

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 101 of 2014

Date of Decision: 30.01.2015

NHPC Limited Erstwhile

..Petitioner

versus

M/s Hindustan Construction Co.Ltd. and others

..Respondents

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. Whether to be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Present : Ms. Reeta Kohli, Senior Advocate with
Ms. Guneet Babbar, Advocate, for the petitioner.

Mr. Chetan Mittal, Senior Advocate with
Mr. Sumeet Goel and Mr. Samir Rathaur, Advocates,
for respondent No.1.

S.J.VAZIFDAR, ACTING CHIEF JUSTICE

In this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the said Act'), the petitioner seeks a declaration of one A.P.Mishra, as its nominee Arbitrator, to adjudicate the disputes between the parties and for quashing the appointment of one D.P.Bajaj-respondent No.2 appointed as an arbitrator on behalf of the petitioner by the President of the Institute of Engineers (India)-respondent No.2.

2. The petitioner and respondent No.1 entered into an agreement dated 30.10.2006 for various construction works including construction of dams, diversion channels and surface power house. Clause 67 of the agreement in so far as it is relevant reads as under:-

“67.1 If any dispute arises between the Employer and the Contractor in connection with or arising out of the Contract or the execution of the Works, whether during the execution of the works or after their completion and whether before or after the repudiation or after termination of contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, an attempt shall be made to resolve the matter in dispute amicably.

67.2 xx xx xx

67.3 Any dispute in respect of which the Employer and the Contractor have failed to reach at an amicable settlement pursuant to Sub Clause 67.1, shall be finally settled by arbitration as set forth below. The arbitral Tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer.

i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Indian Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The Arbitral Tribunal shall consist of three Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of the Institution of Engineers (India). For the purposes of the Sub Clause, the term “Indian Contractor” means a contractor who is registered in India and is a juristic person created under Indian Law as well as a joint venture between such a contractor and a foreign Contractor.

ii) xx xx xx

iii) xx xx xx

iv) If one of the parties fail to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the President of the Institution of Engineers (India), both in cases of foreign contractors as well as Indian contractors, shall appoint the Arbitrator. A certified copy of the order of the President of Institution of Engineers (India), making such an appointment shall be furnished to each of the parties.

v) Arbitration proceedings shall be held at New Delhi/Faridabad (India) and the language of the arbitration proceedings and that of all the documents and communication between the parties shall be English.

vi) xx xx xx."

3. Disputes and differences arose between the parties. Respondent No.1 by a letter dated 07.06.2013 set out some of the disputes and contended *inter-alia* that its claims had neither been paid nor deliberated upon. Respondent No.1, therefore, requested the petitioner to resolve the matter amicably as per the above clause and stated that in the event of the disputes not being resolved amicably within four weeks from the receipt of the letter by the petitioner, it would proceed for settlement of the disputes in accordance with the above clause. Respondent No.1 confirmed its readiness and availability for the resolution of the matter amicably at the earliest.

4. The petitioner did not reply to the above letter. Respondent No.1, therefore, by further letter dated 08.07.2013 reiterated some of the above facts and listed some of the issues which awaited an amicable resolution. Respondent No.1 stated that the parties had been unable to resolve the disputes till date and in light thereof invoked Arbitration Clause 67.3 and referred the disputes to

arbitration. Respondent No.1 appointed one Jayant Nashikkar, as an arbitrator and requested the petitioner to appoint an arbitrator within 30 days of the receipt of the letter to enable further steps to be taken in terms of Clause 67.3. The petitioner, however, did not appoint an arbitrator within 30 days of the receipt of letter dated 08.07.2013. Respondent No.1, therefore, by its letter dated 27.09.2013 requested the Institute of Engineers (India) to appoint an Arbitrator to complete the constitution of the Arbitral Tribunal for adjudication of the disputes and differences between the parties. Ms. Reeta Kohli, learned Senior Counsel appearing on behalf of the petitioner contended that some of the issues/disputes referred to in this letter were new and were not referred to in the earlier letter dated 07.06.2013.

5. By its letter dated 09.10.2013 the petitioner informed respondent No.1 that it had appointed said A.P.Mishra, as an arbitrator. As we mentioned at the outset, the petitioner seeks a declaration of his appointment as its nominee.

6. On 12.11.2013, Institute of Engineers (India) appointed the said D.P.Bajaj-respondent No.2 as an arbitrator on behalf of the petitioner pursuant to the request of respondent No.1 by the said letter dated 27.09.2013.

7. Soon thereafter, the arbitrator nominated by the petitioner and the arbitrator appointed by the Institute of Engineers (India) appointed the Presiding Arbitrator.

8. The position, therefore, is this. Before this petition was filed, the Arbitral Tribunal was constituted comprising of the first respondent(s) nominee, the arbitrator appointed on behalf of the

petitioner by the Institute of Engineers (India) and the Presiding Arbitrator appointed by the said two arbitrators. If the reliefs sought are granted, it would in effect result in the removal of one of the arbitrators on the panel, namely, respondent No.2 nominated by the Institute of Engineers and consequently the removal of the Presiding Arbitrator as well.

