

RAJASTHAN HIGH COURT

Suri Construction

Vs.

State of Rajasthan

D.B. Civil Writ Petition No. 3615 of 2005
(V.K. Bali and P.S. Asopa, JJ.)

23.08.2005

JUDGMENT

P.S. Asopa. J.

1. This is a Division Bench Civil Writ Petition against the order dated 6.4.2005 passed in S.B. Arbitration Application No. 34/2004, by the learned Single Judge while exercising the administrative delegated power of the Hon'ble Chief Justice whereby the matter has been referred to the standing committee for arbitration, despite the forfeiture of right of reference of dispute for arbitration to said Standing Committee, was upheld by her.

2. The short but important question of law involved in the matter is "whether even after the forfeiture of the right to refer the dispute to the arbitrator i.e., Standing Committee, can still the same arbitrator be appointed by the learned Single Judge while exercising her administrative delegated power."

3. Briefly stated the relevant facts of the case are that a dispute arose between the appellant-petitioner-contractor (hereinafter referred to as 'the Contractor') and the department whether the amount of sales-tax in regard to the goods supplied and manufactured is payable by the contractor or by the respondent State ? When the Government failed to refer the dispute within 30 days despite the service of the notice and payment of fee as required by the arbitration agreement, the appellant-petitioner came out with a case that the respondents have forfeited their right to adjudicate upon the dispute, through the Standing Committee, therefore, the sole arbitrator may be appointed by the Court.

4. The learned Single Judge while exercising the administrative powers came to the conclusion that the right of adjudication through Standing Committee has been forfeited but the Court in its discretion under Section 11 of the Arbitration and Conciliation Act, 1996, (for short 'the Act') can appoint the same committee. The relevant portion of the order of learned Single Judge reads as under:

"It is no doubt true that if one of the contracting parties has failed to appoint an arbitrator in terms of the agreement, the power lies with the Court in view of Section 11 of the Indian Arbitration and Conciliation Act, 1996 to appoint a suitable person as arbitrator to adjudicate upon the dispute and, therefore, in the instant matter too, this power is vested with the Court due to the inaction alleged against the respondent-defendant. The Court, in exercise of its jurisdiction, and discretion, therefore, cannot be precluded from referring the dispute to the Department itself, in a given set of circumstances or if the situation so warrants also in the case at hand, where the mode and manner of payment of sales tax is prescribed in the deed of agreement itself under Clause 36D quoted hereinbefore which is sufficiently clear. The same can, therefore, be decided by the Standing Committee itself. In fact the application had himself submitted to the jurisdiction of the Department in regard to the liability of payment of sales tax in view of specific Clause 36D which *prima facie* specifies the liability and the same has to be held binding on the party which is liable, after an opportunity of hearing is granted to the applicant and the respondent to submit their stand before the Standing Committee which is appointed as an arbitrator.

Hence, this Court in exercise of its jurisdiction and discretion under Section 11 of the Act of 1996 is appointing the Standing Committee of the Department of State to decide the dispute specifying the reasons for passing the award. The Standing Committee, therefore, shall arbitrate upon the existing dispute between the parties and decide the matter in terms of the agreement which had been executed between them as this Court does not consider it fit and proper to appoint a new arbitrator under the existing facts and circumstances of this matter as this Court under Section 11 of the Act, 1996, cannot be compelled to necessarily appoint a new arbitrator to the exclusion of the standing committee of the Department in absence of any *mala fide* or malicious motive attributed against the Standing Committee to whose jurisdiction the applicant had himself submitted in terms of the agreement but has now raised a technical plea that the

Department did not refer the dispute within the stipulated time due to which its right to function as arbitrator ought to be seized which is not acceptable to this Court for the reason assigned herein before.

Therefore, while exercising its powers under Section 11 of the Act of 1996, it is considered legally permissible to assign the matter to the Standing Committee in the capacity of an arbitrator since the dispute to be decided lies clearly within the parameters of the deed of agreement itself and would thus lead to expeditious disposal of the matter."

