

SUPREME COURT OF INDIA

North Eastern Railway

Vs.

Tripple Engineering Works

C.A.No.6275 of 2014

(Ranjan Gogoi and M.Y.Eqbal JJ.)

13.08.2014

JUDGMENT

RANJAN GOGOI, J.

1. The challenge in this appeal is to order dated 27.06.2012 of the Patna High Court by which a former Chief Justice of the Sikkim High Court had been appointed as the arbitrator to resolve the disputes and differences between the parties to the present proceedings arising out of two contracts bearing No. CAO/CON/722 dated 01.11.1993 and CAO/CON/738 dated 28.04.1994.

2. Both the contracts awarded to the respondent-contractor were terminated on 7.11.1994. Admittedly, the General Conditions of Contract of the Railways, which included an arbitration clause, governed the parties. After the termination of the two contracts the respondent-contractor approached the Patna High Court by means of a writ petition challenging the terminations. The writ petition was dismissed, which dismissal was challenged before this Court in SLP(C) No. 17189/1995. The said special leave petition was also dismissed leaving parties to resolve the differences in an appropriate proceeding i.e. a civil suit or by reference to arbitration, as the case may be.

3. Though a panel of arbitrators as per Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract was appointed as far back as in the year 1996, till date the award(s) in respect of the disputes arising out of either of the two contracts is yet to be

passed. According to the appellant-railways, the proceedings of arbitration has been completed in respect of the disputes arising out of Contract No. CAO/CON/722 dated 01.11.1993. Even if the said statement of the appellant-railways is to be accepted, though no material has been laid in support thereof, what cannot be denied is the fact that till date the award is yet to be passed. Admittedly, the arbitration in respect of the contract No. CAO/CON/738 dated 28.04.1994 has not even commenced. This is on account of the fact that in the year 2002 the North Eastern Railway, which had entered into the contracts with the respondent-contractor, was bifurcated into North Eastern Railway and East Central Railway. As the jurisdiction in respect of the aforesaid contract No. CAO/CON/738 was to be exercised by the East Central Railway it appears that the appellant has disclaimed all responsibility with regard to holding of arbitration proceedings in respect of the said contract and at the same time the East Central Railway has not responded in any positive manner to the several demands for arbitration lodged by the contractor.

Insofar as contract No. CAO/CON/722 is concerned, naturally, both the parties have tried to lay the blame for the delay in the process of arbitration on each other and the huge number of correspondence exchanged in this regard and the frequent change of the arbitration panel on account of exigencies of service of the panel members (retirement, transfer etc.) has made it impossible to pinpoint the responsibility in this regard on any one of the contracting parties. But what is glaring is the fact that though the arbitration proceedings in respect of the said contract No. CAO/CON/722 had commenced as far back as in the year 1996 the award is yet to see the light of the day notwithstanding the assertions made by the Union that the proceedings have been completed though as already noted, no clinching material in this regard has been brought on record; not to speak about the award of the arbitrators though such an award would have been the natural consequence of the completion of arbitration proceedings. It is in the totality of these facts that the High Court had thought it proper to travel beyond the framework of Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract and appoint a retired Chief Justice as the arbitrator.

4. The correctness of the said decision necessarily has to be judged in the light of the facts and circumstances enumerated above. The necessary legal discourse that would be required to be gone into to answer the question as posed above could begin by extracting the provisions of Clauses 64(3)(a)(ii) and (iii) of the General Conditions of

Contract.

64(3)(a)(ii) In cases not covered by clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Rly. Officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manager up to 2 names out of panel for appointment as contractor nominee. The General Manager shall appoint at least one out of them as the contractor nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the ~presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of departments of the Railways for the purpose of appointment of arbitrators.

64(3)(a)(iii) “ If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).

From the provisions of the General Conditions of Contract it is clear that the panel of arbitrators as per the agreement between the parties necessarily has to be Gazetted Railway Officers; any vacancy in the panel of arbitrators has to be filled up in the same manner in which the initial panel is required to be constituted.

5. The classical notion that the High Court while exercising its power under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter for short ~the Act) must appoint the arbitrator as per the contract between the parties saw a significant erosion

in Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corporation Ltd.[1] wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd.[2] wherein following a three Judges Bench decision in Punj Lloyd Ltd. Vs. Petronet MHB Ltd.[3] it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious. The apparent dichotomy in ACE Pipeline (supra) and Bharat Battery Manufacturing Co. (P) Ltd. (supra) was reconciled by a three Judges Bench of this Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited[4] where the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasized by taking into account the expression to take the necessary measure appearing in sub- section (6) of Section 11 and by further laying down that the said expression has to be read alongwith the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corporation Limited and Others Vs. Raja Transport Private Limited[5]. Paragraph 48 of the report wherein the scope of Section 11 of the Act was summarized may be quoted by reproducing sub-paragraphs (vi) and (vii) herein below.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

6. The above discussion will not be complete without reference to the view of this Court expressed in Union of India Vs. Singh Builders Syndicate[6] wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings

had not concluded for over a decade making a mockery of the process. In fact, in paragraph 25 of the report in Singh Builders Syndicate (supra) this Court had suggested that the government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

7. A pronouncement of late in Deep Trading Company Vs. Indian Oil Corporation and Others[7] followed the legal position laid down in Punj Lloyd Ltd. (supra) which in turn had followed a two Judges Bench decision in Datar Switchgears Ltd. Vs. Tata Finance Ltd.[8]. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Company (supra) subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Administration (supra) not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.

8. In the present case Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be railway officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6), in an appropriate case to depart therefrom. In Singh Builders Syndicate (supra) pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of the process. In the present case, admittedly the award in respect of disputes and differences arising out of the contract No. CAO/CON/722 is yet to be passed. Though the appellant-Railway has in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said Contract has been finalized, no material, whatsoever, has been laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and differences arising out of Contract No. CAO/CON/738 has not even commenced. A period of nearly two decades has elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts. The situation is distressing and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein. In a situation where the procedure and process under the Act

has been rendered futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged in the light of the several decisions noticed by us. We are, therefore, of the view that no infirmity muchless any illegality or failure of justice can be said to be occasioned by the order passed by the High Court so as to warrant any interference. We, therefore, unhesitatingly dismiss this appeal filed by the appellant-railways. However, in the facts of the case we do not deem it appropriate to burden the appellant with any costs.

[1] (2007) 5 SCC 304

[2] (2007) 7 SCC 684

[3] (2006) 2 SCC 638

[4] (2008) 10 SCC 240

[5] (2009) 8 SCC 520

[6] (2009) 4 SCC 523

[7] (2013) 4 SCC 35

[8] (2000) 8 SCC 151
