SUPREME COURT OF INDIA

The Iron and Steel Co. Ltd

Vs.

Tiwari Road Lines

08.05.2007

C.A.No.2386 of 2007

(G.P. Mathur and Lokeshwar Singh Panta JJ.)

JUDGMENT

G.P. MATHUR, J.

Leave granted.

2. This appeal, by special leave, has been filed against the judgment and order dated 9.9.2005 of a Division Bench of Andhra Pradesh High Court by which the writ petition filed by the appellant herein The Indian Iron and Steel Co. Ltd. was dismissed. The writ petition was filed assailing the order dated 27.12.2004 of Chief Judge, City Civil Courts, Hyderabad (designated authority) by which the petition filed by the respondent M/s. Tiwari Road Lines was allowed and a retired judicial officer was appointed as sole arbitrator to decide the dispute between the parties.

3. The appellant The Indian Iron and Steel Co. Ltd., having its registered office at Kolkata, invited tenders on 17.2.2003 for transportation of pig iron and steel material from Burnpur/Kolkata stockyard to different customer locations in various parts of the country. The tender submitted by the respondent M/s. Tiwari Road Lines was accepted and a letter was issued on 14.5.2003 awarding the contract to the respondent to transport the material with effect from 17.5.2003 for a period of two years. The tender was submitted by the respondent at the Head Office of the company at Kolkata and the agreement was also signed between the parties at Kolkata. In terms of the agreement the respondent furnished a bank guarantee for Rs.5,00,000/-. According to the appellant there was failure on the part of the respondent to comply with the terms of the agreement and accordingly the appellant invoked the bank guarantee on 16.9.2003.

Feeling aggrieved by the encashment of the bank guarantee, the respondent filed an application before the Chief Judge, City Civil Courts, Hyderabad, who was the designated authority under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') under the scheme framed by the Andhra Pradesh High Court, for appointment of an arbitrator to decide the dispute between the parties. The appellant contested the application on two grounds, viz., that the City Civil Court at Hyderabad had no territorial jurisdiction to entertain the application and, secondly, under the terms of the agreement between the parties the dispute had to be resolved in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the application filed under Section 11 of the Act was not maintainable. The Chief Judge, City Civil Courts, Hyderabad allowed the application by order dated 31.3.2004 and appointed a retired judicial officer as arbitrator to decide the dispute. The said order was challenged by the appellant by filing a civil

revision petition before the Andhra Pradesh High Court. The revision petition was allowed and the matter was remanded to the City Civil Court, Hyderabad to consider the question of jurisdiction. The City Civil Court again allowed the application filed by the respondent by order dated 27.12.2004 and appointed a retired judicial officer as arbitrator to decide the dispute between the parties. This order was challenged by the appellant by filing a writ petition in the High Court on the ground, inter alia, that the application under Section 11 of the Act was not maintainable as the agreement between the parties contained a clause that any dispute between the parties shall be decided in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the respondent had not taken recourse to the said Rules. The other plea taken in the writ petition was that the City Civil Court, Hyderabad, had no territorial jurisdiction to entertain the application under Section 11 of the Act. The High Court negatived the contention raised by the appellant and dismissed the writ petition and it is these orders which are subject-matter of challenge in the present appeal.

4. We have heard learned counsel for the parties and have perused the records.

5. After the tender of the respondent M/s. Tiwari Road Lines had been accepted, an agreement was executed between the parties which contained General Conditions of Contract for transportation of iron/ steel materials and pig iron from Burnpur and Kolkata to various destinations in India. Clause 13 of the General Conditions of Contract reads as under: - "13. ARBITRATION

13.1 All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

13.2 In all above cases, the work under the contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the contractor as advised by the company will be withheld by the companion account of such proceedings."

A perusal of clause 13.1 will show that under the terms of the agreement all disputes or differences whatsoever arising between the parties have to be decided by arbitration in accordance with the Rules or Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

6. It is not disputed that the respondent did not make any effort to have the dispute settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. On the contrary, it straightaway moved an application under Section 11 of the Arbitration and Conciliation Act, 1996 before the City Civil Court, Hyderabad, which was the designated court, in accordance with the scheme framed by the High Court of Andhra Pradesh. The principal question, which requires consideration is, whether such an application moved by the respondent was maintainable. Sub-sections (1) to (7) of Section 11 of the Act read as under: - "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."

