

SUPREME COURT OF INDIA

Union of India

Vs.

Besco Ltd

C.A.No.4483 of 2017

(Kurian Joseph and R.Banumathi,JJ.,)

27.03.2017

JUDGMENT

Kurian Joseph,J.,

SLP(Civil) No.17838 of 2014

1. Leave granted.

2. The short question arising for consideration in this case is whether the Chief Justice of a High Court or any person or institution designated by him, while exercising power under Section 11(6) of The Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") is bound to nominate an arbitrator as specified in the agreement for arbitration. The designated Judge in the High Court took the view that the appellant has lost the mandate to appoint an arbitrator since it failed to appoint the arbitrator within the permitted time and hence nominated an independent arbitrator.

3. Mr. Maninder Singh, learned Additional Solicitor General, placing reliance on *Union of India and another v. M.P. Gupta*¹ and *Union of India and others v. Master Construction Company*², submitted that the designated Judge, exercising the power under Section 11(6) of the Act, is bound to nominate a person as stipulated in the agreement for arbitration. In *M.P. Gupta* (supra), the relevant clauses on arbitration contained a provision that the arbitrators should be Gazetted Railway Officers. It may also be relevant in this context to note that the arbitration agreement contained a specific provision that it is a term of contract that no person other than a gazetted railway officer should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all. This Court hence set aside the order passed by the designated Judge who had nominated a retired Judge as the sole arbitrator. In *Master Construction Company* (supra), the question in issue was, in fact, left open.

4. Mr. Dushyant Dave, learned Senior Counsel appearing for the respondent submits that once the right of a party to nominate an arbitrator is forfeited, the Chief Justice or the

designated Judge under Section 11(6) of the Act is free to nominate any qualified person as arbitrator and that the Chief Justice or the designated Judge is not bound to nominate the arbitrator as specified in the agreement. Our attention has been invited to *Northern Railway Administration. Ministry of Railway, New Delhi v. Patel Engineering Company Limited*³ and *North Eastern Railway and others v. Tripple Engineering Works*⁴.

5. In *Patel Engineering Company Limited* (supra), a three-Judge Bench of this Court held that the Chief Justice or the designated Judge, if required, is free to deviate from the arbitration clause and nominate an independent person; but while doing so, due regard shall be given to the qualifications prescribed in the arbitration agreement, as required under Section 11(8) of the Act.

6. In *Tripple Engineering Works* (supra) also this Court reiterated the position that the Chief Justice or the designated Judge was free to deviate from the terms of the contract. Paragraphs-6 and 7 read as follows:

"6. The "classical notion" that the High Court while exercising its power under Section 11 of the Arbitration and 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. v. Bharat Petroleum Corpn. Ltd.* 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 v. Bharat Battery Mfg. Co. (P) Ltd.* wherein following a three-Judge Bench decision in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* 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.

7. The apparent dichotomy in *ACE Pipeline* and *Bharat Battery Mfg. Co. (P) Ltd.* was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn. v. Patel Engg. Co. Ltd.*⁵ wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised 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 along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*⁶. Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (*Indian Oil case*, SCC p. 537)

"48. (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."

(emphasis in original)"

7. In *Indian Oil Corporation and others v. Raja Transport Private Limited*, this Court has elaborately discussed the scope of Section 11 of the Act and held that if the circumstances so warrant, the Chief Justice or the designated Judge can ignore the specified arbitrator as stipulated in the agreement. Paragraphs-45 and 48, to the extent relevant, read as follows:

"45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by *Northern Railway Admn.*, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons.

48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the

parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(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."

9. On the facts of the present case, one wonders whether the issue actually arose or not. Clause 2900 of the Standard Conditions of Contract no doubt provides that the sole arbitrator shall be a Gazetted Railway Officer but in Clause 19.0 of the agreement dated 16.01.2012 executed between the parties, it is clearly stipulated that the contract shall be governed by the General Conditions and Special Conditions of Contract. Clause 19.0 specifically provides that ... "the contract shall be governed by the general conditions and special conditions of contract. ...".

10. Paragraph-18.0 of the General Conditions and Special Conditions of Contract, reads as follows:

“18.0 ARBITRATION:

(a) In the event of any question, dispute or difference arising under these conditions or any special condition of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole Arbitration of a person appointed to be arbitrator, by the General Manager in the case contracts entered into by the Zonal Railways and Production Units by the member of the Railway Board concerned, in the case of contracts entered into by the Railway Board and by the head of the organizations in respect of the contracts entered into by the other organizations under the Ministry of Railways. There will be no objection if the arbitrator is a Government Servant that he had to deal with matters to which the contract relates or that in the course of his duties as a Government Servant, he has expressed views on all or any of the matters in disputes or difference. The award of the Arbitrator shall be final and binding on the parties to this contract.”

11. Thus, it is clear that there is no stipulation for appointment of a Railway Officer. It can be any person. The designated Judge of the High Court has only exercised his powers in terms of the agreement by nominating an independent arbitrator.

12. Thus, we find no merit in this appeal and the same is accordingly dismissed. There shall be no order as to costs.

13. In view of the Judgment of this Court in Civil Appeal No. 4483 of 2017 @ Special Leave Petition (Civil) No. 17838 of 2014, we find no merit in this petition and the same is accordingly dismissed. There shall be no order as to costs.

Judgment Referred.

1(2011) 5 SCALE 0165

2(2008) 10 SCC 0240

3(2014) 9 SCC 0288

4(2009) 8 SCC 0520