SUPREME COURT OF INDIA

Food Corporation of India

Vs.

Indian Council of Arbitration

C.A.Nos.4655-4809 with 4810-4987 of 2003

(Doraiswamy Raju and D. M. Dharmadhikari, JJ.)

17.07.2003

JUDGEMENT

D. RAJU, J.:-

1. Special leave granted. These appeals are dealt with together since they involve identical questions for consideration on almost similar set of facts.

2. The appellants are the Food Corporation of India (hereinafter referred to as the 'FCI') and it had approached the Delhi High Court and thereafter this Court against the action of the Indian Council of Arbitration (hereinafter referred to as the 'ICA'). In refusing, as conveyed in its letter dated 4-3-1998, to proceed with the arbitration claims till the FCI and the opposite parties therein (hereinafter called 'Millers') agree in writing afresh that the arbitration may be conducted under the Rules of Arbitration of the Indian Council of Arbitration. Therefore, the council and the concerned millers are arrayed in the respective cases, as respondents before this Court.

3. The FCI, in the course of its functions and day to day transaction of its business, entered into agreements with the millers for storage-cum-milling of FCI paddy stored in millers premises into conventional raw/parboiled rice and delivering the rice as per the out-turn stipulated for different varieties of paddy and delivery of the same in return for the payments to be made on the rates agreed to between them. The relevant contracts, apart from containing the detailed terms and conditions for carrying out thereof, also contained an uniform and standardized arbitration clause, for settlement of claims and disputes arising out of such contracts through the council. It appears, in some cases, that the council asked the FCI to forward the name of the sole arbitrator to the council for proceeding with the matter further and in yet another case the council asked the FCI to get the rice mills concerned to convey directly to the ICA their consent.

4. The relevant arbitration clause in these contracts is as hereunder :-

"All disputes or differences whatever existing between the parties out of or relating to the agreement meaning and operation or effect of this agreement or the breach thereof shall be settled by arbitration in accordance with the rules or arbitration of the Indian Council of Arbitration and the award made in pursuant thereof shall be binding on the parties. The Senior Regional Manager/Zonal Manager of the Corporation shall appoint/nominate arbitrator out of the persons in the panel of arbitrators maintained by ICA. It is a term of this contract that in the event of the arbitrator being transferred, vacation of office, death or inability shall appoint another person out of panel maintained by ICA to act as arbitrator. Such person shall be entitled to proceed with reference from the stage where it was left by his predecessor.

Provided further that any demand for arbitration in respect of any claim(s) of the Miller, under the contract shall be in writing and made within one year of the date of completion of expiry of the period of contract. If the demand is not made within the period, the claim(s) of the Millers shall be deemed to have been waived off and absolutely barred and the Corporation shall be discharged and released of all liabilities under the contract in respect of these claims.

The costs of the proceedings in connection with arbitration shall be in the discretion of the arbitrator who may make suitable provision for the same in his award."

5. Even after the FCI had sent consent letters from different rice mills to ICA, finding no response from some of the Millers when the ICA wrote to them, the ICA by its communication dated 10-12-1998 called upon the FCI to require the concerned Millers, who gave consent for arbitration through ICA, to communicate directly with the ICA conveying their consent and conveying further that on receipt of the consent from the concerned Rice Mill in a specific case, the ICA will proceed in the matter as per the rules and that if the Rice Mills do not give their consent for reference of the disputes for settlement through ICA, the matter in which no clear consent is conveyed will be closed on file and consequently refund the deposit made by the FCI. Thereupon, the FCI approached the

Delhi High Court invoking its jurisdiction by seeking adjudication on the following three questions :-

i. "Whether under the existing arbitration clause the dispute between the parties is arbitrable in accordance with I.C.A. Rules.

ii. Whether the Registrar, I.C.A. has any jurisdiction to direct the claimant to get fresh agreement signed. If so, what is the effect of failure to obtain such fresh agreement and in such case which will be the forum for adjudication of dispute between the parties.

iii. Whether the Registrar, I.C.A., in asking for the new requirement under question Nos. 1 and 2 as above, is justified in his decision not to proceed with the case further, and also to ask the petitioner-F.C.I. to seek approval of respondents Nos. 2 and 3 for appointment of a common arbitrator upon the F.C.I. for obtaining consent from respondents Nos. 2 and 3 afresh in this respect."