Sub-section (2) of Section 11 of the Act provides that subject to sub- section (6), the parties are free to agree on a procedure for appointing the arbitrator. The opening part of sub-sections (3) and (5) of Section 11 of the Act use the expression "failing any agreement referred to in sub-section (2)". Therefore, sub-sections (3) and (5) will come into play only when there is no agreement between the parties as is referred to in sub-section (2) of Section 11 of the Act, viz., that the parties have not agreed on a procedure for appointing the arbitrator or arbitrators. If the parties have agreed on a procedure for appointing arbitrator or arbitrators, sub-sections (3) and (5) of Section 11 of the Act can have no application. Similarly, under sub-section (6) of Section 11 request to the Chief Justice or to an institution designated by him to take the necessary measures, can be made if the conditions enumerated in clauses (a) or (b) or (c) of this sub-section are satisfied.

Therefore, recourse to sub-section (6) can be had only where the parties have agreed on a procedure for appointment of an arbitrator but (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. Therefore, a combined reading of the various sub- sections of Section 11 of the Act would show that the request to the Chief Justice for appointment of an arbitrator can be made under sub- sections (4) and (5) of Section 11 where parties have not agreed on a procedure for appointing the arbitrator as contemplated by sub-section (2) of Section 11. A request to the Chief Justice for appointment of an arbitrator can also be made under sub-section (6) where parties have agreed on a procedure for appointment of an arbitrator as contemplated in sub-section (2) but certain consequential measures which are required to be taken as enumerated in clauses (a) or (b) or (c) of sub-section (6) are not taken or performed.

7. In the present case the agreement executed between the parties contains an arbitration clause and clause 13.1 clearly provides that all disputes and differences whatsoever arising between the parties

out of or relating to the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. This clause is in accordance with sub-section (2) of Section 11 of the Act. There being an agreed procedure for resolution of disputes by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration sub-sections (3), (4) and (5) of Section 11 can have no application. The stage for invoking sub- section (6) of Section 11 had also not arrived. In these circumstances, the application moved by the respondent before the City Civil Court, Hyderabad, which was a designated authority in accordance with the scheme framed by the Chief Justice of the Andhra Pradesh High Court, was not maintainable at all and the City Civil Court had no jurisdiction or authority to appoint an arbitrator. Thus the order dated 31.03.2004 passed by the Chief Judge, City Civil Courts, Hyderabad, appointing a retired juridical officer as arbitrator is clearly without jurisdiction and has to be set aside.

8. The legislative scheme of Section 11 is very clear. If the parties have agreed on a procedure for appointing the arbitrator or arbitrators as contemplated by sub-section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken straightaway. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure for appointing the arbitrator as contemplated by sub-section (2) of Section 11 of the Act or the various contingencies provided for in sub-section (6) have arisen. Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by sub-section (2) and there is no allegation that anyone of the contingencies enumerated in clauses (a) or (b) or (c) of sub- section (6) had arisen, the application moved by the respondent herein to the City Civil Court, Hyderabad, was clearly not maintainable and the said court had no jurisdiction to entertain such an application and pass any order. The order dated 27.12.2004, therefore, is not sustainable.

9. In the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. It is for this reason that in clause (a) of sub-section (8) of Section 11 of the Act it is specifically provided that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties.

10. The judicial pronouncements also show that normally the clause in the agreement providing for settling the dispute by arbitration by arbitrators having certain qualifications or in certain agreed manner should be adhered to and should not be departed with unless there are strong grounds for doing so. In S. Rajan vs. State of Kerala (1992) 3 SCC 608, the Court was called upon to interpret sub- section (4) of Section 20 of the Arbitration Act, 1940, which reads as under:

"20. Application to file in Court arbitration agreement. - (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder

as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

The Court considered the scope of sub-section (4) of Section 20 of the Arbitration Act, 1940 and held as under: - "Sub-section (4) of Section 20 says that the reference shall be to the arbitrator appointed by the parties. Such agreed appointment may be contained in the agreement itself or may be expressed separately. Where the agreement itself specifies and names the arbitrator, it is obligatory upon the court, in case it is satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It is not open to the Court to ignore such an arbitration clause of the agreement and to appoint another person as an arbitrator. Only in cases where the arbitrator specified and named in the agreement refuses or fails to act or where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appoint an arbitrator. Since in the present case the agreement specified and named the arbitrator, there was no occasion or warrant for the court to call upon the parties to submit panels of arbitrators. The court was bound to refer the dispute only to the arbitrator named and specified in the agreement."

