

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Revision No.3214 of 2017 (O&M)
Date of Order:19th April, 2018

Indian Oil Corporation Ltd.

..Petitioner

Versus

Ponty Malik Construction Co. and another

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: R.K.Chhibbar, Senior Advocate, with
Mr. Abhinav Tandon, Advocate,
for the petitioner.

Mr. Anmol Partap Singh Mann, Advocate,
for respondent no.1.

ANIL KSHETARPAL, J(Oral)

Petitioner-Indian Oil Corporation Limited has filed this revision petition under Article 227 of the Constitution of India, challenging the order dated 11.02.2014, dismissing an application filed by the petitioner under Section 14(2) and 15(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). This revision petition was filed after the delay of more than 2 years.

The respondent-company was awarded a contract for construction of raw water reservoir channel and pump house at the Panipat Refinery. The agreement between the parties contained arbitration clause for resolution of the disputes. Respondent-contractor filed an application under Section 11 of the Act and the learned Additional District Judge, Panipat appointed Sh. Ajit Commar Roy, retired Chief Engineer of PWD, located in Orissa as the sole Arbitrator. The order passed by the learned Additional

District Judge was challenged before the High Court but later on the revision was withdrawn with liberty to raise the question of limitation and the non-existence of any dispute between the parties before the Arbitrator itself. Even a review application was filed by the petitioner, which was also disposed of permitting the petitioner to challenge the jurisdiction of the Arbitrator before the Arbitrator itself. The petitioner moved an application under Section 16(2) read with Section 16(5) of the Act before the learned Arbitrator, challenging the proceedings on the following grounds:-

- (i) *The propriety of the appointment of Shri Ajit Coomar Roy as Arbitrator;*
- (ii) *The existence of the Arbitration Agreement; and*
- (iii) *The existence of any Notified claim (much less a notified claim included in the Final Bill in accordance with the provisions of Clause 6.6.3.0 of the GCC) so as to bring the claims of the Respondent within the ambit of the Arbitration Agreement embodied in Clause 9.0.1.0 of the GCC or the jurisdiction of the Ld. Arbitrator.”*

The sole Arbitrator rejected the application vide order dated 29.12.2006. Thereafter, the learned Arbitrator proceeded with the arbitration proceedings. Once again another application was made to the Arbitrator and the learned Arbitrator passed an order on 09.05.2007, operative part thereof is as under:-

“The adjudication of the dispute whether each claim of the Claimant is tenable with respect to arbitration clause and relevant clauses of the contract is dependent

upon scrutiny and proper interpretation of relevant clauses of the agreement. Therefore, parties have been given opportunity to place their respective relevant materials, documents, evidence and their respective contentions with respect to each claim of the claimant in course of the hearing of the proceeding on merit.”

Thereafter, the petitioner filed an application under Section 13 of the Act, requesting the Arbitrator to recuse himself from the office of Sole Arbitrator in the proceedings or alternatively decide on the challenge to his continuing in his office as the Sole Arbitrator on the grounds stated in the said application. The learned Arbitrator disposed of the application while recording thus:-

“Therefore, for conducting further proceedings, I order that claimant is to place its evidence to substantiate the arbitrability of its each claim in terms of arbitration agreement and contract clauses.”

The petitioner even thereafter gave notice to the sole Arbitrator under Section 14(1)(a) of the Act requesting him not to proceed further in the arbitration as his mandate had been terminated.

The petitioner filed a Arbitration Case No.1/2008 under Sections 14(2) and 15(2) of the Act before the learned Additional District Judge, Panipat, which has been dismissed, subject matter of challenge in the present revision petition.

This Court has heard the arguments of learned counsel for the parties at length and with their able assistance gone through the orders passed by the learned Arbitrator from time to time and the order passed by

the learned Additional District Judge, Panipat.

Section 5 of the Act provides that no judicial authority shall intervene except where so provided. In other words, the scope of judicial intervention in a proceedings before the Arbitrator is very limited and restricted only in cases where it is so provided in the Act.

Section 11 sub-Section 6 of the Act deals with the procedure for change/replacement/appointment of the Arbitrator in certain eventualities. It is not the case of the petitioner that his case falls in the eventualities as provided under Section 11(6) of the Act.

Section 13 sub-Section 5 of the Act provide that whenever an arbitral award is made under sub-section (4), the party challenging the Arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34 of the Act. Section 13 deals with the challenge procedure.

Section 14 of the Act enables a party to apply to the Court to decide on the termination of the mandate on the grounds specified in Clause (a) of Section 14 of the Act, In the present case, application was filed under Sections 14(2) and 15(2) of the Act. For facility of reference, Sections 14 and 15 of the Act are extracted as under:-

14. Failure or impossibility to act.-- (1) The mandate of an arbitrator shall terminate if--

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remain concerning any of the grounds referred to in clause (a) of sub-section (1), a

party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of [section 13](#), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of [section 12](#).

15. Termination of mandate and substitution of arbitrator. -- (1) *In addition to the circumstances referred to in [section 13](#) or [section 14](#), the mandate of an arbitrator shall terminate--*

*(a) where he withdraws from office for any reason; or
(b) by or pursuant to agreement of the parties.*

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

The scope of judicial intervention and such judicial intervention is to be at what stage has been conclusively laid down by the Hon'ble Supreme Court in the case of **M/S S.B.P. & Co vs M/S. Patel Engineering Ltd. & Anr 2005(8) SCC 618**. Paragraphs 45, 46 and 47 of the aforesaid judgment, which are relevant for the decision of the case are extracted as

under:-

45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum

chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

47. We, therefore, sum up our conclusions as follows:

i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an

administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.

(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v) Designation of a district judge as the authority under Section 11(6) of the Act by

the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11 (6) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.

and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending Page 1824 before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.

(xii) The decision in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. is overruled

Now the question arises whether the High Court should interfere with the arbitration proceedings at this stage or not?

The Hon'ble Supreme Court has held that the party aggrieved by any order of the Arbitral Tribunal unless has a right as per the procedure prescribed in the Act has to wait for challenging the aforesaid order in the proceedings under Section 34 of the Act. The court has also noticed that even the High Court could not interfere under Articles 226/227 of the

Constitution of India against every order made by the Arbitral Tribunal.

On the one hand, petitioner claims that dispute is not arbitrable as the claim does not falls within the scope of notified claim and hence beyond the ambit of arbitration agreement. Whereas on other hand, respondent claims that dispute is arbitrable.

In the present case, petitioner had filed an application under Section 14(2) read with Section 15(2) of the Act. In the considered opinion of this Court, petitioner failed to bring forth any ground which may fall within the scope of Section 14 and Section 15 of the Act. Section 14 deals with only two eventualities as provided under Clause (a) and Clause (b) of sub-section (1) of Section 14. Section 14(2) deals with only Clause (a) of Section 14(1) of the Act which provides that if the Arbitrator de jure or de-facto unable to perform his functions or for other reasons fails to act without any undue delay. In the present case, petitioner has failed to point out ground which may fall within Clause (a) of sub-section (1) of Section 14.

Section 15 deals with the two separate eventualities, one is when Arbitrator withdraws from the office for any reason; or by or pursuant to the agreement of the parties, the Arbitrator is to be substituted. In the present case, none of the eventualities as envisaged by Section 15 of the Act has been pointed out.

In view of the aforesaid discussion, this court does not find any good ground to interfere with the order passed by the learned court.

The revision petition is dismissed.

19th April, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No