

CASE NO.:
Appeal (civil) 1945 of 2007

PETITIONER:
Municipal Corporation, Jabalpur & Ors

RESPONDENT:
M/s Rajesh Construction Co

DATE OF JUDGMENT: 13/04/2007

BENCH:
TARUN CHATTERJEE & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

[Arising out of S.L.P. (C) Nos.19332-33 of 2005]

TARUN CHATTERJEE, J.

Delay Condoned.
Leave granted.

This appeal is directed against the judgments and final orders dated 29th July 2004 and 8th April, 2005 passed by a learned Judge of the High Court of Madhya Pradesh at Jabalpur in M.C.C. No. 3295 of 2003 and M.C.C. No. 1579 of 2004. By the order dated 29th July 2004, learned Judge of the High Court appointed Mr. Justice B.C. Verma, a retired Chief Justice of the Punjab and Haryana High Court, as sole arbitrator to adjudicate upon disputes between the appellants and the respondent herein. The order dated 8th April, 2005 passed in MCC No. 1579 of 2004 is under challenge as the application for review and/or recall of the order dated 29th July 2004 at the instance of the appellants was also rejected.

Notice was issued on the application for condonation of delay and also on the special leave petitions by this court on 12th September 2005. After exchange of affidavits an order was passed by this court on 5th January 2007 in which one of us was a party. The said order of this court may be relevant for our decision which is as follows:-

"Having regard to the facts of the case, we suggested to the parties that the Municipal Corporation may be directed by this Court to constitute a Board of Arbitrators under Clause 29 of the Agreement without any preconditions. Such an appointment should be made within three weeks from this Court's order and the Board of Arbitrators will take up the matter from the stage at which it has reached before the Arbitrator appointed by the High court. The Board of Arbitrators shall thereafter conclude the proceedings within six months."

However, this suggestion of this court made on 5th January 2007 was not accepted by the respondent and for that reason, we heard the appeal on merits.

The appellants floated a notice inviting tender for construction of a road. Finally, half of the job was awarded to the respondent by entering into a contract on the same terms and conditions as contained in the tender. The tender contained

various clauses; one amongst the same being Clause 29 which pertained to arbitration in case any dispute arose between the parties and reads thus:-

"Except as otherwise provided in this contract all questions and disputes relating to the meaning of the specifications, drawing and instructions herein before mentioned and as to thing whatsoever, in any way arising out or relating to the contract, designs, drawings, specifications, estimates concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment there of shall be referred to the City Engineer in writing for his decision, within a period of 30 days of such occurrence. Thereupon the City Engineer shall give his written instructions and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of the parties.

Upon receipt of written instructions of decisions, the parties shall promptly proceed without delay to comply such instructions or decisions. If the City Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested if the parties are aggrieved against the decision of the C. E., the parties may within 30 days prefer an appeal of the M.P.L., Com. who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The M.P.L. Com will, give his decision within 90 days. If any party is not satisfied with the decision of the M.P.L. Com, he can refer such disputes for arbitration by an Arbitration Board to be constituted by the Corporation which, shall consist of three members of whom one shall be chosen from among the officers belonging to be Urban Administration and Development Department not below the rank of B.E. one Retired Chief Engineer of any Technical Department and City Engineer Nagar Nigam Jabalpur,

The following are also the terms of this contract, namely, :

- a) No person other than the aforesaid Arbitration Board constituted by the Corporation (to handle cases of all Technical Departments) shall act as Arbitrator and it for any reason that is not possible the matter shall not be referred to Arbitration at all.
- b) The Corporation may at any time effect any change in the personnel of the Board and the new members or members appointed to the Arbitration Board shall be entitled to proceed with the reference from the stage it was left by his or their predecessors.
- c) The party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute(s).

d) Where the party invoking arbitration is the contractor no reference for arbitration shall be maintainable, unless the contractor furnishes a security deposit of a sum determined according to the table given below, and the sum so deposited shall on the determination of arbitration proceeding, be adjusted against the cost, if any awarded by the Board against the party and the balance remaining after such adjustment or in the absence of the such cost being awarded the whole of the sum shall be refunded to him within one month from the date of the award.