In Government of A.P. vs. K. Mastan Rao 1995 Supp. (4) SCC 528, the agreement between the parties provided for settlement of dispute by three persons holding the post of Chief Engineer of the project, Deputy Secretary to Government, Finance Department, and the Director of Accounts of the project. On the petition made by the contractor, the subordinate judge removed the panel of three arbitrators and appointed a retired Chief Engineer as the sole arbitrator to adjudicate the dispute. This Court, after taking into consideration the terms of the agreement, set aside the order passed by the subordinate judge and directed that the arbitration matter should be entrusted to the incumbents of the three posts mentioned in the agreement. In Rite Approach Group Ltd. vs. Rosoboronexport (2006) 1 SCC 206, it was held as under in para 20 of the Report: - "20. In view of the specific provision specifying the jurisdiction of the Court to decide the matter, this Court cannot assume the jurisdiction. Whenever there is a specific clause conferring jurisdiction on particular Court to decide the matter then it automatically ousts the jurisdiction of the other Court. In this agreement, the jurisdiction has been conferred on the Chamber of Commerce and Trade of the Russian Federation as the authority before whom the dispute shall be resolved. In view of the specific arbitration clause conferring power on the Chamber of Commerce and Trade of the Russian Federation, it is that authority which alone will arbitrate the matter and the finding of that arbitral tribunal shall be final and obligatory for both the parties."

11. This being the settled position of law we are clearly of the opinion that the respondent should have initiated proceedings for settlement of disputes by arbitration in accordance with the Rules of

Arbitration of the Indian Council of Arbitration as provided in clause

13.1 of the agreement and the application moved by it to the City Civil Court, Hyderabad, for appointment of an arbitrator was not maintainable. Consequently, the order passed by the City Civil Court, Hyderabad dated 27.12.2004 is wholly illegal and without jurisdiction and is liable to be set aside.

12. Learned counsel for the appellant has also submitted that City Civil Court, Hyderabad had no jurisdiction to entertain the application moved by the respondent as no part of cause of action had accrued there. In this connection, he has referred to clause (b) of sub-section (12) of Section 11 and clause (e) of sub-section (1) of Section 2 of the Act which will govern the question of jurisdiction as to Chief Justice of which High Court has to be approached for moving an application under Section 11 of the Act. Learned counsel has submitted that the tenders were floated at Kolkata, the respondent submitted the tender at Kolkata, the agreement was executed at Kolkata and, therefore, the court at Hyderabad had no jurisdiction to entertain the application.

Learned counsel has also submitted that the view taken by the High Court that as the bank guarantee was furnished at Hyderabad and was encashed at Hyderabad, the court at Hyderabad has jurisdiction is erroneous in law inasmuch as the agreement did not contain any clause regarding the place from where the bank guarantee had to be furnished. Learned counsel has submitted that there was only a requirement for furnishing the bank guarantee and that it could be furnished from anywhere in India and since in the present case the bank guarantee was furnished by the respondent from a bank at Hyderabad it was encashed there and, therefore, the said fact was wholly irrelevant for deciding the plea of jurisdiction. He has also relied upon a decision of this Court in South East Asia Shipping Co.

Ltd. vs. Nav Bharat Enterprises Pvt. Ltd. (1996) 3 SCC 443, in support of his contention that the submission of the bank guarantee from Hyderabad or the encashment thereof does not constitute even a part of cause of action to confer jurisdiction on the court at Hyderabad. Though we find substance in the contention raised by the learned counsel for the appellant but in view of our finding recorded on the main point, we do not consider it necessary to express any final opinion on the second contention.

13. For the reasons discussed above, the appeal is allowed with costs throughout. The judgment and order dated 9.9.2005 of the High Court of Andhra Pradesh and the judgment and order dated 27.12.2004 of the City Civil Court, Hyderabad appointing an arbitrator are set aside. It will be open to the parties to get the dispute decided by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.