

SUPREME COURT OF INDIA

ACC Limited

Vs.

Global Cements Ltd

S.L.P(Civil)No.17689 of 2012

(K.S.Radhakrishnan and Jagdish Singh Khehar,JJ.)

11.06.2012

JUDGMENT

K.S.Radhakrishnan,J.

1. The question that falls for consideration in this case is whether on the death of a named arbitrator, the arbitration agreement survives or not.
2. At the very outset, let us refer to the relevant arbitration clause in the agreement dated 16.12.1989, which reads as follows:

"21. If any question or difference or dispute shall arise between the parties hereto or their representatives at any time in relation to or with respect to the meaning or effect of these presents or with respect to the rights and liabilities of the parties hereto then such question or dispute shall be referred either to Mr. N.A. Palkhivala or Mr. D.S. Seth, whose decision in the matter shall be final and binding on both the parties."
(Emphasis added)

3. The petitioner submits that both Shri N.A. Palkhivala and Shri D.S.Seth are no more and therefore the arbitration clause in the agreement does not survive. It was pointed out that Shri N.A. Palkhivala was named in the agreement since he was the Chairman of the petitioner company and Shri D.S.Seth was named in the agreement since he was the Director of the company. Both of them were nominated as arbitrators since they were closely associated with the company and also due to their eminence, impartiality and familiarity in all commercial transactions and the corporate laws. The petitioner submits that since the arbitrators are no more, the arbitration clause in the agreement has no life and hence there is no question of entertaining the application preferred under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') filed by the respondent.

4. The respondent, (applicant before the High Court), refuted those contentions and submitted before the High Court that the arbitration clause in the agreement would survive even after the death of the named arbitrators and the parties can still resolve their difference or dispute by referring them to another arbitrator or move the court for appointing a substitute arbitrator whose decision would be final and binding on both the parties.

5. Bombay High Court entertained the application preferred by the respondent under Section 11 of the Act. The Court took the view that clause 21 of the Agreement did constitute an agreement to refer disputes to arbitration and also took the view that in the absence of any prohibition or debarment, there is no reason for the court to presume an intent on the part of the parties to the effect that a vacancy that arises on account of a failure or inability of a named arbitrator to act cannot be supplied by the court under Section 11. The court took the view unless the parties have expressly precluded such a course being followed, give effect to the policy of the law, which is to promote the efficacy of arbitration and the efficacy of commercial arbitration must be preserved particularly when business dealings are based on an agreement which provides recourse to arbitration. The designated Judge of the High Court appointed Mr. Justice S.N. Variava, former Judge of this Court as an arbitrator to adjudicate the dispute and difference between the parties. Legality of that order is under challenge before us.

6. Mr. S. Ganesh, Senior Advocate appearing for the petitioner explained the circumstance under which Shri N.A. Palkhivala as well as Shri D.S. Seth was nominated as arbitrators in the arbitration clause of the Agreement dated 16.12.1989. Learned senior advocate pointed out that Shri N.A. Palkhivala was an eminent jurist of high reputation and he was the former Chairman of the applicant's company and the parties had specifically named him as an arbitrator because of his familiarity and indepth knowledge of arbitration law as well as corporate law. Learned senior counsel also pointed out that Shri D.S. Seth was appointed since he was the former Director of the applicant's company and was familiar with the commercial transactions and he was also instrumental in dealing with the various issues between the parties. Learned counsel pointed out because of the special nature of the appointment of both Shri N.A. Palkhivala and Shri D.S. Seth, the parties wanted their difference or dispute to be resolved only by those named arbitrators and on their death, the arbitration clause in the agreement would not survive. Learned counsel pointed out that that was the intention of the parties and the same is clearly discern able from the facts of the case and the terms of the arbitration Clause in the agreement. Parties, it was pointed out, never intended to refer the dispute to any other arbitrator except the named arbitrator and such an inference can be drawn from Clause 21 and the facts of the case. Learned counsel also pointed out that in the above circumstances, Section 15(2) of the Act has no application and

the High Court has committed an error in entertaining the application under Section 11 appointing a substitute arbitrator.

