrator.

8. On 24.1.2002, Mr. Verma sent a communication to Mr. Donovan, endorsing copies thereof to both the parties, the relevant part whereof reads as under:-

"Dear Mr. Donovan,

Pursuant to our conversation on telephone last night (10 p.m. Indian Standard Time January 23, 2002) and this morning January 24, 2002, I obtained a copy of your FAX message regarding the appointment of presiding Arbitrator from Mr. U.K. Panda, Company Secretary, GRIDCO. His FAX Number is 91-674-542981.

I deeply regret the necessity of saying that on further reading the provisions of Arbitration and Conciliation Act, 1996 (India Act 26 of 1996) which do not bar the appointment of an Indian as presiding arbitrator, Clause 28 (including its sub-clause) of the shareholders agreement between GRIDCO, AES and others dated 31st August,

1999, I wish to reconsider my agreeing with you that Mr. David A.R. Williams be the Presiding Arbitrator in this arbitration case. Since the shareholders agreement is subject to the jurisdiction of the appropriate court(s) in Orissa, and the place of arbitration is Bhubaneswar, I request that you agree to the appointment of a retired Judge of the High Court of Judicature, Orissa or of the Supreme Court of India. We may discuss further and finalise the name of a presiding arbitrator from amongst the retired Judges in India.

This is no reflection on the credentials of Mr. Williams for whom I have the highest regards and to whom I tender an apology through you.

Yours truly,

Sd/-

K.B. Verma

January 24, 2002"

9. Mr. Donovan declined the request of Mr. Verma for reconsidering the appointment of Mr. Williams. In his response dated 25.1.2002 to Mr. Verma, Mr. Donovan stated inter alia "I do not believe that we either can or should reconsider our appointment of Mr. Williams. You and I agreed at the outset, and reiterated throughout the course of our discussions, that the presiding arbitrator should be a national of a jurisdiction other than India and the United States. I so agreeing, we acted in accordance with basic principles of international arbitration. Under the Arbitration and Conciliation Act, 1996, Mr. William's appointment was effective upon our (SIC) validly constituted tribunal. I do not know of any authority that would allow us to rescind the appointment, but in any event I believe it would be inappropriate to do so. With the greatest respect for your recent thoughts on the matter, therefore, I must decline your request that we reconsider our appointment. In these circumstances, I see no need to pass on your thoughts to Mr. Williams or to copy him on this email."

10. In his further communication dated 28.1.2002, Mr. Donald informed the petitioners very firmly that Mr. Verma and he, having conferred, he was writing on behalf of Mr. Verma and himself that they do not have authority to reconsider their appointment of Mr. Williams and that the tribunal was effectively constituted with Mr. Williams as presiding arbitrator. Mr. Donald emphasized that Mr. Williams is a person of unquestionable distinction who is eminently qualified to serve as presiding Arbitrator in this proceeding.

11. Many a letters/messages appears to have been exchange wherein the petitioners were insistent on the third arbitrator being chosen from out of the retired Judges available in India but Mr. Donovan was not agreeable.

12. On 31.1.2002, Mr. Verma addressed a letter to Mr. Williams and copies to Mr. Donovan and the parties, wherein he stated as under:-

"Dear Mr. Williams,

I write this letter to say that a controversy has arisen in influential opinion making section of the civil society in regard to my agreeing with Mr. Donald F. Donovan of Debevoise & Plimpton, New York, the other arbitrator, that you will be the presiding arbitrator. The controversy is likely to snowball and affect the arbitration.

Since arbitration is quasi judicial, I would not like it to be tainted by controversy.

In the circumstances, I consider it honorable to withdraw and do hereby withdraw from the arbitration and leave it to your conscience to reconsider your acceptance of the office of presiding arbitrator.