Amount of Claim
Rate of Security Deposits

For claim below
Rs.10000/-
5% of amount claimed
For claim of Rs.10000/-
and above but below
Rs.1,00,000/-
3% of amount claimed
subject to minimum of
Rs. 500/-
For claims of
Rs.1,00,000/- and above
2% of the amount
claimed subject to a
minimum of Rs. 3000/-

e) \005 \005
f) \005
g)\005
h)\005 \005"
(Underlining is ours)

Reference to sub-clauses (e) to (h) of the Arbitration Clause 29 would not be necessary in view of the fact that the said sub-clauses are not required to be considered for decision and accordingly are omitted.

In 2002, the respondent filed an application under Section 11(6)(c) of the Arbitration and Conciliation Act 1996 (hereinafter called the "Act") in the High Court of Madhya Pradesh at Jabalpur seeking appointment of an arbitrator to adjudicate upon disputes between it and the appellants, which came to be registered as M.C.C No. 285/2002. By an order dated 7th May 2003, a learned Judge of the High Court allowed the application directing the appellant, Municipal Corporation, to invoke the arbitration clause and appoint an arbitrator in compliance with Clause 29 of the contract at the earliest to resolve the disputes between the parties. The learned Judge directed:

"In view of the aforesaid circumstances, the application filed by the applicants under Section 11(6)(c) of the Act is hereby allowed. The respondents are directed to invoke the arbitration clause 29 and it is directed that as early as possible the arbitrator be appointed to resolve the dispute between the applicant and the respondent nos. 1 and 2."

(Underlining is ours)

A bare perusal of this direction made by the High Court, while allowing the application under Section 11(6)(c) of the Act, would clearly indicate that the Corporation was directed to invoke the arbitration clause and appoint an Arbitration Board in compliance with Clause 29 of the contract. In that view of the matter, we examined Clause 29 of the contract and its sub clauses in detail from which the followings emerge:

[I] No reference for arbitration shall be maintainable unless the contractor furnishes the security deposit of a sum determined as per the table given in sub-clause (d) of the contract by the Corporation.

[II] Obligation of the Corporation would arise to constitute an Arbitration Board only after the security deposit is determined by the Corporation and deposited by the contractor.

[III] The Corporation shall constitute a Board called 'Arbitration Board' for arbitration which shall consist of three members of whom one shall be chosen from among the officers belonging to the Urban Administration and Development Department not below the rank of B.E., one Retired Chief Engineer of any Technical Department and City Engineer, Nagar Nigam, Jabalpur; subject to compliance of (I) and (II) as noted herein above.

At the risk of repetition, we may reiterate that the High Court while allowing the application under Section 11(6)(c) of the Act directed appointment of the Arbitrator in terms of Clause 29 of the contract, which contained the aforesaid provisions.

It may be kept on record that, on instruction, Mr. Ranjan Mukherjee, appearing on behalf of the Corporation, submitted that the Corporation was ready and willing to constitute an Arbitration Board in compliance with Clause 29 of the contract without any reference being made to the Chief Engineer, or in case of failure of the Chief Engineer to take decision or give instruction in writing to file an appeal before MPL Com and that the Arbitration Board shall proceed from the stage at which the learned Arbitrator, appointed by the High Court, had already reached.

Keeping in mind the aforesaid stand taken by the Corporation, we shall now consider whether the High Court was justified in appointing a retired Chief Justice of a High Court as the sole arbitrator to resolve the disputes raised by the parties.

Seeking enforcement of the order of the High Court dated 7th May 2003, invoking Clause 29 for appointment of an arbitrator, the respondent filed another application being M.C.C.No. 3295/2003. By the impugned order, as noted herein earlier, Mr. B.C Verma, retired Chief Justice of Punjab and Haryana High Court was appointed by a learned Judge to act as an arbitrator to adjudicate upon the disputes between the parties.