5. The submission of learned counsel for the petitioner-appellant is that once the right of adjudicating body as an arbitrator is forfeited then the same arbitrator cannot be appointed and in case the same arbitrator is appointed then the same would amount to revival of right which has already been forfeited. Counsel for the appellant placed reliance upon *Chetan Construction Company v. State and Others*, ¹ and *Singhal Construction Company, Bharatpur v. State of Rajasthan*, ² in support of the contention that in such a situation the Court has to appoint arbitrator independent of the contract.

6. Counsel for the respondents on the strength of a Supreme Court Judgment reported in *State of Rajasthan and Others v. M/s Nav Bharat Construction Co.* ³ has argued that Clause 23 is not the arbitration clause. Although the said argument has not been raised before the learned Single Judge.

7. The further submission of the counsel for the respondent is that the same arbitrator can be appointed even if his right of adjudication is forfeited.

8. Heard learned counsel for the parties, perused the record of case and carefully examined the rival submissions of both the parties.

9. We have gone through the aforesaid judgment of Hon'ble Supreme Court in *State of Rajasthan and Others v. M/s Nav Bharat Construction Co.* (supra). In that case the contractor filed an application under Section 17 of the Act of 1940 and prayed for passing a decree in terms of the Award. The State of Rajasthan under Section 30(1) of the Act filed objection to the Award. The objections of the State were rejected by the Court of the District Judge who made the Award Rule of the Court by passing a decree in terms thereof on 5.10.1999. On behalf of the State, it was argued that clause 23 is not an arbitration clause. The appeal was ultimately dismissed on the ground that the State is estopped on the doctrine of acquiescence and waiver from raising objection to

the competence of substituted arbitrator and validity of arbitration proceedings by taking recourse to clause 23 of the agreement.

10. Here in the instant case, there is no denial on the part of the respondent State that clause 23 of the contract is not an arbitration clause and it has been stated in reply to para Nos. 7, 8 and 9 that application made by the contractor was dealt with as per procedure and there was no illegality or defect in the procedure. Therefore, although the respondent State is estopped from raising the dispute that clause 23 is not an arbitration clause but still we would like to deal with both the aspects of the matter as dealt by the Hon'ble Supreme Court.

11. We are of the view that the judgment reported in *State of Raj. v. N.B. Constructions* (supra), is not applicable for the reason that clause 23 in dispute between the Hon. Supreme Court and this Court substantially differ in the language. Both the clauses are reproduced hereunder for ready reference.

Clause of the contract in the present case :

Clause 23 : Standing Committee for settlement of disputes

"If any question, difference or objection, whatsoever shall arise in any way, in connection with or arising out of this instrument, or the meaning of operation of any part thereof, or the rights, duties or liabilities of either party then, save in, so far, as the decision of any such matter, as herein before provided for, and been decided, every such matter constituting a total claim of Rs. 50,000/- or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated, or has been rightly terminated, and as regards the right of obligations of the parties, as the result of such termination, shall be referred for decision to the empowered standing committee, which would consist of the followings :

- (i) Administrative Secretary concerned.
- (ii) Finance Secretary or his nominee, not below the rank of Dy. Secretary, and/or Chief Accounts Officer
- (iii) Law Secretary or his nominee not below the rank of Joint Legal Remembrancer
- (iv) Chief Engineer-cum-Additional Secretary of the concerned Department.
- (v) Chief Engineer concerned (Member Secretary).

The Engineer-in-charge, on receipt of application along with non-refundable prescribed fee, (the fee would be two percent of the amount in dispute, not exceeding Rs. One lac) from the contractor shall refer the disputes to the committee within a period of one month from the date of receipt of application.

1. Procedure and application for referring cases for settlement by the Standing Committee shall be, as given in form RPWA 90."

Clause in dispute before the Hon. Supreme Court:

"Clause 23. Except where otherwise specified in the contract, the decision of the Chief Engineer of the Government of Rajasthan for the time being shall be final conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, decisions, drawings and instructions herein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, of the contract by the contractor shall be final, conclusive and binding on the contractor."