Facts

7. The petitioner by way of Agreement dated 16.12.1989 transferred land admeasuring 53 acres 33 Gunthas and land admeasuring 100 acres 01 Gunthas with buildings and Mining Leases granted by the Government of Gujarat in or under lands admeasuring 423.22 hectares, 21.121 hectares and 4.7551 hectares to the respondent. By Orders dated 24.01.2002 and 03.02.2003, the Collector, Porbander as well as Secretary (Appeals), Revenue Department, State of Gujarat held that the petitioner had committed breach of condition Nos. 3, 4 and 5 of the order of 1993 and condition Nos. 8 & 11 of Lease Agreement dated 15.03.1982 and that the said lands were transferred to the respondent without prior permission of the Collector and as such the petitioner had committed breach of the conditions of order/lease agreement. The Collector, therefore, resumed possession of the aforesaid lands. Aggrieved by those orders, the petitioner had filed Special Civil Applications bearing Nos. 1975 of 2003 and 1972 of 2003 inter alia challenging the orders passed by the Collector, Porbander and Secretary (Appeals) before the High Court of Gujarat. The respondents were made parties in the above proceedings, the predecessor in title of the respondent neither initiated any proceedings against the petitioner nor challenged those orders of the Collector, Porbander or the Secretary (Appeals). Therefore, the Special Civil Applications were dismissed by the High Court on 15.12.2009 and appeals were not preferred against the said judgment and no proceedings were initiated by the respondent as well.

8. The respondent later sent a lawyer notice to the petitioner seeking reference of the dispute to an arbitrator involving Clause 21 of the Agreement. By a letter dated 08.10.2011, the respondent sought to propose the names for appointment as a Sole Arbitrator on the ground that the two nominated arbitrators under clause 21 had expired.

9. The petitioner through their lawyer replied vide letter dated 07.12.2011 objecting to the appointment of a substitute arbitrator on the ground that the arbitration clause 21 of the Agreement did not provide for the appointment of any other arbitrator and that was the intention of the parties. It was pointed out that on the death of the two named arbitrators, the arbitration clause itself would come to an end and there is no question of appointing another arbitrator to resolve the question or dispute or difference between the parties.

10. We have examined closely arbitration clause 21 of the Agreement dated 16.12.1989 as well as various letters exchanged between the parties and ascertained the intention of the parties from the facts.

Reasoning and Conclusion:

11. Clause 21 of the Agreement indisputably is an arbitration agreement which falls under Section 7 of the Act. The intention of the parties to enter into an arbitration agreement can therefore clearly be gathered from clause 21 of the Agreement. Clause 21 clearly indicates an agreement on the part of the parties to refer the disputes to the named arbitrators in the Agreement.

12. This Court in *Jagdish Chander v. Ramesh Chander*¹ in a clear exposition of law has laid down the principles to be borne in mind while interpreting an arbitration agreement under Clause 7 of the Act. Existence of an agreement is not in dispute, the question is about its enforceability on the death of the named arbitrators. Facts clearly indicate that the parties in this case have contemplated that if any question or difference or dispute arises between them, in relation to or with respect to the meaning or effect of the contract or with respect to their rights and liabilities, the same would be referred to one of the two named arbitrators named in the arbitration clause. The question is whether Clause 21 would outlive the lives of the named arbitrators.

13. Section 14 of the Arbitration and Conciliation Act, 1996 provides for the circumstances in which the mandate of the arbitrator is to terminate. It says that the mandate of an arbitrator will end when it becomes impossible for him to perform his functions de facto or de jure or for some other reasons he fails to act without undue delay or withdraws from office or the parties agree to terminate his mandate.

14. Section 15(2) of the Act provides that where a substitute arbitrator has to be appointed due to termination of the mandate of the previous arbitrator, the appointment must be made according to the rules that were applicable to the appointment of the arbitrator being replaced. No further application for appointment of an independent arbitrator under Section 11 will lie where there has been compliance with the procedure for appointment of a substitute arbitrator. On appointment of the substitute arbitrator in the same manner as the first, no application for appointment of independent arbitrator under Section 11 could be filed. Of course, the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically say so. Reference may be made to the judgment of this Court in *Yash with a Constructions (P.) Ltd. v. Simplex Concrete Piles India Ltd.*².

15. Sections 14 and 15 provide the grounds for termination of the mandate of the arbitrator on the ground of incapability of the arbitrator to act or if he withdraws from his office or when the parties agree to the termination of the mandate of the arbitrator. Section 15(2) states that a substitute arbitrator shall be appointed as per the rules that were applicable to the

appointment of the arbitrator being replaced. Section 15(2), therefore, has to be given a liberal interpretation so as to apply to all possible circumstances under which the mandate may be terminated.

