

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **AA No.6/2008**

% **Date of Decision: 10.02.2009**

M/s.Rapti Contractors Petitioner
Through: Mr.Raman Kapur, Advocate.

Versus

Reliance Energy Ltd & Ors Respondents
Through : Mr.Rishi Aggarwal, Advocate.

CORAM :-

HON'BLE MR. JUSTICE ANIL KUMAR

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

*

1. This is a petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 by the petitioner for appointment of an arbitrator in terms of the arbitration agreement between the parties.

2. The learned counsel for the petitioner on instructions seeks to delete respondents No.3 to 7 as parties to the present petition. The learned counsel for the respondents also has no objection for deletion of the respondents No.3 to 7 as parties to the present petition.

3. The petitioner contends that it is a partnership firm doing business of construction and maintenance on contract basis and the firm is registered with the Registrar of Firms at Lucknow.

4. It is contended that in 2004 respondent No. 2, Reliance Energy Ltd, invited offers for construction of 33 KVA sub-station building at Balaji-Kalkaji, New Delhi (Remaining Civil and electrical works). The offer submitted by the petitioner was accepted at Delhi by respondent No.2.

5. After the acceptance of the offer of the petitioner a letter of intent was issued. In accordance with the work order dated 28th September, 2004, issued in accordance with the letter of intent, the date of commencement of work was 28th March, 2004 and the total work was required to be completed by 17th December, 2004, i.e. within a period of 80 days only.

6. The petitioner contended that his working was dependant mainly on the respondent permitting the petitioner to proceed with the work, without causing any hindrance in any manner and by resolving the problems at site in time and by faithfully discharging his obligation under the contract. According to the assertions of the petitioner, the

respondents failed to discharge their obligations under the contract. It is asserted that the respondents took an exceptionally long time in giving constructional drawings and failed in finalizing the logistics of the work. The no-objection certificate which was required from the Municipal Corporation of Delhi was not obtained nor had the plans been got sanctioned from the Municipal Corporation of Delhi, entailing delay in start of the work. During this period according to the plea of the petitioner his labour, plant and tools remained idle. Disputes arose between the parties and in terms of the arbitration clause contained in the detailed work order No.CPG/7302/BLJ dated 28th September, 2004 the petitioner invoked the arbitration agreement between the parties, first for adjudication of disputes by the respondents. The arbitration agreement in terms of the clauses in the agreement between the parties is as below:-

“Arbitration:- All disputes arising out of and in connection with this contract, which cannot be settled by mutual negotiations within 30 days of reference, by either party shall be considered a dispute within the meaning of this Clause. Such dispute shall be referred to Arbitration in accordance with the rules of Indian Arbitration.

18.0 Arbitration:- If any disputes or differences arise between the owner and the contractor in relation to or out of this contract, the same shall be referred to the Arbitration of two arbitrators, one each to be appointed by the owner and the contractor. The provisions of the Indian Arbitration Act, 1940 shall apply for such Arbitration. The decision so given shall be final and binding upon the parties hereto. ”

7. The petitioner contended that on account of breaches committed by the respondents disputes arose which were referred to the respondents with the request to settle the same mutually and amicably. The petitioner communicated the disputes by letter dated 29th September, 2007. Along with the letter the details of the disputes were also sent. The disputes, however, could not be settled even after more than 50 days and, therefore, the petitioner invoked the arbitration clause No.18 of General Conditions of Contract which is the arbitration agreement and nominated its nominee for the arbitral Tribunal with the request to the respondents to nominate their arbitrator.

8. According to the petitioners even after 30 days of invoking the arbitration agreement the respondents did not appoint an arbitrator. The petitioner thereafter, filed the present petition on 20th January, 2008 and till the filing of the petition the respondents have not appointed any arbitrator.

9. The petition is contested by the respondents contending that the petition under Section 11 of the Arbitration & Conciliation Act, 1996 is not maintainable. It was contended that the arbitration agreement contemplates adjudication of disputes under the Indian Arbitration Act, 1940 which stands repealed by virtue of Section 85 of the Arbitration & Conciliation Act, 1996 and consequently there is no agreement between

the parties to have the disputes adjudicated by arbitration and the arbitration agreement is void in law and, therefore, no arbitrators can be appointed nor arbitration proceedings can commence.

10. The respondents also contended that the arbitration agreement is violative of Section 10 of the Arbitration and Conciliation Act, 1996 as there cannot be an even number of arbitrators after the enactment of Arbitration & Conciliation Act, 1996.

11. The petition is also contested on the ground that the Court does not have territorial jurisdiction since the respondents is a company registered at Mumbai and by virtue of Clause 19 the jurisdiction of the Court other than Mumbai was excluded. Clause 19 regarding jurisdiction is as under:-

“19. Jurisdiction

The contract shall be governed by and constructed according to the laws in force in India. The contractor hereby submits to the jurisdiction of the Courts situated at Mumbai for the purposes of actions and proceedings arising out of the contract and the courts in Mumbai only will have the jurisdiction to hear and decide such actions and proceedings.”