Aggrieved by the aforesaid order of the learned Judge of the High Court, the appellants filed a review application before the High Court, which by the subsequent order dated 8th April, 2005 passed in M.C.C. No. 1579 of 2004, which is impugned in Special Leave Petition No.19333 of 2005, was rejected. Feeling aggrieved by the aforesaid orders, this appeal has been filed by

the appellants.

We have heard the learned counsel for the parties and gone through the material put on record in detail. At the outset, it is necessary for us to examine Section 11(6)(c) of the Act, which reads as under:

"11. Appointment of arbitrators. \026
(1)\005.

(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 Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment." [Underlining is ours)

Section 11(6)(c) says that in case one of the parties to the arbitration agreement fails to perform any function entrusted to it, the other party shall have the right to approach the appropriate forum to take necessary measure in that regard. However, this provision also says that in a situation where the arbitration agreement provides for other measures for securing the appointment of an arbitrator, the same shall be followed.

It was contended by Mr. Ranjan Mukherjee, learned counsel appearing for the appellants, that it was not open to the High Court to appoint an arbitrator without complying with Clause 29 of the contract. According to him, as noted herein earlier, the High Court by its own order dated 7th May 2003 directed appointment of an arbitrator in compliance with Clause 29 of the contract which clearly provides a procedure for appointment of an arbitrator and also indicates who shall be appointed arbitrator and how he shall be appointed. Mr. Mukherjee had brought to our notice that Clause 29 of the contract clearly stipulated that no person other than the Arbitration Board constituted by the Corporation would act as arbitrator provided that the party invoking arbitration clause furnishes a security deposit of a sum determined according to the table given in the contract itself. After such determination and on deposit of the said sum by the party invoking arbitration clause, it would become the duty and obligation of the Corporation to constitute an Arbitration Board as provided in Clause 29 of the contract. Accordingly, Mr. Mukherjee contended that since the High Court by its earlier order dated 7th of May, 2003, having directed the parties to invoke arbitration clause in compliance with Clause 29 of the contract, it was not open to the High Court to appoint a retired Chief Justice of a High Court as an Arbitrator before the respondent had furnished security and before determination of the amount of security by the Corporation, as provided in Clause 29 (d) of the contract, which clearly says, as noted herein earlier, that no reference for arbitration shall be maintainable unless the

contractor furnishes the security deposit of a sum determined by the Corporation. Mr. Mukherjee, therefore, contended that the High Court was not justified in appointing a retired Chief Justice of a High Court to act as an Arbitrator over looking Clause 29(d) of the contract and also without considering the fact that obligation of the Corporation to appoint an arbitrator to resolve a dispute between the parties would only arise when the contractor had furnished security which was to be determined by the Corporation.

This submission of Mr. Mukherjee was seriously contested by Mr. Amit Sharma, learned counsel appearing for the respondent. According to him, no interference can be made with the impugned order since the High Court was fully justified in appointing an arbitrator in the manner it had done. In this connection reliance was placed on the case of Datar Switchgears Ltd. v. Tata Finance Ltd [2000(8) SCC 151]. Reliance was also placed by Mr. Sharma on the case of Punj Llyods Ltd v. Petronet MHB Ltd. [2006(2) SCC 638]. Relying on the aforesaid two decisions, Mr. Sharma invited us to reconsider the submission of Mr. Mukherjee and to dismiss the present appeal.

Having heard the learned counsel for the parties and after considering the rival submissions made on their behalf and examining Clause 29 of the contract in detail, we are of the view that the High Court was not justified in appointing a retired Chief Justice of a High Court to act as sole arbitrator as the same is contrary to Clause 29 of the contract. As noted earlier, the High Court, by its earlier order dated 7th May 2003 directed the parties to invoke the arbitration clause and to appoint an arbitrator in compliance with Clause 29 of the contract entered into between the parties.

Clause 29 specifically stipulates, as indicated herein earlier, that if any dispute arises between the parties, the party seeking invocation of the arbitration clause, shall first approach the Chief Engineer and on his failure to arbitrate the dispute, the party aggrieved may file an appeal to MPL Com, failing which, the Corporation shall constitute an Arbitration Board to resolve the disputes in the manner indicated in Clause 29. However, before doing so, the party invoking arbitration clause is required to furnish security of a sum to be determined by the Corporation.

