

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision : 16.09.2011

+ FAO (OS) No. 231 / 2010

M/S. NAV NIRMAN CONSTRUCTION COMPANY

... ..APPELLANT

Through : Mr. Sandeep Sharma and
Mr. Vikas Sharma, Advocates
for the Appellant with
Mr. Sushil Sadana, Partner.

- V E R S U S -

EXECUTIVE ENGINEER CD – IX,
IRRIGATION AND FLOOD CONTROL DEPARTMENT,
GNCT OF DELHI

... ..RESPONDENT

Through : Mr. Rohit Madan &
Mr. Gautam Gupta, Advocate
for the Respondent with
Mr. Ish Kumar, Chief Engineer,
Zone – II in person.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | NO |
| 2. | To be referred to Reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

SANJAY KISHAN KAUL, J. (ORAL)

1. The appellant was awarded a contract for construction of inlet/outflow structure of DDA Storm Water drain at a bid price of ₹20,23,116.00. This bid was accepted by the respondent on 11.5.1992. The stipulated date for commencement of the work was 18.5.1992 and the date for completion of work was 17.10.1992, i.e. a period of five (5) months. The work, however, got completed only on 30.10.1997 after almost five (5) years of the stipulated date of completion. The petitioner raised the final bill after completion of work and claimed additional payments on account of delay in completion of the work. Since there were disputes which arose on this account, the appellant invoked the arbitration clause, being clause No.25, of the agreement on 14.8.2000. The respondent, however, did not appoint any arbitrator and the appellant moved an application on the original side of this Court under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act').

2. The aforesaid application filed by the appellant, being AA No.45/2003, was disposed of vide order dated 21.4.2003. A perusal of the said order shows that a request was made by the appellant that the respondent has a panel of arbitrators consisting of retired Chief Engineers and requested that any one of them may be appointed as the arbitrator. This request was acceded to by the counsel for the respondent. It is on such joint request of the parties that Mr. A.S. Gahlawat, retired Chief Engineer of the Haryana Irrigation Department, who was on the panel of the respondent, was appointed as the sole arbitrator to adjudicate the disputes which had arisen between the parties.
3. The arbitrator made and published his award dated 19.4.2006 awarding various claims to the appellant totaling to ₹13,98,726.75 along with interest @ 12 per cent per annum from 14.8.2000 up to the date of publication of the award. The total, thus, comes to ₹23,49,858.95. There is no reference to future interest.
4. The respondent, thereafter filed objections to the award vide OMP No.451/2006 which has given rise to the

impugned Order dated 23.12.2009 setting aside the award.

5. We may notice that the learned single Judge has discussed the various claims awarded by the arbitrator but has really given no findings in respect of the same. This appears to be so on account of the fact that the learned single Judge found that the reference itself was bad in law in view of peculiar wordings of the arbitration clause. It appears that the same learned single Judge had given various pronouncements on the same clause as referred to in paragraphs 12 & 13 of the impugned judgement to come to this conclusion. The appointment of the arbitrator was, thus, held contrary to the contract.
6. In order to appreciate the aforesaid plea, we would like to reproduce the arbitration clause, once again, as it is the common case of the parties that the clause has not been correctly reproduced, which reads as under:

“CLAUSE 25. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right matter of

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 shall be referred to the sole arbitration of the person appointed by the D.G. of works/Chief Engineer, CPWD/(DA), Zone II in charge of the work at the time of dispute or if there be no D.G. of works/Chief Engineer, the administrative head of the said F.C.W. (DA), Zone)))) at the time of such appointment. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such D.G. of works/Chief Engineer or administrative head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. **It is also a term of this contract that no person other than a person appointed by such D.G. of works/Chief Engineer or administrative head of CPWD/(DA), Zone II as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.** In all, cases where the amount of claim in dispute is ₹75,000.00 (Rupees Seventy five thousand

only) and above, the arbitrator shall give reasons for the award.”