12. I have heard the learned counsel for the parties. Regarding the non-maintainability of the petition as respondents No.3 to 7 were also impleaded, it is contended that since respondents No.3 to 7 have been

deleted as parties, therefore, it cannot be held that there is no valid arbitration agreement between the petitioner and all the parties. The respondent no.1 & 2 are the same entity and therefore, the dispute that there is no arbitration agreement with respondents no. 3 to 7 does not survive in the facts and circumstances.

13. The learned counsel for the respondents, after some arguments, has given up his objection regarding lack of territorial jurisdiction of this Court to adjudicate Section 11 petition under the Arbitration & Conciliation Act, 1996 in view of the decision of the Hon'ble Supreme Court in Patel Roadways Ltd, Bombay v. Prasad Trading Company, (1991) 4 SCC 270. In any case the cause of action has arisen at Delhi as the work was executed at Delhi and the payments were also made at Delhi and the offer of the petitioner was also given in Delhi and merely on account of registered office of the respondents being at Mumbai, there was no cause of action at Mumbai. The Supreme Court in Patel Roadways Ltd (Supra) had held that the choice of forum can be limited by incorporating inclusion Clause under the agreement but by agreement jurisdiction cannot be conferred on a place where it does not lie. Relying on the explanation to Section 20 of the Code of Civil Procedure it was held that if the cause of action had not arisen at the place where the defendant has its principal office, then merely on account of the principal office of the defendant being at that particular

place, the cause of action cannot be said to have arisen there and consequently the defendant cannot, by incorporating an inclusion clause, confer jurisdiction on the Court having jurisdiction over the place where only the principal office is situated.

14. The next contention of the respondents is that the arbitration agreement is void as it contemplates appointment of even number of arbitrators contrary to Section 10 of Arbitration & Conciliation Act, 1996. It is also contended that the arbitration agreement contemplates adjudication of disputes in accordance with the Indian Arbitration Act, 1940 which stood repealed on the day the arbitration agreement was entered into between the parties and, therefore, the arbitration agreement is void.

15. Regarding the appointment of even number of arbitrators, the learned counsel for the petitioner has relied on *Dr. Deepashree v. Sultan Chand & Sons*, 2008 (4) Arb.LR 94 (Delhi). In *Deepashree* (Supra) the arbitration agreement contemplated appointment of two arbitrators, one each to be appointed by the parties. On disputes having arisen, an arbitrator was appointed by one of the parties and the other party was asked to give consent to the appointment of that arbitrator as the sole arbitrator. The opposite party had declined to concur with the appointment of the nominated arbitrator as the sole arbitrator and had

nominated another arbitrator as per the terms of the agreement. Thereafter, an application under Section 11 was filed by one of the parties. The learned Single Judge relying on a judgment of the Andhra Pradesh High Court in Sri Venkateswara Construction Company v. Union of India, AIR 2001 A.P 284 where an agreement for arbitration by two arbitrators was construed as an agreement for reference to a sole arbitrator, and relying on two judgments of this Court, Wipro Finance Ltd v. Sandplast India Ltd, 2006(3) Raj. 524 (Delhi) and Marine Container Services (South) Pvt Ltd v. Atma Steels Ltd, 2001(1) Arb.L.R.341 (Delhi) where sole arbitrators were appointed even though the arbitration agreements were for the appointment of two arbitrators, had held that an agreement for appointment of two arbitrators is not an agreement within the meaning of Section 10(1) of the Act and consequently Section 10(2) comes into play and the Arbitral Tribunal is to consist of a sole arbitrator.

16. Section 10 (1) of the Arbitration & Conciliation Act, 1996 provides that the parties are free to determine the number of arbitrators provided that such number shall not be an even number. Section 10(2) of the said Act, however, provides that failing the determination referred to in sub-Section (1) the arbitral tribunal shall consist of a sole arbitrator. The precedents referred to hereinabove had also held that an arbitration agreement which provides for an even number of arbitrators will not be

invalid on that count only and it was held that in those circumstances the arbitration agreement is to be deemed to be for reference to a sole arbitrator. A similar view was also taken in North East Securities Ltd v. Sri Nageshwara Chemicals and Drugs Pvt Ltd, 2001(1) Arb.L.R.70 (A.P). In view of the precedents discussed above it cannot be held that the arbitration agreement is void solely for the reason that it contemplated arbitration by even number of arbitrators. Section 10(2) of the Arbitration and Conciliation Act, 1996 shall be applicable in the circumstances and the arbitral tribunal is to consist of a sole arbitrator. The petitioner had appointed an arbitrator and asked the respondents to appoint his arbitrator which the respondents failed to appoint within 30 days or before filing of the present petition. Since even numbers of arbitrators are not to be appointed, therefore, it will be just and appropriate to appoint a sole arbitrator. The learned counsel for the petitioner also has no objection in case a sole arbitrator is appointed in place of the arbitrator nominated by the petitioner.

