

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

ARBITRATION APPLICATION NO. 9 OF 2016

The State of Maharashtra .. Applicant
versus
M/s Kalyan Toll Infrastructure Ltd. .. Respondent

Mr. Girish K. Naik-Thigle, Advocate for applicant
Mr. A. S. Bajaj, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 7th March, 2017

ORDER :

1. Present application has been moved purportedly invoking section 11 of the Arbitration and Conciliation Act, 1996 ("The Act" for brevity) questioning order dated 31-05-2016 passed by two members of the arbitration tribunal on application dated 26-05-2016 wherein objection has been taken to appointment of arbitrator Mr. R. H. Tadvil by the claimant, for, the tribunal could not be said to be functional for lack of full coram since the tribunal is supposed to be constituted by three members pursuant to clause 3.4.17 of the agreement which reads thus :

" 3.4.17. SETTLEMENT OF DISPUTES :

Under no circumstances whatever shall be Entrepreneur be entitled to submit any claim for consideration of the Government on any account unless the Entrepreneur shall have given sufficient prior intimation and shall have submitted the details in writing to the Engineer within one month of the cause of such claim.

(i) Except where otherwise specified in the contract and subject to the powers delegated to him by the Government under the codes/rules then in force, the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties to the contract, upon all questions, relating to meaning of the Specifications, designs, drawings, and instructions herein before mentioned and as to quality or workmanship or materials used on the work or as to any other question, claim, right matter or thing whatsoever if 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 of failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof or during operation or maintenance. The Superintending Engineer, shall give his orders on the claims within 45 days of receipt of claim by the Engineer, failing which the Entrepreneur may submit the claim directly to Chief Engineer irrespective of the amount of claim.

(ii) The Entrepreneur may within thirty days of receipt by any order by the Superintending Engineer of the Circle as aforesaid, appeal against it to the Chief Engineer concerned with the work / project. The Chief Engineer shall give his orders on all claims referred to him within 30 days of receipt of claims. Where any dispute is not resolved as above or the Entrepreneur is not satisfied with the decision of Chief Engineer, the following provision shall apply.

(iii) Arbitration: Where any dispute is not resolved as above, the following provision shall apply.

a) At the request of either party by a written notice to that effect to the other party (a notice of Reference) the dispute shall be submitted to arbitration in accordance with the provisions of The Arbitration and Conciliations Act, 1996 (No. 26 of 1996).

b) The place of Arbitration shall be the city of head quarter of the Chief Engineer.

c) The arbitration shall take place before a panel of three arbitrators.

d) The parties shall agree upon the identity of the Arbitrator (s) within thirty days of the receipt of the Notice of Reference by the relevant party. If the parties are unable to so agree upon the identity of the Arbitrator (s) then :

(i) The parties shall use their best endeavor to agree on to an appointing authority within thirty days of the receipt of the Notice of Reference by the relevant party, and

(ii) In the event that the parties are unable to agree as aforesaid upon an appointing authority, the Arbitrator (s) shall be appointed on the application of either party by the Secretary, Public Works Department, Government of Maharashtra whose decision as to the identity of the Arbitrator (s) shall be final. "

and further that while appointing arbitrator Mr. R. H. Tadvi, the procedure stipulated in aforesaid clauses has not been followed.

2. The objection by applicant-State to appointment of Mr. R. H. Tadvi by claimant as arbitrator came to be decided and over-ruled under aforesaid order dated 31-05-2016.

3. Mr. Naik-Thigle, learned counsel for the applicant-state submits that in such a case, the applicant has no other remedy but to invoke section 11 of the the Act seeking direction to respondent-claimant to adopt proper procedure for appointment

of arbitrator pursuant to clause 3.4.17 and in case of failure to do the same, section 11 (5) and (6) of the Act may be invoked and appropriate orders be passed along with setting aside order dated 31-5-2016.