12. A bare perusal of the aforesaid clause 23 in the present case as well as in the case before Hon'ble Supreme Court in *State of Rajasthan and Others v. M/s Nav Bharat Construction Co.* (supra), clearly reveal that in the present case Arbitration Clause 23 deals with any question, difference or objection, in any way in connection with or arising out of this instrument, or the meaning of operation of any part thereof with the further reference for decision and pre-requisite condition for reference i.e. Notice and the requisite fee as well as the reference to the Committee within a period of one month from the date of receipt of the application whereas in case of Hon'ble Supreme Court in *State of Rajasthan and Others v. M/s Nav Bharat Construction (Co.)* (supra), the opening words are "except where otherwise specified in the contract", clearly reveal that the same is a residuary clause for filling the gap with regard to specifications, decisions, drawings and instructions and further there is no reference of any dispute arising between the parties in connection with or arising out of the instrument. Apart from the above, the case before Hon'ble Supreme Court was under the Act of 1940 which clearly reveal that the clause 23 which was in existence was prior to 1996 (sic) 23 of agreement of 2002 which

came into force after Act of 1996. We are of the view that the clause 23 before the Hon'ble Supreme Court was not of arbitration whereas clause 23 of the present case is of arbitration.

13. That the respondent-State neither during the proceedings on the application for referring the matter to the arbitrator nor before the learned Single Judge has stated that clause 23 is not the arbitration clause. Therefore, the respondent is estopped from revising his stand on the basis of doctrine of acquiescence and waiver still we have pointed out the difference between the two clauses and are of the firm view that the clause 23 of the present case is an arbitration clause.

14. In the judgment of Hon'ble Division Bench of this Court in Chetan Construction Company (supra), there was no occasion to answer the question raised in this writ petition directly as the arbitration application on behalf of the contractor petitioner was dismissed. Here in the instant case the learned Single Judge after holding that one of the parties i.e., State Government/Department has failed to refer the dispute within the prescribed period of 30 days but still the same arbitrator has been appointed and the arbitration application has been disposed of.

15. In M/s Singhal Constructions (supra), also the finding of forfeiture was upheld but same arbitrator was not appointed. Therefore, in both the judgments there was no occasion to answer the above referred question that even after the forfeiture of the right to refer the dispute to the arbitrator i.e., Standing committee, can still the same arbitrator be appointed by the learned Single Judge while exercising her/his administrative delegated power.

16. We have examined the aforesaid question and in our view right of forfeiture cannot be revived unless forfeiture is held to be wrong. In case right is again revived then the same would be contrary to the settled principles of law that "one cannot take advantage of his/its own wrong".

17. As regards the exercise of the administrative discretion for appointment of the same arbitrator, we are of the view that the said discretion is available only in case the right of forfeiture of the reference to the Standing Committee is set-aside.

18. In view of above, the order of the learned Single Judge dated 6.4.2005 is set-aside

and now the question remains to be decided as to who is to be appointed as Sole Arbitrator ? Retired Justice R.S. Kejriwal is appointed as a sole arbitrator and taking into consideration the claim involved in the dispute, we fix a consolidated remuneration of Rs. 85,000/- which shall be paid to the sole arbitrator by both the parties to the dispute in ratio of 50 : 50. The Arbitrator is requested to dispose of the dispute within three months from the date of entering upon the reference. The arbitrator may extend time for disposal of the dispute, if circumstances so warrant. The Arbitrator is also entitled to receive a sum of Rs. 7,000/- being the office expenses to be incurred in the proceedings. Registry is directed to send a copy of this order to Hon'ble Retired Justice R.S. Kejriwal for information and further action.

19. The aforesaid writ petition is disposed of accordingly.
Petition disposed of.

Cases Referred.

1. 2005(1) WLC (Raj.) 484 : RLW 2005(1) Raj. 103
2. 2001(3) WLC (Raj.) 325 : RLW 2001(3) Raj. 1771
3. 2005(4) RCR(Civil) 473 : 2005(5) RDD 171 (SC)