

CASE NO.:
Appeal (civil) 6593-6594 of 2005

PETITIONER:
Union of India & Anr.

RESPONDENT:
M/s. V.S.Engineering (P) Ltd.

DATE OF JUDGMENT: 16/11/2006

BENCH:
A.K.MATHUR & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

A.K.MATHUR, J

These appeals are directed against the judgment and order passed by the High Court of Andhra Pradesh. By the impugned order dated 27.4.2001 a batch of writ petitions were disposed of including the one before us whereby the High Court appointed arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as 'the Act'). In the present appeals, we are concerned with Writ Petition No.2465 of 2001 [Union of India & Anr. v. M/s.V.S.Engineering (P) Ltd & Anr.]. So far as order dated 27.4.2001 passed by the Division Bench of the High Court is concerned, all the issues raised in that order has already been decided by this Court in the case of SBP & Co. v. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618] by a seven Judge Bench of this Court. Therefore, no purpose will be served by examining the validity of the order of the Division Bench of the High Court challenged in this present appeal as all issues are covered in the decision of SBP & Co. (supra), therefore this appeal is accordingly disposed of in the light of the aforesaid decision.

Brief facts giving rise to another appeal are that M/s. V.S. Engineering Private Limited, Hyderabad was awarded the work of supply and stacking of 50mm machine crushed stone ballast at Nallapadu Depot and loading the same into B.T.Wagons by Mechanical/ Manual means for a quantity of 1.8 lakh cum at the value of Rs.5,02,20,000/-. The agreement No.GM/W/SC/93/2 providing payment of mobilization advance and machinery and plant advance was executed by the contractor on 19.4.1993. The completion period was 39 months as per the acceptance letter dated 27.1.1993. As per the agreement the work was to be commenced from 26.4.1993 and completed by 26.4.1996 supplying the ballast at the rate of 60,000 cum per annum. As the contractor could not commence the work as per the tender conditions and supplied only 88214 cum up to November, 1997 penalty for an amount of Rs.1,01 crore was recovered from the running bills of the contractor. The appellant did not agree to the request of the contractor for waiver of penalty and rescheduling of supply. Therefore, a dispute arose between the parties and the contractor sought appointment of an arbitrator under clause 64 of the General Conditions of contract. In pursuance of the contractor's demand the Arbitral Tribunal was appointed to adjudicate the contractor's claim. The Arbitral Tribunal initiated the proceedings and the contractor submitted his

claim statement before the Arbitral Tribunal. Subsequently, the contractor filed an arbitration application No.60 of 1998 dated 16.10.1998 before the High Court of Andhra Pradesh at Hyderabad under section 11 of the Act, seeking appointment of an Arbitrator to resolve the dispute emanating from the agreement dated 19.4.1993. The appellant- Union of India contested the arbitration application filed by the respondent by filing a counter and denying the allegations. It was pointed out that it was wrong to say that the payment was not done for the work done. It was alleged that the payment was made as per the terms of the contract and there was no delay on the part of the Railway. It was also contended that the request for referring the dispute for arbitration has to be done in accordance with Clauses 63 & 64 of the General Clauses of Contract. As per Clause 63, on receipt of the application the Railway had to notify the decisions on all matters including the matters which came up under the caption excepted matters. The respondent subsequently made a request for referring the matter to Arbitral Tribunal, The General Manager of the Railways as per Clause 64 of the General Conditions of Contract accepted the request of the respondent for referring the dispute to the Arbitral Tribunal and accordingly, a letter was sent on 5.5.1998 furnishing four names of Railways Officers out of which the respondent had to nominate up to two names which was the requirement in accordance with clause 64 (3) (a) (ii) of the General Conditions of Contract. The respondent chose one name i.e. Shri R.N. Raghavan out of the four names given to him and the dispute was referred to the Arbitral Tribunal on 20.8.1998. Thereafter some other Railway Official was appointed. Some claims were not referred to the Arbitral Tribunal. Meanwhile, the contractor filed petition in the High Court. The High Court on 28.11.2000 appointed Mr. Justice Y.V. Narayana as Arbitrator to resolve the disputes and referred all 14 claims and also fixed the fee at Rs.2 lac. Aggrieved by the order dated 28.11.2000 passed in Civil Miscellaneous Petition No.60 of 1998, the appellant filed a writ petition before the High Court challenging the order of the learned Single Judge appointing the Arbitrator before the Division Bench. The Division Bench clubbed together large number of matter including various issues pertaining to Arbitration Act, 1996 & decided by its order dated 27.4.2001. This order was also challenged by Union of India by filing the present appeal. The Division Bench of the High Court by this order disposed of Union of India's appeal pertaining to this subject matter and directed that in view of the peculiar facts of this case that since General Manager of the Railway has already constituted an Arbitral Tribunal, the appellant should approach the learned Single Judge for modification/ recalling the aforesaid order dated 28.11.2000. Pursuant to that the appellant approached the learned Single Judge praying for modification of the order. Learned Single Judge dismissed the aforesaid application by order dated 21.2.2002. While dismissing the application, learned Single Judge observed as follows :

" As this court is of the opinion that the Arbitral tribunal constituted by the General Manager is impliedly set aside and the matters referred are already withdrawn by referring the same to the sole Arbitrator appointed by this Court, the question of functioning of the Arbitral Tribunal constituted by the General Manager, Railways, does not arise."