6. The stand of the FCI in respect of those questions seems to have been that, having regard to Rr. 4(b), 5, 9, 10, 13, 14 to 19, 20 to 22 and 37 of the ICA Rules and a proper understanding of the same, the direction to get any fresh agreement for arbitration is contrary to law, that the arbitral proceedings in these cases have already been commenced on 15-10-1997 when the request for the dispute to be referred to arbitration was received by the respondents, that the request made by the appellants is not inconsistent, in any manner, with the ICA Rules or the provisions of the Act and consequently the ICA could not have refused to comply with the request to refer and proceed with the claims in accordance with law. The same was opposed by the respondents.

7. The learned single Judge of the High Court, by his order dated 10-2-2000 in A.A. Nos. 175, 173 etc. of 1999, held the petitions before the Court to be not maintainable on the view that the proceedings necessary for the Court to take steps for the appointment of the arbitrator have not been fulfilled. The learned Judge observed further that the arbitration clause in question envisaged the appointment of arbitrator by the FCI whereas if it is to be appointed by the ICA, it can be only with the consent of the parties, which, according to the Court, was wanting in these cases. Rule 22(a) of the ICA Rules was considered to be in direct conflict with the arbitration clause entered into between parties in this regard and once the power to appoint the arbitrator is given under the arbitration clause in this case to the Senior Regional Manager/Zonal Manager of the FCI, no power could be said to have been given to the ICA to appoint an arbitrator and that it is only after an arbitrator has been appointed by the FCI in terms of the agreement the rules of the ICA were required to be followed as to the procedure for conduct of the same and not before that stage and consequently there was no failure on the part of the ICA in these cases to call for the interference of the Court. Aggrieved, these appeals have been filed.

8. Heard the learned senior counsel appearing on either side. Shri G. L. Sanghi, learned counsel for the Food Corporation of India, the appellants herein, both at the time of hearing and in the written submissions, vehemently contend that the orders of the High Court, under challenge, suffer from serious infirmities and the reasons assigned therefor are untenable in law. It is contended for the appellants that there is no inconsistency or contradiction between the clause for arbitration as contained in the agreement between the parties and the provisions contained in the ICA Rules and that a proper and harmonious construction have to be made of the same keeping in view the firm determination of the contracting parties to have the disputes resolved and determined by means of arbitration through the medium of the ICA. The High Court, according to the appellants, ought to have properly reconciled the arbitration clause and the relevant ICA Rules to ensure the resolution of the dispute by arbitration rather than create an unjustified and unwarranted stalemate in the matter. Strong reliance is sought to be placed on the language of the arbitration clause in the contract and the provisions contained in Rr. 16, 21 and 22 of the ICA Rules to justify the stand of the appellants. It is equally contended on behalf of the appellants that when at no point of time the appellant asserted for any right in them to nominate the arbitrator themselves and instead had been all along requesting the ICA to nominate the arbitrator to facilitate arbitration in accordance with its procedure, the stand taken for the ICA to insist upon a fresh consent for proceeding in the matter further was wholly unjustified. The ICA was said to be taking varying stands at different stages to justify its unreasonable and unwarranted stand in obstructing the resolution of the dispute between parties amicably by means of arbitration, unmindful of the heavy stakes involving public money in the process. Reliance has been also made on the case law purporting to support their stand.