In this case, admittedly, the security has not been furnished by the respondent to the Corporation. We, in fact, asked Mr. Sharma, appearing on behalf of the respondent to ascertain on the date of the hearing of the appeal, whether the security deposit was made or not. On instruction, Mr. Sharma informed us that such security has not yet been deposited. Such being the position even today, we hold that the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish security as envisaged in Clause 29(d) of the contract. Therefore, we are of the opinion, that on account of non-furnishing of security by the respondent, the question of constituting an Arbitration Board by the Corporation could not arise at all. Accordingly, we hold that the High Court was not justified in appointing a retired Chief Justice of a High Court as Arbitrator by the impugned order.

It is not disputed before us that the learned Arbitrator appointed by the High Court has already commenced the arbitration proceeding. Mr. Mukherjee, appearing on behalf of the Corporation, on instruction, had submitted before us that they shall constitute an Arbitration Board as soon as the

respondent furnishes security in terms of Clause 29(d) of the contract and if any direction is given to the Arbitration Board to proceed from the stage the learned Arbitrator had already reached, that would not be objected to. That is to say, Mr. Mukherjee contended that the Arbitration Board may be directed to take over the arbitration proceedings from the stage the learned Arbitrator had already reached.

Such being the stand taken by the Corporation, we direct the respondent to furnish the security of a sum to be determined by the Corporation within six weeks from this date and in the event security determined by the Corporation is furnished within the time mentioned herein earlier, the Corporation shall constitute an Arbitration Board in compliance with Clause 29 of the contract. It is directed that the Arbitration Board shall proceed from the stage the learned Arbitrator appointed by the High Court had already reached.

That apart, it has to be kept in mind that it is always the duty of the court to construe the arbitration agreement in a manner so as to uphold the same. Therefore we must hold that the High Court ought not to have appointed an arbitrator in a manner, which was inconsistent with the arbitration agreement.

Before parting with this judgment, we will be failing in our duty if we do not consider and deal with the decisions cited by Mr. Sharma appearing on behalf of the respondent. First decision relied on by him was Datar Switchgears Ltd. case (supra). It is difficult to understand how the said decision would be of assistance to Mr. Sharma. In this decision, this Court was dealing with a case falling under Section 11(6) of the Act where no time limit is prescribed, whereas time limit of 30 days is prescribed under Section 11(4) and (5) of the Act. In that context, it was held by this court that if one party makes a demand for appointment of an arbitrator to the opposite party and the latter does not make an appointment within 30 days of demand, the right of appointment of arbitrator does not get automatically forfeited after expiry of 30 days. This Court held that under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but still continues. However, the right of the opposite party ceases when an application under Section 11 seeking appointment of an arbitrator is filed. This is not the factual situation in the present case, nor are we concerned with this aspect in the present case.

So far as the case of Punj Llyods Ltd (supra) is concerned, it is true that this decision of this Court was rendered by a bench of three Judges which affirmed the decision in the case of Datar Switchgears Ltd. (supra). Since we are not concerned in the facts and circumstances of the present case with the question decided by this Court in the aforesaid two decisions, we are unable to rely on those decisions.

For the reasons aforesaid, the order dated 29th July 2004 which has given rise to Civil Appeal arising out of Special Leave Petition No.19332 of 2005 is set aside and we direct the Corporation to constitute an Arbitration Board in terms of Clause 29 within a period of three months from this date, provided the respondent furnishes security in terms of the table provided in Clause 29(d) of the contract, as determined by the Corporation within a period of six weeks from this date. We, however, make it clear that in view of the stand taken by the Corporation, as noted herein earlier, the Arbitration Board shall

commence their proceedings from the stage the arbitrator appointed by the High Court had already reached.

Since we have set aside the order dated 29th July 2004, Civil Appeal arising out of Special Leave petition No. 19333 of 2005 filed against the order dated 8th April, 2005 has become infructuous.

The Appeal is disposed of in the manner indicated above. There will be no order as to costs.

JUDIS