

SUPREME COURT OF INDIA

Yashwith Construction P. Limited

Vs

Simplex Concrete Piles India Limited and Another

Special Leave Petition (Civil) 11279 of 2006 (Cc 3801/2006)

(P. K. Balasubramanyan and R.V. Raveendran, JJ)

03.07.2006

JUDGMENT

P. K. BALASUBRAMANYAN, J.

1. Delay condoned.

2. On a dispute having arisen, the Managing Director of the respondent company appointed an arbitrator in terms of the arbitration clause. The arbitrator resigned. Thereupon the Managing Director of the respondent company, in view of the mandate in the arbitration agreement promptly appointed another arbitrator. At that stage, the petitioner approached the Chief Justice of the High Court under Section 11 sub- Section 5 read with Section 15(2) of the Arbitration & Conciliation Act, 1996 (for short "the Act"), praying that the Chief Justice may appoint a substitute arbitrator to resolve the disputes between the parties. The Chief Justice found that the appointment of the second arbitrator by the Managing Director, after the resignation of the first arbitrator, was valid in law since it was permissible under the contract and the right to make such an appointment was saved by Section 15(2) of the Act. The argument that Section 15(2) of the Act referred to statutory rules providing for appointment of Arbitrators and not to a contractual provision for such appointment was rejected by the learned Chief Justice. It was held by him that no occasion arose for him to appoint an arbitrator under Section 11(6) of the Act in the case. Thus, the application was dismissed leaving the parties to pursue their claims before the arbitrator appointed by the Managing Director in terms of arbitration agreement between the parties.

3. The petitioner challenged the decision of the learned Chief Justice by way of a Writ Petition in the High Court. The Division Bench noticed the decision of this Court in *SBP & Co. Vs. Patel Engineering Ltd. & Another* 2005 (8) SCC 618 holding that the order passed by the Chief Justice is a judicial order and no Writ Petition would lie in the High Court challenging such an order and only an appeal could be filed in the Supreme Court invoking Article 136 of the Constitution of India. But the Division Bench thought that since that decision saved appointments made on or before the date that decision was rendered by this Court, the Writ Petition filed by the petitioner would also be saved and the Writ Petition could be decided on merits. The Division Bench held that the position obtaining under Section 8(1) of the Arbitration Act of 1940 differed from that available under the present Act especially in the context of Section 15 thereof and that in terms of Section 15(2) of the Act, the Managing Director could, on the basis of the arbitration agreement, appoint another arbitrator when the originally appointed arbitrator resigned, thus attracting Section 15(1)(a) of the Act. It further held that Section 15(2) covered not only cases of appointments under statutory rules or rules framed under the Act, but it would also take in the terms of the agreement between the parties for appointment of an arbitrator and in that view, the Managing Director, in the case on hand and on the terms of the arbitration agreement, would have the right to appoint a substitute arbitrator. Thus, it was held that the learned Chief Justice was right in rejecting the application made by the petitioner. Thus, the Writ Petition was dismissed. It is this decision of the Division Bench that is sought to be challenged in this petition for special leave to appeal.

4. In our view, the learned Chief Justice and the Division Bench have rightly understood the scope of Section 15 of the Act. When the arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorized originally by the arbitration agreement, promptly appointed a substitute arbitrator. It is true that in the arbitration agreement there is no specific provision authorizing the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the originally appointed arbitrator withdraws from the arbitration. But, this so called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term "rules" in Section 15(2) obviously referred to the provision for appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfill his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.

5. Since here, the power of the Managing Director of the respondent is saved by Section 15(2) of the Act and he has exercised that power on the terms of the arbitration agreement, we see no infirmity either in the decision of the learned Chief Justice or in that of the Division Bench. We do not think it necessary in this case to go into the question whether the Writ Petition before the High Court was maintainable on the basis that it challenged an order of the Chief Justice rendered on 4.3.2005, prior to the date of the decision in SBP & Co. Vs. Patel Engineering Ltd. & Another(supra) rendered on 26.10.2005.

6. In this view of the matter, we see no reason to grant leave to appeal or issue notice on this petition for special leave to appeal. The petition is dismissed.