

# SUPREME COURT OF INDIA

You One Engineering and Construction Company Limited and Another

Vs

National Highways Authority of India

Arbitration Petition No. 27 of 2005 (With Arbitration Petitions Nos. 28 and 29/2005)

(B. N. Srikrishna, JJ)

10.03.2006

## JUDGMENT

**B. N. SRIKRISHNA, J.**

This is an application under Sec 11(6) read with section 11 (12) referred to as 'the Act') read with Paragraph 2 of the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 (hereinafter referred to as 'the Scheme') for appointment of a third/Presiding Arbitrator in accordance with an agreement dated 23-5-2001 between the parties. Under Section 3 of the Scheme, the Chief Justice of India has designated me as the person to pass appropriate orders on the applications and, hence, the applications have been placed before me.

2. Since the issue involved in all the three applications is same, these applications can be disposed of by a common order.

3. The petitioner in each of these applications is a joint venture of two constituents, who entered into a construction contract with the respondent - National Highways Authority of India (for short 'NHAI').

4. The first petitioner is a company incorporated/registered under the laws of the Republic of Korea,

with its registered office at Seoul. Thus, it is a body corporate incorporated in a country other than India within the meaning of Section 2(f) (ii) of the Act. Further, the contract entered into between the parties and the respondent pertains to execution of construction work, which is considered as commercial under the laws in force in India. The petitioners had entered into three different contracts each one of them contained an arbitration clause that the arbitration arising therefrom would amount to an international commercial arbitration within the meaning of Section 2(f) (ii) of the Act. Although, the three contracts relate to construction of highways as part of the National Highways Development Programme in different areas, the Arbitration Agreements in two of the contracts pertain to Delhi and Hyderabad. The Arbitration Agreements are contained in the standard form 'General Conditions of Contract (GCC)' for Delhi and Hyderabad, while the third contract which pertains to Visakhapatnam, stands modified by the incorporation by reference of the FIDIC conditions of contract. The Arbitration Agreement as contained in clause 67.3 reads as under:

## **"ARBITRATION**

Sub-Clause 67.3 is modified to read as follows:

"Any dispute in respect of which the Recommendation (s), if any, of the Board has not become final and binding pursuant to Sub-clause 67.1 shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open - up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. The Arbitral Tribunal shall consist of 3 Arbitrators, one each to be appointed by the Employer and the Contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President, Indian Road Congress for the purpose of this Sub-clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridical person created under Indian Law as well as a Joint Venture between such a Contractor and a Foreign Contractor.

(ii) In case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The Arbitral Tribunal shall consist of 3 Arbitrators, one each to be appointed by the Employer and the Contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of Indian Road Congress. For the purposes of this Clause 67, the term "Foreign Contractor" means a contractor who is not registered in India and is non juridical person created under Indian Law.

(iii) Neither party shall be limited in the proceedings before such Tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to sub-clause 67.1. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

(iv) Arbitration may be commenced prior to or after completion of the work, provided that the obligations of the Employer, the Engineer, the Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the works.

(v) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of the Indian Roads Congress both in cases Foreign Contractors as well as Indian Contractors, shall appoint, the arbitrator. A certified copy of the order of the President of the Indian Roads Congress making such an appointment shall be furnished to each of the parties.

(vi) Arbitration proceedings shall be held at New Delhi, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English. The decision of the majority of the Arbitrators shall be final and binding upon both parties. The cost and the expenses of Arbitration proceeding will be paid as determined by the Arbitral Tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such parties or on its behalf shall be borne by each party itself."

5. After the contract had been partially executed, certain disputes arose between the parties as a result of which the respondent gave a notice of termination of contract on 21-12-2004 invoking clause 63.5 of the General Conditions & Conditions of Particular Application of the Contract Agreement dated 23-5-2001. We are not really concerned with the reasons for termination or as to their correctness or otherwise, since that was precisely the dispute between the parties. The petitioners by their reply dated 10-3-2005, controverted the right of the respondent to terminate the contract and maintained that the termination of the contract was illegal. By a letter dated 24-5-2005, the petitioners issued a notice of Arbitration to the respondent stating that "a dispute with respect to the illegal and arbitrary termination of the captioned contract and payment of consequential damages to us from NHAI have arisen between NHAI and us" and that the petitioner had appointed Mr. Justice A.K. Srivastava, a retired Judge of the High Court of Delhi, as their nominee arbitrator. By a letter dated 16-6-2005, the respondent-NHAI appointed Shri Bageshwar Prasad as its nominee arbitrator. Although the two arbitrators met once on 26-6-2005 for appointment of the third/ Presiding Arbitrator, they were unable to agree on the choice of the presiding arbitrator. Since Justice Srivastava insisted on appointment of a retired Judge who was senior to him to which there was no response from Shri Bageshwar Prasad. On 6th July 2005, Shri Bageshwar Prasad, the nominee arbitrator of the respondent, intimated the respondent that he and Shri Justice Srivastava could not reach upon a consensus with regard to the choice of the presiding arbitrator and requested the respondent to move the Indian Road Congress (IRC) for appointment of the presiding arbitrator. On 20-7-2005, the respondent wrote to the IRC requesting for nominating the presiding arbitrator. On 29-8-2005, the IRC addressed a letter to the petitioners calling upon the petitioners to pay Rs. 12, 500/- as their share of the processing fee which was charged to the parties for appointment of the