7. It is the opinion of the learned single Judge that since the arbitration clause specifically stipulated that no person other than the person appointed by the authority should act as an arbitrator and that if for any reason that is not possible, the matter need not be referred to arbitration at all, the court could not have exercised the powers under Section 11 (8) of the said Act.
8. Learned counsels for the parties have in this context discussed the effect of the judgement pronounced by the Supreme Court in Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao (1993) 2 SCC 654. As pointed out by learned counsel for the appellant, the nature of clause is similar. This is apparent from paragraph 4 of the judgement where clause 65.1 has been reproduced being the arbitration clause and contains the sentence “and if for any reason it is not possible the matter is not referred to the arbitration at all....”. The contention in context of the aforesaid clause is contained in paragraph 11 of the judgement, which reads as under:

“11. It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Shri Rao, therefore, that since the agreement postulated preference to arbitrator appointed by the administrative head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the administrative head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(1)(a), then the respondent has been given right under Clause 65.2 to avail the remedy under Section 8(1)(a) and request the court to appoint an arbitrator. If the contention of Shri Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself.”

The Supreme Court held that the appointment of the arbitrator by the trial court as upheld by the High Court

was perfectly legal and valid warranting no interference as the failure to appoint an arbitrator by the designated authority would invite the provisions of Section 11 (6) of the said Act. We note that Nandyal Coop. Spinning Mills Ltd.'s case (supra) was decided under the provisions of the Arbitration Act, 1940.

9. Both the learned counsels for the parties seek to rely upon the case of Indian Oil Corporation Ltd. & Ors. Vs. Raja Transport (P) Ltd. (2009) 8 SCC 520.
10. Learned counsel for the appellant has drawn our attention to paragraphs 46 and 47 of the judgement, which reads as under:

“46. This takes us to the effect of the condition in the arbitration agreement that "it is also a term of this contract that no person other than the Director, Marketing or a person nominating by such Director, Marketing of the Corporation as aforesaid shall act as Arbitrator." Such a condition interferes with the power of the Chief Justice and his designate under Section 11(8) of Act to appoint a suitable person as arbitrator in appropriate cases. Therefore, the said portion of the arbitration clause is liable to be ignored as being contrary to the Act.

47. But the position will be different where the arbitration agreement names an individual (as contrasted from someone referred to by

designation) as the Arbitrator. An example is an arbitration clause in a partnership deed naming a person enjoying the mutual confidence and respect of all parties, as the Arbitrator. If such an arbitration agreement provides that there shall be no arbitration if such person is no more or not available, the person named being inextricably linked to the very provision for arbitration, the non-availability of the named arbitrator may extinguish the very arbitration agreement. Be that as it may.”

It is, thus, submitted that the failure of a designated authority to appoint an arbitrator does not impede the authority of the Chief Justice or his designate under Section 11(6) of the said Act to appoint a suitable person in appropriate cases. We may, however, note that the appointment of the arbitrator by the court was set aside on the ground that there was no valid invocation to appoint an arbitrator prior to approaching the court.

11. The third judgement referred is in the case of Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited (2007) 5 SCC 304, which has, in fact, been considered in Indian Oil Corporation Ltd. & Ors. Vs. Raja Transport (P) Ltd. case (supra).

12. The legal position, which emerges, is as follows:

- i) If the arbitration clause contains a term that a designated authority shall appoint an arbitrator, then recourse to take arbitration shall be according to the said provision.
- ii) The position would be slightly different if there is a named arbitrator where the failure of the named arbitrator to act would nullify the arbitration clause itself. In other words, the arbitration clause, such as the one in issue, will not perish merely because the designated authority fails to appoint an arbitrator even though charged with the said obligation.
- iii) In case of the designated authority failing to act in appointing an arbitrator after the arbitration clause has been invoked the aggrieved party is well within its right to approach the court under Section 11 of the said Act seeking the appointment of an arbitrator by the Hon'ble Chief Justice or his designate.