17. The next contention of the respondents is that the arbitration agreement stipulates that the arbitration shall be governed by the provisions of the Indian Arbitration Act, 1940 and since the Act of 1940 had been repealed by virtue of Section 85(1) of the Arbitration and Conciliation Act, 1996 and as the arbitral proceedings had not commenced before the coming into force of the Act of 1996 as

contemplated in Section 85(2) of the Act of 1996 and as there was no agreement between the parties to subject themselves to arbitration under the Arbitration and Conciliation Act, 1996 or any modification of the Arbitration Act, 1940, the arbitration agreement in its entirety is void in law. Section 85 of the Arbitration & Conciliation Act, 1996 is as under:-

“85. Repeal and saving:- 1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 are hereby repealed.

(2) Notwithstanding such repeal,-

a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force.

b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.”

18. Section 85 of the Arbitration & Conciliation Act, 1996 contemplates that the Act shall apply in relation to the arbitral proceedings which commenced on or after this act comes into force. Since the arbitration was invoked by the petitioner vide letter dated 23rd November, 2007 after coming into force of Arbitration & Conciliation Act, 1996, so the arbitration between the parties cannot commence under the Indian Arbitration Act, 1940. Since the agreement contemplates adjudication of disputes between the parties under the AA No.6/2008

Indian Arbitration Act, 1940, therefore, whether the agreement will become void or the arbitration can proceed in accordance with the Arbitration & Conciliation Act, 1996.

19. It is well-settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable. Partial invalidity in contract will not ipso facto make the whole contract void or unenforceable. Wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has to be given to legal and valid parts striking out the offending parts.

20. In *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, AIR 2006 SC 963 the Hon'ble Supreme Court had held –

“The proper test for deciding validity or otherwise of an agreement or order is 'substantial severability' and not 'textual divisibility'. It is the duty of the court to sever and separate trivial or technical part by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the Court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be "to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of

unreasonable provisions if the covenanter is unable to face litigation."

Applying the doctrine of severability in *Shin Satellite* (supra) the Court had held –

"In the present case, Clause 23 relates to arbitration. It is in various parts. The first part mandates that, if there is a dispute between the parties, it shall be referred to and finally resolved by arbitration. It clarifies that the rules of UNCITRAL would apply to such arbitration. It then directs that the arbitration shall be held in Delhi and will be in English language. It stipulates that the costs of arbitration shall be shared by the parties equally. The offending and objectionable part, no doubt, expressly makes the arbitrator's determination "final and binding between the parties" and declares that the parties have waived the rights of appeal or objection "in any jurisdiction". The said objectionable part, in my opinion, however, is clearly severable as it is independent of the dispute being referred to and resolved by an arbitrator. Hence, even in the absence of any other clause, the part as to referring the dispute to arbitrator can be given effect to and enforced. By implementing that part, it cannot be said that the Court is doing something which is not contemplated by the parties or by 'interpretative process', the Court is re-writing the contract which is in the nature of 'novatio'. The intention of the parties is explicitly clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a Court of law can be separated and severed by using a 'blue pencil'.

21. Applying the ratio of the above said case to the case at hand I am of the opinion that the offending clause, i.e. the clause stipulating that the arbitration shall be governed by the provisions of the Indian Arbitration Act, 1940, is clearly severable from the rest of the agreement. Consequently the part of the agreement which clearly expresses the intention of the parties to refer their disputes to

arbitration is valid and enforceable. A fortiori in case the agreement contemplates adjudication of disputes under the Indian Arbitration Act, 1940 which had been repealed on the day the arbitration agreement was invoked or even on the date when the agreement was executed, the disputes between the parties are to be adjudicated by the arbitration Act which is applicable on the day the arbitration agreement was entered between the parties. The learned counsel for the respondents is unable to show any provision or precedent that in case the agreement is for adjudication of disputes under an Act which had already been repealed when the agreement was executed, then the entire agreement, the intention of the parties to get the disputes resolved through arbitration, shall be negated completely and the Arbitration Agreement shall be void.

22. For the foregoing reasons, the petition is allowed and Mr. Justice Vijender Jain (Retd), House No.136, Sector 15A, Noida-201301, (Phone Nos.9711009541, 95120-2511535/2511536) is appointed as a sole arbitrator for adjudicating all the disputes between the parties under the contract in question. The learned arbitrator shall fix his own fees which shall be borne equally by the parties. The learned arbitrator shall also decide his own procedure. The parties are directed to appear before the arbitrator on 20th February, 2009 at 5 PM. A copy of this order be sent to the Learned Arbitrator forthwith. Copies of this order be also

given to the learned counsel for the parties dasti. Considering the facts and circumstances parties are also left to bear their own cost. With these directions the petition is disposed of.

FEBRUARY 10, 2009
'K'

ANIL KUMAR, J.