With warm regards,

Yours sincerely,
(K.B. VERMA)"

13. On 1.2.2002, the petitioners appointed Justice S.C. Mohapatra, retired Judge of High Court of Orissa and Allahabad and former Chairman of Orissa Administrative Tribunal as their Arbitrator in place of Mr. Verma, in view of his having withdrawn from arbitration. On 1.2.2002, Justice S.C. Mohapatra addressed a communication to Mr. Donovan requesting him to agree for the appointment of a former Judge of Supreme Court of India (named in the letter) to be the third Arbitration. It is also stated that if Mr. Donovan was not agreeable then the petitioners would move the Chief Justice of India under Section 11 of the Act for appointment of a third arbitrator. Copy of the communication was endorsed to Mr. Williams also.

14. Mr. Williams, the third Arbitrator, has in his fax message dated 5.2.2002, addressed to both the parties and the two Arbitrators, stated that he was not agreeable to the suggestion of withdrawing himself as presiding Arbitrator. He has assigned reasons in support of his resolution based on the provisions of the Act and practice in international commercial arbitration. He has firmly stated that an arbitral tribunal consisting of himself as presiding Arbitrator and Justice Mohapatra and Mr. Donovan as two Arbitrators had come into existence and it was not legally permissible under the Act for him to withdraw. Reference is made to Sub-section (2), (3), (4) and Section 15 of the Act.

15. It may be stated that Mr. David A.R. Williams is a Queen's Counsel of New Zealand and was a litigation partner of the Russell McVeagh firm in Auckland until 1987. He served as a Judge of the High Court of New Zealand from 1991 through 1994. He is a member of the ICC Court of International Arbitration in Paris and the LCIA Court of Arbitration in London. The credentials and credibility of Mr. Williams to act as presiding Arbitrator has not been

disputed by the petitioners; what has been disputed is only the legality and consequential validity of the appointment.

16. According to the petitioners, the appointment of Mr. Williams as presiding Arbitrator is a nullity for two reasons (i) that the appointment of the third Arbitrator is a judicial act, to be performed by two Arbitrators, and therefore, must be in writing and in consultation with or at least after putting the parties to notice of the proposed appointment; and (ii) that Mr. K.B. Verma agreed to the appointment of Mr. Williams as third Arbitrator on account of his being under a mistake as to Indian law that the third Arbitrator in an international commercial arbitration has to be a non-Indian. For these two serious infirmities, as alleged by the petitioners, they pray that the appointment should be held a nullity and hence liable to be ignored. The office of the third Arbitrator, the presiding Arbitrator, being vacant, such vacancy can be filled up by the Chief Justice of his designate under Section 11(6) of the Act, is the submission of the petitions.

17. I have heard Mr. G.L. Sanghi, senior advocate, the learned counsel for the petitioners and Mr. P. Chaidambaram, senior advocate, the learned counsel for the respondents.

18. Whether the appointment of the third arbitrator should necessarily be done by the two appointment arbitrators by sitting together and in writing? Are they required to consult the parties too, while doing so, or at least, to put the parties on previous notice? Primarily it is for the parties to agree upon a procedure for appointing the arbitrator or arbitrators. Failing such agreement, Sub-section (3) of Section 11 of the Act provides that 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. The law nowhere contemplates such appointment being necessarily in writing. The requirement of the law is that there should be an appointment and the appointment should be by the two appointed arbitrators. Shri G.L. Sanghi, the learned senior counsel for the petitioners placed reliance on the law as stated in Halsbury's Laws of England (Fourth Edition, Volume 2 vide para 570). The statement of law there is the appointment of umpire by the arbitrators is a judicial act; they must therefore meet and exercise the power together. This statement of law in Halsbury is based on two decided cases namely, *Re Hopper*², *Re Lord and Lord*³. Reliance was also placed on *Keshavsinh Dwarkadas Kapadia, etc. v. Indian Engineering Company*⁴. Dealing with the case of appointment of an umpire under the *Arbitration Act, 1940* this Court has observed by reference to certain English cases:-

"The appointment of an umpire by two arbitrators means that the arbitrators are to concur in appointing an umpire. There is no particular method of appointment of an umpire prescribed by the Act. The usual method of appointment of an umpire by the arbitrators is in writing. Arbitrators who are required to appoint an umpire are under no obligation to obtain the approval of the choice of the personnel by the parties who appointed the arbitrators. If any party is dissatisfied with the choice that will not affect the validity of the appointment. [See, *Oliver v. Collings*⁵].