If the aforesaid principles are applied to the facts of the present case, it is not disputed that the arbitration clause was invoked by the appellant. No arbitrator was appointed by the designated authority. The appellant filed an application under Section 11 (6) of the said Act. The respondent took the plea of the designated

authority being there to appoint the arbitrator. It is in such circumstances that the court appointed the arbitrator which was well within the authority of law.

13. There is another fact which is material in the present case, i.e. the consent of the counsel for the appellant for appointment of the arbitrator in question. In fact, the appointing order shows that it is really the consent of the parties which has given rise to the appointment of the arbitrator rather than a direction of the court made unilaterally. The consent of the respondent who was representing the designated authority is, thus, a consent by that designated authority for the appointment of that particular arbitrator.
14. We are, thus, not in agreement with the view taken by the learned single Judge that the arbitration clause in question can give rise to a position in law that the failure of the designated authority to appoint an arbitrator would give a go bye to arbitration or denude the Chief Justice or his designate to appoint an arbitrator. In fact, this is not a peculiar arbitration clause but such term is contained in various arbitration clauses of various

authorities which have been analyzed by the Supreme Court and this Court as is apparent from the judgement in Nandyal Coop. Spinning Mills Ltd. case (supra).

15. The result is that the legal principle in this behalf enunciated in the impugned judgement as also in Arbitration Petition No.219/2008 titled M/s. Arvind Construction Company Pvt. Ltd. Vs. Union of India & Ors. decided on 2.3.2009 and Arbitration Petition No.451/2008 titled Engineering Development Corporation Vs. Municipal Corporation of Delhi & Anr. decided on 22.9.2009, do not correctly reflect the legal position and the legal position is as enunciated by us aforesaid.
16. In view of the aforesaid and there being no conclusive findings on merits by the learned single Judge though various claims have been discussed and observations made without any conclusion, the impugned order as a whole has to be set aside.
17. The natural sequitur to our order would be to remand the matter back to the learned single Judge of this Court for fresh adjudication. However, there are certain

peculiar facts & circumstances of this case which are best left unsaid as they may prejudice any fresh arbitration. Learned counsel for the appellant and learned counsel for the respondent, on instructions from Mr. Ish Kumar, Chief Engineer, Zone II, who is the designated authority agree that the award dated 19.4.2006 itself be set aside and the matter be referred to a new arbitrator. The pleadings and the evidence on record of the earlier arbitrator are agreed to be taken on record before the new arbitrator, who has to only hear the final argument and publish a fresh award uninfluenced by the earlier award. It is proposed by the designated authority that Mr. S.M. Chopra, Additional District & Sessions Judge (Retd.), R/o 181, Desh Bandhu Apartments, Kalkaji, New Delhi-110019 (Mobile No.9213230349) be appointed as the sole arbitrator to adjudicate the disputes between the parties. This is acceptable to the learned counsel for the appellant on instructions.

18. Mr. S.M. Chopra, Additional District & Sessions Judge (Retd.) is accordingly appointed the sole arbitrator to

enter upon reference and adjudicate the claims of the appellant by taking into account the complete material on record before the earlier arbitrator who will proceed from the stage of final hearing of the matter and publish a fresh award uninfluenced by the earlier award. The arbitrator will endeavour to conclude the final argument and pronounce the award within a period of three (3) months from the first date of hearing.

19. The records of the arbitration are stated to be lying in OMP No.451/2006, which may be remitted to the new arbitrator. The fee of the arbitrator shall be ₹50,000.00 to be shared equally by the two parties as per the consent of the parties. The arbitration cost will form a part of the main cause.
20. The parties to appear before the arbitrator for necessary directions on 3.10.2011 at 5:00 p.m. The counsels for the parties will inform the learned arbitrator in advance and a copy of the order be also sent to the arbitrator expeditiously.
21. The appeal is allowed in the aforesaid terms leaving the parties to bear their own costs.

22. Dasti to learned counsels for the parties.

SANJAY KISHAN KAUL, J.

SEPTEMBER 16, 2011
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RAJIV SHAKDHER, J.