9. Shri A. K. Ganguli, learned senior Counsel appearing for the ICA, during the course of arguments followed by a written submissions, strenuously contend that in view of the decision reported in Konkan Railway Corporation Ltd. and another v. Rani Construction Pvt. Ltd. ((2002) 2 SCC 388) the order passed on an application under Section 11(6) of the 1996 Act is not adjudicatory in nature and the Judge passing the same is not a Tribunal and, therefore, the SLPs are not maintainable under Article 136 of the Constitution of India, in view of the decisions reported in (2002) 2 SCC 388 (supra) and Konkan Railway Corporation Ltd. and others v. Mehul Construction Co. ((2000) 7 SCC 201), it is also urged that in the teeth of the applications filed before the High Court under Section 11(6) of the 1996 Act, it is not now open to the appellants to contend that the same was not under the said provisions of law and the order passed could not be viewed as one passed under the said provisions. Reiterating the stand taken and justifying the course of action adopted by the ICA, it is being contended that in the teeth of the stipulation contained in the arbitration clause in the agreement between parties enabling the Senior Regional Manager/Zonal Manager of the Corporation to appoint/nominate an Arbitrator out of the persons in the panel of Arbitrators maintained by the ICA, the question of nomination by the Registrar of the ICA, as envisaged under Rule 22 of the ICA Rules, does not AIR 2002 SC 778 : 2002 AIR SCW 426 : 2002 CLC 478, AIR 2000 SC 2821 : 2002 AIR SCW 2960 : 2000 CLC 1609 arise and that the claims on the FCI to the contrary are not sustainable in law. Strong reiteration is made by assigning several reasons as to why the application filed by the appellants before the High Court must be viewed to be one invoking powers under Section 11(6) of the 1996 Act and not otherwise as now claimed on behalf of the appellants. It is further urged that if at all there had been failure to resolve the matter by means of arbitration it was due to the lapse on the part of the appellants to nominate the arbitrator as per its own arbitration clause and the same was not attributable to the ICA. The appointment of arbitrator in the arbitration clause in the agreement between parties is said to be directly contrary to and in conflict with the procedure for appointment/nomination of the arbitrator

under the rules of ICA and, therefore, there are no merits in these appeals.

10. Shri Rajiv Datta, learned senior Counsel appearing for some of the Millers-Private parties and the other learned Counsel appearing for similar such parties, who adopted his contentions, for the Millers, strenuously contend at the time of hearing and in the written submission that no exception could be taken to the stand of the ICA in all these matters and that not only the appeals are not maintainable in view of the decisions of this Court noticed supra, but the arbitration clause in the agreement and the ICA Rules being directly in conflict, the ICA could not have nominated the arbitrator to proceed with the arbitration clause as sought for by the appellants. Contentions similar to those raised by the ICA are reiterated on behalf of the Millers too, besides contending that in the absence of any fresh agreement between parties, there is no scope for resolving disputes by means of arbitration. Adverting to certain clauses in the contract, it has been also contended for the Millers that the arbitration clause, apart from being one sided, could be invoked only by the Millers and the disputes, if any, to be raised by the FCI are outside the purview of the said arbitration clause.

11. We have carefully considered the averments of the learned Counsel appearing on either side. So far as the maintainability of the appeals are concerned, strong reliance is placed upon the decisions of this Court reported in Konkan Railway Corpn. Ltd. and others v. Mehul Construction Co. ((2000) 7 SCC 201) and Konkan Railway Corporation Ltd. and another v. Rani Construction Pvt. Ltd. ((2002) 2 SCC 388). AIR 2000 SC 2821 : 2002 AIR SCW 2960 : 2000 CLC 1609, AIR 2002 SC 778 : 2002 AIR SCW 426 : 2002 CLC 478

12. The ratio of the decision in (2000) 7 SCC 201 (supra) proceeds on the basis that at a time when the matter comes before the Chief Justice or his nominee under Section 11 it would not be appropriate for them to entertain any contentious issues between the parties and decide the same and that the decision of the Chief Justice or his nominee is merely an administrative order, the nature of the function performed by them being essentially to aid the constitution of Arbitral Tribunal immediately, just by appointing an arbitrator without wasting any time. Even in cases of refusal of the request to make an appointment of an arbitrator, this Court observed that there is no involvement of any judicial or quasi-judicial function and if at all the remedy could be only to invoke jurisdiction under Article 226 of the Constitution of India seeking for a mandamus to have the reference made to an arbitrator. In the decision reported in (2002) 2 SCC 388 (supra), dealing with the case of a challenge made to a reference and the nature of the decision taken to make the reference to an arbitrator, the Constitution Bench of this court held while affirming the earlier decision that the order of the Chief Justice or his designate under Section 11 AIR 2000 SC 2821 : 2002 AIR SCW 2960 : 2000 CLC 1609