The appointment by arbitrators of an umpire should be the act of the will and judgment of the two. Such an appointment is to be one of choice and not of chance. [See, *Re-Cassell*). (1829) 9 B & C 624 : 109ER 232.

19. In '*Lord v. Lord*' it appeared by the submission that the parties had bound themselves, in case the two arbitrators first appointed should not agree, to perform the award of such third person as the said arbitrators should by writing under their hands, to be indorsed on the submission, appoint as umpire. One of the arbitrators sealed that the memorandum of appointment was not made or signed by himself. In this background it was held that every judicial act, to be done by two or more, must be completed in the presence of or who do it; for those who are to be affected by it have a right to the united judgment of all up to the very last moment.

20. In *Re Hopper* (supra), *Lord v. Lord* (supra) was cited and distinguished. Cockburn, CJ held that signing the appointment of umpire is not a judicial act; the judicial act is the agreement as to the appointment of the particular person who is to be the umpire, and the signing is merely the record of that which they have already done in the judicial exercise of their functions. Blackburn J, has noted, after seeing several cases that were cited that no case has decided that, where two arbitrators have exercised their judgment in the selection of an umpire, their not being present together at the mere formal act of afterwards recording the appointment vitiates it, and to uphold this proposition would be to adhere to the letter of the law instead of to the substance.

21. *Lord v. Lord* was cited before the Court of Appeal in *European Grain and Shipping Limited v. Johnston*⁶. The rule propounded in *Lord v. Lord* was adversely commented upon. Lord Denning, MR held that the time had come when business convenience requires laying down a different rule. When an agreement or award or another document is to be done by two or three, generally the draft can be exchanged and it would be enough if the final document is signed by all. It is quite unnecessary for them all to meet together to sign it though each signed it at a different time or place from the others. Kerr L.J. in his speech noticed some arbitral rules, particularly of the International Chamber of Commerce and held that where arbitrators were in different countries and took many important decisions by correspondence or by telephone, it would be in the interest of all parties for saving costs with coincidence in time and place of the arbitrators for the purely formal purposes of signing the award is not insisted on as essential.

22. Shri P. Chadmabaram, the learned senior counsel appearing for the respondents urged that the submission of the petitioners proceeds on wrong premises inasmuch as the appointment of third arbitrator by the two arbitrators cannot be said to be a judicial act. The learned counsel referred to *Jaswant Sugar Mills Ltd., Meerut v. Lakshmi Chand and Ors.*⁷ wherein (at pages 251-252) the Constitution Bench has laid down the criteria for determining a decision or an act to be judicial, and submitted, by reference to those tests that the act of appointing the third arbitrator cannot be said to be a judicial act. In the Constitution Bench decision of this Court in *Konkan Railway* (supra) the principles laid down in *Jaswant Sugar Mills Ltd.* (supra) have been reiterated and it has been held that the appointment of an

arbitrator by the Chief Justice under Section 11(6) of the Act is not an adjudicatory order and cannot be said to be discharging of a judicial function. That being so, the appointment of the third arbitrator by two arbitrators can certainly not be a judicial act. Shir P. Chidambaram, the learned senior counsel further referred to the provisions contained in Section 7(3), 7(4)(a), 12(1), 12(2), 31(1) of the Act and submitted that the Legislature has taken care to use the word 'writing' or 'in writing' wherever it intended any act or function to be performed in writing but the Legislature had not chosen to engraft the requirement of writing into Section 11(3), and therefore, by process of interpretation or by attributing an intention to Legislature which the legislative drafting does not, the requirement of the appointment of third arbitrator by the two arbitrators being necessarily in writing cannot be spelled out. There is substance in the submission so made.