4. Countering aforesaid submissions, Mr. Bajaj learned counsel for respondent-claimant submits that section 11 of the Act cannot be invoked in the facts and circumstances of the case, for, a procedure contemplated under clause 3.4.17 has already been followed and if at all appointment of arbitrator is to be challenged, such challenge could be posed only in the manner as contemplated under the provisions of the Act and not otherwise.

5. Learned counsel further submits that the stage of appointment of arbitrator has already passed. There had been no challenge to constitution of original arbitration tribunal, however, claimant's arbitrator recused himself, and is being replaced by Mr. R. H. Tadvī who is duly qualified to act as an arbitrator and accordingly his name had been communicated to the remaining members of the tribunal. He submits that in any case, powers under section 11 of the Act cannot be invoked in the present matter, for, even otherwise clause 3.4.17 reproduced hereinabove lets in resolution of dispute as could be seen from clause (ii) and that present applicant has already referred the

matter to the Secretary. He, however, submits that this is only alternate submission without prejudice to earlier one that mechanism is available pursuant to the provisions of the Act. According to learned counsel, section 13 particularly sub-section (3) of the same may possibly be available, however, he hastened to say that since the tribunal has already decided on the point, it may not be open for the applicant to invoke section 13(3) of the Act. He submits that the reasons underlying the application is aimed only at procrastinating the arbitration proceedings and to keep the claims of the claimant from being arbitrated upon.

6. Learned counsel Mr. Bajaj during the course of his submissions has referred to and relied on a decision of the supreme court in the case of *Antrix Corp. Ltd. vs. Devas Multimedia P. Ltd.*, reported in 2013 (6) LJSOFT (S.C.) 188 = 2013 AIR SCEW (S.C.) 2781 = 2013 (4) AIR BOM R. (S.C.) 176 wherein, according to him, if challenge is to be posed to appointment of arbitrator at the instance of the claimants, it could not at all be done by way of independent proceedings under section 11(6) of the Act. He refers to paragraphs no. 31, 32 and 33 of said judgment reading thus;

" 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 nt 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. It maybe noted that in case of Gesellschaft Fur Biotechnologische Forschun GMBH Vs. Korpan Laboratories Ltd. & Anr. [(2004) 13 SCC 630), a learned Single Judge of the Bombay High Court, while hearing an appeal under Section 8 of the 1996 Act, directed the claims/disputes of the parties to be referred to the sole arbitration of a retired Chief Justice with the venue at Bombay, despite the fact that under the Arbitration Agreement it had been indicated that any disputes, controversy or claim arising out of or in relation to the Agreement, would be settled by arbitration in accordance with the Rules of Reconciliation of the International Chamber of Commerce, Paris, with the venue of arbitration in Bombay, Maharashtra, India. This Court held that when there was a deviation from the methodology for appointment of an Arbitrator, it was incumbent on the part of the Chief Justice to assign reasons for such departure.

32. *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.

33. 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 Datta 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. "

7. Mr. Naik-Thigle purports to refer to and rely on observations in paragraph no. 32 of aforesaid judgment to stress that since party has failed to act in consonance with procedure particularly clause 3.4.17 referred to above, section 11 (6) of the Act would be available.

8. In the present matter, one of the arbitrators particularly the person recommended by claimant had recused, occasion had arisen to replace him by other person which exercise appears to

have been carried out. In the facts and circumstances of the case and in view of observations quoted above, challenge to the appointment of arbitrator by claimant does not appear to be available under section 11 of the Act nor can it be said that a case has been made out for appointment of arbitrator pursuant to section 11. If any challenge is to be posed to appointment of arbitrator, as observed by the supreme court in paragraph no. 32 of its judgment reproduced (*supra*), recourse as referred to may have to be explored, if resort is not deemed to be had.

9. In the circumstances, application is not being entertained and is dismissed.

10. Learned counsel Mr. Thigle, at this stage, seeks operation of interim relief to be continued for a further period of four weeks.

11. The effect and operation of this rejection is thus deferred for a further period of four weeks.

SUNIL P. DESHMUKH,
JUDGE

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