SUPREME COURT OF INDIA

Union of India

Vs.

Singh Builders Syndicate

C.A.No.3632 of 2007

(R.V.Raveendran and H.L. Dattu JJ.)

26.02.2009

ORDER

R.V.Raveendran, J.

1. The appellant challenges the order of the Delhi High Court dated 27.3.2006 appointing a Retired Judge of the High Court as sole Arbitrator to decide the disputes arising in respect of a construction contract between the Northern Railways (appellant) and the respondent.

2. The appellant contends the appointment of arbitrators should be only in accordance with Clause 64 of the general terms and conditions contract which requires two serving Gazetted Railway officers of equal status being appointed as Arbitrators, one by the contractor from a panel made available by the General Manager of Northern Railways and the other by the Northern Railways, and the two arbitrators so appointed, in turn appointing an Umpire.

3. It is true that the Arbitral Tribunal should be constituted in the manner laid down in the Arbitration agreement. Provisions for arbitration in contracts entered by governments, statutory authorities, and government companies, invariably require that the Arbitrators should be their own serving officers. Such a provision has to be given effect, subject to requirements of independence and impartiality. But there can be exceptions and this case which has a chequered history, falls under such exceptions.

4. Let us refer to the facts briefly. The respondent made a request for arbitration in the year 1999. As the appellant failed to take necessary steps as mandated by clause 64, the respondent filed an application under Section 11 of the *Arbitration and Conciliation Act, 1996* (`Act' for short) in AA No. 202/2000. In pursuance of the directions issued on 11.11.2002 by the designate of the Chief Justice of the Delhi High Court, an Arbitral Tribunal was constituted in terms of clause 64, consisting of Shri A.K. Mishra, (Chief Engineer/TPS) nominated by the contractor, Shri S.P. Virdi (Dy.F.A. & CEO) nominated by the appellant, and Shri H.K. Jaggi (Chief Bridge Engineer) as the Umpire. But even before the proceedings could commence before the Arbitral Tribunal, Shri A.K. Mishra, one of the Arbitrators, was transferred and consequently he tendered resignation in May, 2004. As the

appellant failed to provide a fresh panel to enable the respondent to make a fresh nomination, the respondent again approached the High Court by filing AA No.240/2004. A fresh panel was made available thereafter from which the respondent nominated Shri Ashok Gupta as its Arbitrator. Hardly after one sitting of the Arbitral Tribunal, Shri Ashok Gupta was also transferred and he tendered his resignation on 21.7.2005.

> "As appellant again failed to take steps for filling the vacancy, the respondent approached the Court again by filing IA No. 6511/2005 in AA 240/2004. In pursuance of an order dated 24.8.2005 passed by the High Court, again a panel was made available and the respondent made its choice on 9.9.2005. As no steps were taken in pursuance of it by the appellant, the respondent sent a reminder on 14.10.2005. There was no response. In this background, the respondent again approached the High Court on 10.11.2005 in Arb. Petn. No. 256/2005 for appointment of an independent sole arbitrator. During the pendency of the said petition, the General Manager of Northern Railways appointed Sri Ved Pal as the contractor's nominee arbitrator on 22.11.2005."

5. The High Court was of the view that no useful purpose will be served by again reconstituting a Three Member Arbitral Tribunal in accordance with clause 64. The High Court found that the matter has been pending from 1999 when the respondent first made the request for reference to Arbitration and that the cumbersome process of constituting an Arbitral Tribunal in terms of the Arbitration agreement and the delays on the part of Railways in complying with the provisions of the arbitration agreement, led to the arbitration becoming virtually a non-starter. Therefore, the High Court allowed the petition on 27.3.2006 and appointed Justice Jaspal Singh, a retired Judge of the Delhi High Court as the arbitrator. Justice Jaspal Singh recused himself and the High Court on 19.7.2006, appointed Justice R.C. Chopra, another retired Judge of the Delhi High Court as the arbitrator.

6. The said order is challenged in this appeal by special leave. On 6.11.2006, this Court stayed the arbitration proceedings before the sole Arbitrator. The question that arises for consideration in this appeal by special leave is whether the appointment of a the retired Judge of the High Court as sole Arbitrator should be set aside and an Arbitral Tribunal should again be constituted in the manner provided in terms of clause 64.

7. Dealing with a matter arising from the old Act (Arbitration Act, 1940), this Court, in *Union of India v. M.P.Gupta*[1], held that appointment of a retired Judge as sole Arbitrator contrary to clause 64 (which requiring serving Gazetted Railway Officers being appointed) was impermissible. The position after the new Act came into force, is different, as explained by this Court in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.*[2]. This Court held that the appointment of arbitrator/s named in the arbitration agreement is not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered and/or given effect, as closely as possible. It was further held that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of sub-section (8) of section 11 of the Act are kept in view. This would

mean that invariably the court should first appoint the Arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the Arbitrator/s appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.

8. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such Tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the Arbitration Agreement, the Chief Justice or his designate, required to exercise power under section 11 of the Act, can step in and pass appropriate orders. We fail to understand why the General Manager of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as Arbitrators and that the Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

> "Constituting Arbitral Tribunals with serving officers from different far away places should be avoided. There can be no hard and fast rule, but there should be a conscious effort to ensure that Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades."

9. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress.

> "Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of clause 64, there may be a need to change even the other two members of the Tribunal. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole Arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India."

10. Another aspect referred to by the appellant, however requires serious consideration. When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge/s. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of

private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as Arbitrator/s. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost.

> "Institutional arbitration has provided a solution as the Arbitrators' fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as Arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an Arbitrator whose fees are in their `range' having regard to the stakes involved. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such Arbitrator. It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high cost are two areas where the Arbitrators by self regulation can bring about marked improvement."

11. We find that a provision for serving officers of one party being appointed as arbitrator/s brings out considerable resistance from the other party, when disputes arise. Having regard to the emphasis on independence and impartiality in the new Act, government, statutory authorities and government companies should think of phasing out arbitration clauses providing for serving officers and encourage professionalism in arbitration.

12. As far as this case is concerned, we do not propose to issue any directions in regard to the fees, as the High Court has fixed the fee at Rs.10,000/- per hearing subject to a maximum of Rs.150,000/- plus clerkage, to be shared equally by the parties.

13. In view of the above, the appeal is dismissed.

[1]2004 (10) SCC 504 *[2]2008 (11) SCALE 500*