Hence, aggrieved against this order the present Special Leave Petition was filed and leave was granted. Hence both the present appeals have come up before us for final disposal.

Learned Additional Solicitor General appearing for the appellant- Union of India has pointed out that as per Clauses 63 & 64 of the General Conditions of Contract, this Court in no uncertain terms has held that the Arbitral Tribunal has to be constituted as per the General Conditions of Contract, the High Court should not interfere under Section 11 of the Act and the High Court should accept the Arbitral Tribunal appointed by the General Manager, Railway. In this connection, learned ASG invited our attention to a decision of this Court directly bearing on the subject in Union of India & Anr. v. M.P.Gupta [(2004) 10 SCC 504] wherein a similar question with regard to appointment of Arbitral Tribunal for the Railways with reference to Clause 64 of the General Conditions of Contract came up before this Court and this Court held that where two gazetted railway officers are appointed as the Arbitral Tribunal, the High Court should not appoint a retired Judge of the High Court as a sole Arbitrator and the appointment of sole arbitrator was set aside. The conditions of Clauses 63 & 64 of the General Conditions of Contract are almost analogous to the one we have in our hand. In that case also relying on Clause 64 of the contract a three Judge Bench presided over by the Chief Justice of India observed as follows :

" In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K.Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P.K.Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months."

Earlier also in the case of Datar Switchgears Ltd. v. Tata Finance Ltd & Anr. [(2002) 8 SCC 151] their Lordships have observed that the arbitrator should be appointed within thirty days on demand being made by the other party and the appointment could still be made but before the other party moves the Court under Section 11 of the Act. It was observed that once the other party moves the court the right to make the appointment ceases to exist. In the present case as it appears that the General Manager, Railway has already appointed the arbitrator but despite this, learned Single Judge has overruled the objection of the Union of India & appointed learned Judge of the High Court as arbitrator.

As against this learned counsel appearing for the respondent has invited our attention to a decision of this Court in SBP & Co. v. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618] in a Bench of seven Judges by majority has overruled the earlier decision given in Konkarni Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd. [(2002) 2 SCC 388]. So far as the case of SBP & Co. (supra) is concerned it cannot come to the rescue of the respondent. Learned counsel for the respondent invited our attention to paragraph 47 that this judgment will have prospective following. But it did not lay down that when as per agreement arbitrator is appointed then

Court should or should not interfere in the matter, whereas this issue is covered by earlier judgment by this Court in the case of Union of India v. M.P.Gupta (supra) by a three Judge bench which is binding on us. Therefore, the decision in SBP & Co. (supra) cannot be of any help to the respondent. It has also been pointed out that the arbitration proceedings are almost complete. But this Court has stayed the pronouncement of the award. In the present case, in view of the decision in M.P. Gupta (supra) a three Judge Bench has clearly stated that whenever the agreement specifically provided for appointment of two gazetted railway officers of equal status as arbitrators by the General Manager, Railway, then in that case the Court should give this latitude to the General Manager to make appointment.

However, before parting with this case we may also observe that Railways and Public institutions are very slow in reacting to the request made by a contractor for appointment of the arbitrator. Therefore, in case appointment is not made in time on the request made by the contracting party. then in that case the power of the High Court to appoint arbitrator under Section 11 of the Act will not be denuded. We cannot allow administrative authorities to sleep over the matter and leave the citizens without any remedy. Authorities shall be vigilant and their failure shall certainly give rise to cause to the affected party. In case, the General Manager, Railway does not appoint the arbitral tribunal after expiry of the notice of 30 days or before the party approaches the High Court, in that case, the High Court will be fully justified in appointing arbitrator under section 11 of the Act. It is the discretion of the High Court that they can appoint any railway officer or they can appoint any High Court Judge according to the given situation.

As a result of our above discussion, we allow these appeals, set aside the orders of the High Court. We direct the General Manager, Railway to appoint arbitral tribunal within a period of 30 days from the date of receipt of a certified copy of this order. The arbitral tribunal so appointed shall enter into the matter and dispose of the arbitration proceedings as expeditiously as possible. Consequently, the appointment of Justice Y.V.Narayana as arbitrator is set aside. There would be no order as to costs.