

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

+ LPA 90/2017, CM No.4286/2017 (stay)

M/S. TRIPLE A ENGINEERING
PVT. LTD.

...Appellant

Through: Mr. D.K. Rastogi with Mr. Mayank
Rastogi, Advocates.

Versus

SHARVAN KUMAR

....Respondent

Through: None.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

ORDER

06.03.2017

MS. G. ROHINI, CHIEF JUSTICE:

1. The Respondent in Arbitration Petition No.112/2016 preferred this appeal under clause 10 of Letters Patent.
2. The said Arbitration Petition No.112/2016 was filed by the Respondent herein under sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act, 1996') for appointment of an arbitrator and the same was allowed by the learned Single Judge by order dated 07.09.2016 directing appointment of an arbitrator under the Rules of Delhi International Arbitration Centre (DIAC) and that the arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.
3. The first question that needs consideration by us is whether the present appeal under clause 10 of the Letters Patent can be maintained

against the impugned order which was passed under Section 11(6) of the Arbitration Act, 1996 in view of the bar under Section 11(7). For proper appreciation of the controversy involved, it is necessary to look into the language of Section 11 which reads as under:

“11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-Section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-Section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-Section (3) applies and

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(5) Failing any agreement referred to in sub-Section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-Section (4) or sub-Section (5) or sub-Section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this Section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) A decision on a matter entrusted by sub-Section (4) or sub-Section (5) or sub-Section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.”

(emphasis supplied)

4. Drawing the attention of this Court to sub-section (6A) of Section 11, which has been inserted by Act 3 of 2016 w.e.f. 23.10.2015, providing that the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) or (5) or (6), shall confine to the examination of the existence of an arbitration agreement, it is contended by the learned counsel for the Appellant that sub-section (6A) being an independent provision, the bar under sub-section (7) is not applicable.

5. It is sought to be contended by the learned counsel that the impugned order passed by the learned Single Judge is under sub-section (6A), but not under sub-section (6). While placing reliance upon *Smt. Hira Devi & Ors. vs. District Board, Shahjanpur*, AIR 1952 SC 362 and *Subal Paul v. Malina Paul & Anr.*, (2003) 10 SCC 361, it is also contended by the learned counsel that all provisions of the Arbitration Act of 1996 as amended by Act 3 of 2016 have to be read harmoniously so as to ensure that the object of sub-section (6A) is not defeated.

6. There can be no disputes about the principle of law reiterated in *Smt. Hira Devi and Ors. (supra)* that the Court has to try and harmonize the various provisions of an Act while interpreting statute. However, the law is equally well-settled that when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. As explained in *R.S. Raghunath vs. State of Karnataka* (1992) 1 SCC 335 and *Union of India vs. Elphinstone Spinning and Weaving Company Limited* AIR 2001 SC 724, "in its context" would mean the statute as a whole, the previous state

of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy.

7. On a careful reading of Section 11 of Arbitration Act, 1996 as amended by Act 3 of 2016, we are of the view that sub-section (6A) has been inserted to supplement the existing provisions of Section 11 by clearly defining the scope of consideration of an application under sub-sections (4), (5) and (6) of Section 11 and to ensure expeditious disposal of such applications.

8. The object of Act 3 of 2016 is evident from its Statement of Objects and Reasons, which may be reproduced hereunder for ready reference:

"STATEMENT OF OBJECTS AND REASONS

The general law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act.) The act, which is based on the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL), applies to both international as well as domestic arbitration.

2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said report, the Arbitration and Conciliation

(Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22nd December, 2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and Report. The said Committee, submitted its Report to the Parliament on 4th August, 2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework,

the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:-

(i) to amend the definition of “Court” to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year."

(emphasis supplied)

9. Therefore, the contentions of the learned counsel for the appellant which are based merely on sub-section (6A) and without reference to the other provisions of the Arbitration Act, more particularly, the preceding and succeeding provisions of Section 11 are untenable and cannot be accepted.

10. On a reading of all the provisions of Section 11 together, we have no manner of doubt to conclude that sub-section (6A) has been inserted to ensure that at the stage of appointment of an arbitrator by the High Court or the Supreme Court, the scope of consideration is confined only to find out the existence of an arbitration agreement. It has thus been made clear by the law-makers that there is no need to enter into the other issues at that stage.

11. It is also relevant to note that sub-section (7) of Section 11 has also been substituted by Act 3 of 2016. Prior to the said amendment, sub-section (7) stood as under:

"A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the chief justice or the person or institution designated by him is final."

12. However, by Act 3 of 2016, the language of sub-section (7) has been enlarged to make clear the legislative intention of giving a finality to a decision under sub-sections (4), (5) and (6) of Section 11 by adding the words that "no appeal including Letters Patent appeal shall lie against such decision". At the cost of repetition, sub-section (7) as substituted by Act 3 of 2016 may again be reproduced hereunder:

"(7) A decision on a matter entrusted by sub-Section (4) or sub-Section (5) or sub-Section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision."

13. For the aforesaid reasons, we hold that sub-section (6A) cannot be read as an independent provision and that the same does not in any manner affect the finality attached to a decision under sub-sections (4), (5) and 6 of Section 11. It is evident that sub-section (7) as amended by Act 3 of 2016 expressly bars the right of appeal including Letters Patent Appeal against a decision under sub-sections (4), (5) and (6) of Section 11.

11. Therefore, the present appeal under clause 10 of the Letters Patent is not maintainable at all.

14. Accordingly, without going into the merits of the case, the appeal is dismissed as not maintainable.

CHIEF JUSTICE

SANGITA DHINGRA SEHGAL J.

MARCH 06, 2017/pk