16. The scope of Sections 11(6) and 15 came up for consideration before the learned designate of the Chief Justice of India in *Sana Trading Company Ltd. v. IC Textiles Ltd.*³ and the learned Judge held as follows: " It therefore follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act."

17. Section 11(6) would not apply only if it is established that parties had intended not to supply the vacancy occurred due to the inability of the arbitrator to resolve the dispute or due to whatever reasons but that intention should be clearly spelt out from the terms of the arbitration clause in the Agreement.

18. The legislative policy embodied in Sections 14 and 15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hands off and there is no question of persuading or pressurising the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the court's duty is to give effect to the policy of law that is to promote efficacy of arbitration.

19. We are of the view that the time factor mentioned in the arbitration clause "at any time" is a clear indication of the intention of the parties and is used in various statutory provisions as well and the meaning of the same has been interpreted by this Court in various judgments. In *Situ Sahu and Others v. State of Jharkhand and Others*⁴ this Court dealt with Sections 71A and 71B of the Chota Nagpur Tenancy Act, 1908 wherein the power was given to the Deputy Commissioner to restore possession of "raiyat" belonging to Scheduled Tribes transferred in contravention of the provisions of the Act or fraudulently. Section 71A provides that "if at any time it comes to the notice of the Deputy Commissioner that transfer of land belonging to a raiyat who is a member of the Scheduled Tribes has taken plea in contravention of any other provisions of this Act or by any fraudulent method. This Court took the view that the words "at any time" in Section 71A is evidence of the legislative intent to give sufficient flexibility

to the Deputy Commissioner to implement the socioeconomic policy of the Act, namely to prevent inroads upon the rights of the ignorant, illiterate and backward citizens. Certainly, the expression of the words "at any time" used in Clause 21 of the Arbitration Agreement is to give effect to the policy of the Act which is to promote efficacy of arbitration.

20. In *Ibrahimpatnam Taluk Vyavasaya Coolie Sanghem v. K. Suresh Reddy and Others*⁵ this Court examined the scope of Section 50B of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950. The Court, while interpreting the words "at any time", took the view that the use of the words "at any time" in subsection (4) of Section 50B of the Act cannot be rigidly read letter by letter. It must be read and construed contextually and reasonably. The Court also opined that the words "at any time" must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation. In *New Delhi Municipal Committee v. Life Insurance Corporation of India and Others*⁶, this Court was interpreting the expression of the words "at any time" which finds its place in Section 67 of the Punjab Municipal Act, 1911 read with Section 68A which gave power to the Municipal authorities to amend the assessment list. The Court held that the term "at any time" implies that the list may be amended retrospectively. Stating otherwise would amount to denying to the expression "at any time" even its plain, grammatical meaning, quite apart from ignoring the context in which it occurs and the beneficent purpose of its incorporation. The Court held that the expression must be given its full force and effect, which requires the recognition of the committee's power to amend an assessment list even after the expiry of the year following the one in which the list was finalized by due authentication. These decisions are, therefore, to the effect that the expression "at anytime" has to be interpreted contextually and reasonably taking note of the intention of the parties.

21. We have carefully gone through the arbitration clause in the Agreement dated 16.12.1989 and, in our view, the words "at any time" which appear in Clause 21, is of considerable importance. "At any time" expresses a time when an event takes place expressing a particular state or condition that is when the dispute or difference arises. The arbitration clause 21 has no nexus with the life time of the named arbitrator. The expression "at any time" used in the arbitration clause has nexus only to the time frame within which the question or dispute or difference arises between the parties be resolved. Those disputes and differences could be resolved during the life time of the named arbitrators or beyond their lifetime. The incident of the death of the named arbitrators has no nexus or linkage with the expression "at any time" used in clause 21 of the Agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties is resolved as per the Agreement. Arbitration clause would have life so long as any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an

intention to the contrary. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes, in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their no availability, by a substitute arbitrator.

22. We are of the view clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under clause 21 of the agreement.

23. The High Court in our view was justified in entertaining such an application and appointing a former Judge of this Court as a sole arbitrator under the Arbitration and Conciliation Act, 1996 to adjudicate the dispute and difference between the parties.

24. In view of the above mentioned reasons, we find no reason to grant leave to appeal and issue notice on the petition for special leave to appeal and the petition is dismissed.

Judgment Referred

¹(2007) 5 SCC 0719

²2006) 6 SCC 0204

³(2006) Arb.LR 0011

⁴(2004) 8 SCC 0340

⁵AIR [2003 SC 3592

⁶(1977) 4 SCC 0084