9. Normally, such an application is outside the ambit of Section 11. It was, however, contended on behalf of the petitioner that the appointment of respondent No.2 as an arbitrator by the Institute of Engineers (India) was entirely without jurisdiction as the condition precedent for the same had not arisen. The basis of the contention is this. There was no delay on the petitioner's part in appointing the arbitrator. The petitioner did not appoint the Arbitrator earlier because it was under the impression that the parties were yet to explore the possibility of a amicable settlement as contemplated by Clause 67 of the agreement. Although the respondent had raised certain disputes by the letter dated 07.06.2013 which have not been amicably settled, respondent No.1 raised further disputes by the said letter dated 08.07.2013. Respondent No.1 instead of exploring the possibilities of a amicable settlement as required by Clause 67 proceeded to appoint an arbitrator which was impermissible. This first step being impermissible, the subsequent steps, namely, the request of respondent No.1 to the Institute of Engineers to appoint an arbitrator on behalf of the petitioner, appointment of respondent No.2 as an Arbitrator by the Institute of Engineers pursuant to this request as well as the appointment of the Presiding Arbitrator were

wholly without jurisdiction and void. The application under Section 11 of the said Act, therefore, according to Ms. Kohli is maintainable.

10. The submission is liable to be rejected in view of the judgment of the Supreme Court in **Antrix Corporation Limited vs. Devas Multimedia Private Limited, 2014(11) Supreme Court Cases 560**. A similar argument was raised before the Supreme Court. The arbitration clause was invoked without attempting to resolve the disputes as required by the Arbitration Clause in that case. Pursuant to such invocation, the Arbitral Tribunal had been constituted. The question before the Supreme Court was whether the petitioner therein was entitled to proceed in terms of Section 11(6) of the said Act. The Supreme Court held as under:-

“31. The matter is not as complex as it seems and in our view, once the Arbitration Agreement had been invoked by Devas and a nominee Arbitrator had also been appointed by it, the Arbitration Agreement could not have been invoked for a second time by the Petitioner, which was fully aware of the appointment made by the Respondent. It would lead to an anomalous state of affairs if the appointment of an Arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an Arbitrator. In our view, while the Petitioner was certainly entitled to challenge the appointment of the Arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an Arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one Arbitrator already appointed in exercise of the Arbitration Agreement.

32. xx xx xx

33. Sub-Section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-Section (6) may be invoked by any of the parties. Where in terms of the Agreement, the arbitration clause has already been invoked by one of the parties thereto under the I.C.C. Rules, the provisions of Sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an Arbitrator in terms of the Agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

34. The law is well settled that where an Arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an Arbitrator is not maintainable. Once the power has been exercised under the Arbitration Agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In *Som Datt Builders Pvt. Ltd. Vs. State of Punjab [2006 (3) RAJ 144 (P&H)]*, the Division Bench of the Punjab & Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the disputes between the parties to the Arbitration Agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction."

The judgment clearly covers the present case. It is not open, therefore, to me to entertain this petition under section 11(6) of the said Act. I must clarify that I have not dealt with the merits of Ms.Kohli's submissions. There may well be a lot to be said in support of her submissions. The submissions, however, must be considered in

appropriate proceedings which needless to add would be decided on their merits and without being influenced by the result in this petition.

11. Mr. Chetan Mittal, learned Senior Counsel appearing on behalf of respondent No.1 also contended that this Court has no jurisdiction as the venue of the arbitration is New Delhi/Faridabad. He submitted that an application under section 11 of the said Act, which falls under Part-I thereof, can be made only at the place where the arbitration proceedings are to be conducted i.e. the Courts where the arbitration has to take place. He further contended that an application under Section 11(6) cannot be made in a place merely because the cause of action is located there. He relied upon the judgment of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. 2012(9) Supreme Court Cases 552.***

The submission is not well founded. It is in fact contrary to the judgment of the Supreme Court in *Bharat Aluminium Company case (supra)* which has been relied upon by Mr. Mittal. Paragraphs 96 and 97 of the judgment read as under:-

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

"2. Definitions (1) In this Part, unless the context otherwise requires –

(a)-(d) * * *

(e) **"Court"** means the principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not

include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.”

We are of the opinion, the term “*subject matter of the arbitration*” cannot be confused with “*subject matter of the suit*”. The term “*subject matter*” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is

to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

97. The definition of Section 2(1)(e) includes “*subject matter of the arbitration*” to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term “*court*” as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.”

12. The Supreme Court has infact expressly held that even the Courts where cause of action is located would have the jurisdiction to entertain an application under Section 11(6) or an application under Part-I of the said Act. The portion emphasized by me establishes this beyond doubt.

13. The contention that the application is filed in a place without jurisdiction, is, therefore, rejected.

14. In the circumstances, the petition is dismissed. There shall, however, be no order as to costs.

30.01.2015
'ravinder'

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

Whether to be referred to the Reporter.	Yes✓	No.
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