presiding arbitrator. On 14-9-2005, the IRC addressed a letter to the respondent informing it about the appointment of Shri E. V. Narayanan, resident of 17, Raja Nagar , Neelangarai, Chennai - 600 017, as Presiding Arbitrator. Interestingly, in the said letter it was further stated: "It may be mentioned that IRC shall not be responsible for the conduct of Shri E.V. Narayanan during the Arbitral proceedings in the above dispute."

6. The situation is one of an international commercial arbitration within the meaning of Section 2 of the Act, inasmuch as the petitioner is registered in a country outside India and the contract envisages legal relationship considered as commercial under the Indian laws and a dispute arising out of such legal relationship has arisen between the parties. Section 11 (6) contemplates that a request be made to the Chief Justice of India or his nominee to take the necessary measure if (a) a party fails to act as required under the appointment procedure agreed between the parties 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.

7. Although the learned counsel for the petitioners contended that this is a situation falling within the contemplation of clause (c) of Section 11(6) of the Act, namely that the institution i.e., IRC failing to perform the function entrusted to it under the appointment procedure. I am not satisfied. Under the appointment procedure agreed to under clause 67.3, each of the parties to the dispute is required to nominate its arbitrator and the third arbitrator is to be chosen by the two arbitrators appointed by the parties and he shall act as the Presiding Arbitrator. Clause 67.3 (ii) provides that in case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of Indian Road Congress.

8. Here, the subsequently appointed arbitrator is Shri Bageshwar Prasad, who was appointed by the respondent as its arbitrator on 16-6-2005. Thus, the two arbitrators failed to reach a consensus within a period of 30 days i.e., on or before 15-7-2005. Clause 67.3 (ii) contemplates the appointment of Presiding Arbitrator by the President of the IRC. That there was no appointment of the Presiding Arbitrator within 30 days from the appointment of the Arbitrator appointed subsequently i.e., on or before 15-7-2005, is incontrovertible. Thus, under the appointment procedure contemplated by the contract, the President of the IRC was required to appoint the Presiding Arbitrator. This was done by the IRC by its letter dated 14-9-2005. In the circumstances, I am unable to accept the contention of the learned counsel for the petitioner that the situation is one contemplated by clause (c) of Section 11 (6) viz that the institution failing to perform any function entrusted to it under that procedure. Thus, the cause of action for moving an application under Section 11 (6) of the Act does not appear to exist, since the Presiding Officer has been appointed by the IRC in accordance with the contract.

9. The learned counsel for the petitioners then contended that the dispute between the parties was basically a legal issue as to the competence of the respondent to terminate the contract between the parties and that, if at all, the Presiding Arbitrator was to be appointed, S/he should be a person well-

versed in law. He further contended that the IRC was a body of technical persons and the nominee of the IRC Shri E.V. Narayanan was also a technical person who was not well-versed in law. According to the counsel, the institution mentioned in Section 11(6) (c) must adhere to the statutory standards of appointing an arbitrator who is competent to handle the dispute that has arisen between the parties. In the submission of the petitioners, the appointed Presiding Officer, not being a legal person, would be unable to handle the legal dispute that has arisen between the parties, and, therefore, an occasion has arisen for exercise of powers of Section 11(6) of the Act.

10. In my view, the contention has no merit. The Arbitration Agreement clearly envisages the appointment of Presiding Arbitrator by the IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6).

11. On an overall assessment, I am satisfied that the appointment of the Presiding Officer by the IRC is perfectly valid and justified, as no occasion had arisen for the petitioner to move the Chief Justice of India under Sec. 11 (6) of the Act.

12. Learned counsel for the petitioner referred to the judgment of this Court in SBP & Co. v. Patel Engineering Ltd. and another and Rite Approach Group Ltd. v. M/s. Rosoboronexporf and contended that these judgments indicate that in the event of what the learned counsel called "dotted line contract", it was open to this Court to act under Section 11 (6) of the Act to appoint an independent Arbitrator by taking into account the fitness of the Arbitrator and that the fitness of the Arbitrator to handle the specific type of dispute must be factored into the dispute. Neither of these judgments lays down the said proposition of law, nor am I able to accept such a contention.

In the result, I find the petitions to be without merit. The petitions are hereby dismissed.