23. In my opinion, it is not necessary within the meaning of Section 11(3) that the presiding arbitrator must be appointed by the two appointed arbitrators in writing nor it is necessary that the two appointed arbitrators must necessarily sit at one place, deliberate jointly and take a decision in the presence of each other in regard to the appointment of the presiding arbitrator. It is enough if they have actually consulted or conferred with each other and if both or any of them communicates to the parties the appointment of the presiding arbitrator as having taken place by the joint deliberation of the two. It is clearly spelled out from the correspondence between the two arbitrators reproduced hereinabove that the two arbitrators had agreed on principle that the third arbitrator shall be of a nationality different from the one to which either of the parties belongs. They had also agreed upon the appointment of Mr. Williams. The communication of such appointment though made by Mr. Donovan is on behalf of himself and Mr. Verma. The correctness of such consultation having preceded the appointment is not doubted in the correspondence and has also not been disputed by the learned senior counsel for the petitioners during the course of hearing. Mr. Verma's protest to appointment of Mr. Williams was based on 're-consideration' of the issue, that is, on second thoughts. The practice adopted by the two arbitrators is consistent with the practice of International Commercial Arbitration and conducive to the convenience of the parties and also saves them from avoidable expenditure. When an effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties. The appointment need not necessarily be by a writing signed by the two arbitrators; it satisfied the requirement of law if the appointment (i) has been actually made, (ii) is preceded by such consultation as to amount to appointment by the two, and (iii) is communicated. It is not essential to the validity of the appointment that the parties should be consulted, or involved in the process of appointment or given a previous notice of the proposed appointment.

24. The next question is: whether it can be said that Mr. K.B. Verma while agreeing for appointment of Mr. Williams as third arbitrator was under a mistake as to Indian law, and if so, then its effect? Shir G.L. Sanghi, the learned senior counsel, referred to the order passed by M. Jagannadha Rao, J. acting as designate of Chief Justice deciding an application under Section 11(5) of the Act in *Malaysian Airlines Systems BHD (II) v. Justice Travels (P) Ltd.*⁸. Vide Paras 26 and 28. His Lordship has held that Section 11(9) of the Act is not mandatory

and the word 'may' therein cannot be read as 'shall' and to appoint an arbitrator not belonging to the nationality of either of the parties is not mandatory. There is no quarrel with the above said proposition. Yet, there is nothing wrong in the two arbitrators having formed an opinion in consultation with each other that a person of third nationality would be preferable as presiding arbitrator. The submission based on "mistake of law" doctrine is unwarranted and besides the point.

25. In *Konkan Railway Corporation Ltd. and Ors.* (supra) it has been held (vide para 21) that in spite of an appointment having been made by the Chief Justice or his designate an objection as to the constitution of the arbitral tribunal being improper or without jurisdiction is capable of being raised before the arbitral tribunal itself under Section 16 of the Act, for an objection not only as to the width of jurisdiction but also one going to the very root of its jurisdiction is entertainable by the arbitral tribunal under Section 16. That being so assuming without holding that there is any substance in the plea of the petitions it is open for them to raise the same before the arbitral tribunal. Once the arbitral tribunal has come into existence, as it has - in my opinion in the facts and circumstances of the case a petition under Section 11(6) of the Act is not an appropriate remedy which the petitioners have chosen. None of the grounds contemplated by Clauses (a), (b) and (c) of Sub-section (6) of Section 11 exists. There is no deficiency in the constitution of the arbitral tribunal attributable to any of the parties or the arbitrators. There is no occasion for filing a request petition under Section 11(6) of the Act.

26. The petition is dismissed.

¹[2002]1SCR728

⁴[1972]1SCR695

⁷(1963)ILLJ524SC

²(1867) LR2 QB 367

⁵(1809) 11 East 367

⁸2000 (7) SCALE 724

³(1855) 5 E & B 404

⁶(1982) 3 All ER 989