IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 45 OF 2015
IN
ARBITRATION APPLICATION NO. 22 OF 2009
WITH
ARBITRATION APPEAL NO. 44 OF 2015
IN
ARBITRATION APPLICATION NO. 5 OF 2010

Kamal Construction Company ...Appellant
vs.
The Union of India & Ors. ....Respondents

Dr.Abhinav Chandrachud i/b. Naresh R. Dhanjal for Appellant.
Mr.Dhanesh R. Shah for Respondent No.1.
Mr.Y.S. Bhate for Respondent Nos.1 to 3.

CORAM : S.C. GUPTE, J.

10 FEBRUARY 2016

ORDER :

This appeal challenges an order passed by District Court, Nashik in a petition under Section 34 of the Arbitration and Conciliation Act, 1996. By the impugned order, the learned District Judge rejected the petition filed by the Appellant herein challenging the impugned award passed by a sole arbitrator in the matter of reference of disputes between the parties.

2 The disputes between the parties arise out of a contract for the work of construction of CTC-III for CRPF at Mutkhed, District Nanded S/H : external water supply line awarded by the Respondents, who were originally claimants before the sole arbitrator, to the Appellant, who was the Respondent in the arbitration reference. It is the case of the Respondent employer that the Appellant contractor having been unable to secure

completion of the work by the stipulated date and thereby having rendered himself liable for action under Clause 3 of the General Conditions of Contract applicable to the subject contract, the Engineer-in-charge had an option of rescinding the contract and giving the contract to another contractor to complete. It is the case of the Respondent that accordingly, the contract was rescinded and the work was entrusted to another contractor under sub-clause (vi)(c) of Clause 3 of the General Conditions and that in such a case, the Appellant contractor was liable to bear expenses incurred by the department in excess of the expenses, which would have been paid to the Appellant under the original contract if the whole work was executed by him. The notice in this behalf for rescinding the contract and entrusting the original contract work to another contractor was given on 18 November 1996. It is the case of the department that the work, which was at the risk and costs of the Appellant, was got completed by the Respondent through this alternate contractor on 16 June 1999, whereupon the Appellant became liable to bear and pay expenses incurred by the Respondent in excess, as aforesaid. The sole arbitrator appointed in the matter by the persona designata under the contract, namely, Chief Engineer (WZ-II), CPWD, Nagpur, awarded the Respondent's claim in the sum of Rs.22,55,206/- and rejected the Appellant's counter claim. The learned arbitrator also awarded simple interest at the rate of 9% per annum from 18 June 1999 till payment or realisation and also costs of Rs.5000/-. This award was challenged by the Appellant before the District Court of Nashik in an arbitration petition under Section 34 of the Arbitration and Conciliation Act, 1996. The learned District Judge rejected the petition with costs. That order has been challenged before this Court in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

3 At the hearing of this appeal, the following two submissions were advanced by learned Counsel for the Appellant :

(i) Firstly, it is submitted that the arbitration reference was barred by the law of limitation inasmuch as though rescission of the contract was on 18 November 1996, the arbitration clause was invoked on 6 October 2000, that is to say, after three years from the date on which the breach, in respect of which the reference was instituted, occurred. It is submitted that under Article 55 of the Limitation Act, 1963, a suit for compensation for breach of the contract would be barred;

(ii) Secondly, it is submitted that the arbitrator, in the instant reference, was an officer of the Respondent and that this relationship gives rise to a justifiable doubt as to his independence or impartiality. It is submitted that this ground, which was raised specifically before the learned arbitrator, was repelled by him and in the premises, the appellant is entitled to raise, and have the award set aside on, the ground of bias.

4 The Limitation Act, in its schedule, makes specific provisions for suits claiming compensation for breach of a contract. Article 27 of the first schedule to the Limitation Act deals with suits for compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency. The limitation period for claiming such compensation begins when the time specified for performance of the promise arrives or the contingency happens. A separate article is provided for compensation for breach of any contract not specifically provided for elsewhere in the schedule, i.e. Article 55 of the first schedule. In that case, the time begins to run from the date when the contract is broken, or when the breach for which the suit is instituted occurs. The submission of learned Counsel for the Appellant is that Article 55 applies to the facts of

the present case. In the present case, the contract between the parties requires that in a case where the contractor renders himself liable for action under Clauses (i) to (vi) of Clause 3 of the General Conditions, the corporation may rescind the contract and appoint another contractor to complete the work; and that the first contractor would have to bear or pay any expenses, which may be incurred by the employer in excess of the expenses which would have been paid to him if the whole work had been executed by him. In such a case, the liability to pay or perform the promise to pay arises when such a contingency happens, namely, when as a result of the originally contracted work being carried out through an alternative agency, the employer incurs expenses in excess of the originally contracted sum. That contingency has happened in the present case when the alternative agency appointed for carrying out this particular work completed its work on 16 June 1999 at an expense, which was in excess over the originally contracted sum. The contingency having arisen on 16 June 1999 and the arbitration agreement having been invoked on 6 October 2000, the invocation of the arbitration agreement, which is *terminus a quo* for filing of an arbitration reference, was clearly within time. The arbitrator has, accordingly, held the reference to be within time in the impugned award and no fault can be found with the impugned order of the learned District Judge, which affirms those findings.