AIR 2002 SC 778 : 2002 AIR SCW 426 : 2002 CLC 478 nominating an arbitrator is neither an adjudicatory order nor those functionaries could be held to be a Tribunal to make such a decision, the subject-matter of an appeal under Article 136 of the Constitution of India. Adverting to Section 16 of the 1996 Act the Constitution Bench also held that questions relating to the improper constitution of arbitral Tribunal or its want of jurisdiction or objections with respect to the existence or validity of the arbitration agreement are matters which should be canvassed before the arbitral

Tribunal itself which has been specifically empowered to rule on such issues and on its own jurisdiction, as well. Unfortunately, the High Court in this case seems to have proceeded to adopt an adjudicatory role and returned a verdict recording reasons as to the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an arbitrator. In view of such peculiar situation, it would be futile for the respondents to contend that the SLPs are not maintainable, particularly in view of the fact that any recourse to have the arbitrator appointed or nominated could be forestalled by the detailed judgment and the findings recorded by the High Court in this matter. In the light of the above, the details pointed out on behalf of the ICA regarding the submission as to the provisions of law actually invoked before the High Court, the nature of the application or the character of the order passed pales into insignificance. The objections in this regard are consequently rejected.

13. So far as the questions relating to the relevant scope, meaning, purport and the effect of the arbitration clause found in the agreement between parties concerned and the legality or propriety of the constitution of arbitral tribunal, in the teeth of Rules 21 and 22 of the ICA Rules as well as question relating to alleged contradictions or inconsistencies among those provisions, are matters which go to the jurisdiction of the arbitral tribunal or as to the existence or validity of the arbitration agreement itself which, as enjoined under Section 16 of the 1966 Act, falls within the jurisdiction of the arbitral tribunal constituted which has been enabled to adjudicate on such question also before embarking upon an exercise to decide the dispute between the parties or decide them simultaneously. This is the inescapable position which inevitably flows not only from the statutory provisions contained in Section 16 of the 1996 Act, but that such position came to be firmly settled by more than one decision of this Court, including the one rendered by the Constitution Bench, noticed above. Though, elaborate and extensive arguments have been urged on both sides to justify their respective stand or to justify the orders of the ICA and the High Court in these cases, we refrain from expressing any opinion on the same out of deference to the consistent view of this Court that such decisions have to be made or taken only by the arbitral tribunal itself to which the reference had been made, and avoid committing the very same mistake committed by the High Court.

14. The fact that there is an agreement between parties to have their disputes resolved by reference to an arbitration and that it should be through the ICA and in accordance with the rules or procedure prescribed by the ICA is not in controversy. As indicated earlier even assuming without accepting for purposes of consideration that there is any infirmity in the arbitration clause which go to undermine as claimed by the respondents the legality, propriety and validity of the constitution of the Tribunal and/or even if there be any objections as to the existence of an enforceable or valid arbitration agreement, it had to be adjudicated by the very arbitral tribunal after a reference is made to it on being so constituted and it is not for the ICA or the learned Judge in the High Court to undertake this impermissible adjudicatory task of adjudging highly contentious issues between the parties. As observed by the Constitution Bench of this Court, there is nothing in Section 11 of the 1996 Act that requires the party other than the party making the request to be noticed and that it does neither contemplate a response from the other party nor contemplate any decision by the Chief Justice or his nominee on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the stipulated period. The legislative intent underlying the 1996 Act is to minimize the supervisory rules of courts in arbitral process and nominate/appoint the arbitrator

without wasting time, leaving all contentious issues to be urged and agitated before the arbitral tribunal itself. Even under the old law, common sense approach alone was commended for being adopted in construing an arbitration clause more to perpetuate the intention of parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thwart it by adopting a narrow, pedantic and legalistic interpretation.

15. Keeping into consideration all these aspects, we consider it just and more appropriate, proper and reasonable - both in law and in equity and interests of justice to direct ICA to forthwith and not later than sixty days from this date nominate the arbitrator as sought for by the appellants and place the matters before such arbitrator, leaving open to the parties to raise and pursue all objections and contentions and thereby seek for the decision of the arbitrator as envisaged under Section 16 of the 1996 Act, besides getting adjudication of the respective disputes in these cases on merits and in accordance with law. Both parties will have leave and liberties to do so before the arbitrator on being nominated/appointed by the ICA, pursuant to these orders.

16. The appeals are allowed and accordingly disposed of as indicated above. The respective parties will bear their costs.

Appeals allowed.