5 As regards the issue of bias raised by learned Counsel for the Appellant, our courts have consistently taken a view that arbitration agreements in Government contracts providing that an employee of the department will be the arbitrator are neither void nor unenforceable. Relying, however, on the leading case of the Supreme Court on the point, namely, **Indian Oil Corporation Ltd. vs. Raja Transport Pvt.Ltd.**[1]**,** learned Counsel for the Appellant submits that the ratio of this judgment

1 **(2009) 8 SCC 529**

should be restricted to the contracts of government / statutory corporations / public sector undertakings containing an arbitration agreement providing that a named employee of theirs shall be the arbitrator. It is submitted that this entire line of authorities is on the footing that arbitration being a binding alternative dispute resolution process through a private forum chosen by the parties and that forum being so chosen and provided for in the contract with open eyes and full knowledge and comprehension of such provision, neither party can subsequently turn around and dispute the named arbitrator. It is true that in the case of **Indian Oil Corporation,** the contract provided for reference of the disputes to the sole arbitration of a designated employee of the department and that it was a specific term of that contract that no person other than such designated individual shall act as an arbitrator. Whilst dealing with this contract, the Supreme Court did observe that such a contract entered into by a party with open eyes and with full knowledge and comprehension of the provision cannot be subsequently rescinded from. The ratio of the decision in **Indian Oil Corporation,** however, proceeds on the footing of a series of decisions of the Supreme Court acknowledging arbitration agreements in Government contracts providing for arbitration by an employee of the department as valid and enforceable. Several decisions of the Supreme Court on this point were referred to in the case of **Indian Oil Corporation Ltd.** In fact, one of the cases was of **Indian Drugs & Pharmaceuticals Ltd. vs. Indo Swiss Synthetics Gem Mfg.Co.Ltd.**[2] In this case, the relevant arbitration clause provided for reference of disputes to an arbitrator appointed by the chairman and managing director of IPDL. In pursuance of this clause, the chairman and managing director appointed a particular employee as an arbitrator. The Court held that such arbitration clause could not be given a go-by at the instance of the respondent unless he challenged its binding nature in an appropriate proceeding. In other

2 **(1996) 3 SCC 608**

words, the ratio of these decisions is not based on a named or designated employee as an arbitrator. The naming or designation of a particular employee is not crucial for determining the validity of an arbitration agreement providing for an arbitration by an employee arbitrator. The ratio is rather to the effect that the mere fact that under an arbitration clause an employee arbitrator is appointed to adjudicate upon the disputes and differences between the parties, without more, does not undermine the validity of the arbitration agreement. If the arbitrator is not in any way connected with the contract or its performance or has not any time disclosed his opinion in respect of the contract or its performance or is not a direct subordinate of the officer whose decision was the subject matter of disputes, the mere fact that he is an employee of one of the parties is no ground to question his independence or impartiality. Something more will have to be shown which creates a justifiable doubt as to his independence or impartiality in the particular facts of the case. That is not the case here. No such facts are pleaded.

6 Learned Counsel for the Appellant also relies upon a statement of law in Russell on Arbitration, 23rd Edition, that what is to be considered is not only the actual bias but also an apparent bias based on a real possibility test of a fair minded and informed observer. That is indeed so, but, as observed by the Supreme Court, the mere fact that the arbitrator is an employee of one of the parties does not, under the Indian law, give rise to a justifiable doubt as to his independence or impartiality. And beyond this mere fact, there is nothing in the pleadings to justify the case of even such apparent bias.

7 In the premises, there is no merit in the appeal. The appeal is dismissed. There shall be no order as to costs.

8 Learned Counsel for the Appellant seeks a stay of the order. The application for stay is rejected.

9 It is agreed between learned Counsel for the parties that the facts of the companion appeal, namely, Arbitration Appeal No.44 of 2015, are more or less similar and that same issues arise in the matter. Having regard to the reasons discussed above, there is no merit in the companion appeal and the same is also dismissed for the same reasons.

(S.C. Gupte, J.)