

CASE NO.:
Arbitration Petition 12 of 2007

PETITIONER:
YOU ONE MAHARIA \026 JV THR.YOU ONE ENG.& CONSTRUCTION CO.LTD. & ANR

RESPONDENT:
NATIONAL HIGHWAYS AUTHORITY OF INDIA

DATE OF JUDGMENT: 21/08/2007

BENCH:
C.K. THAKKER

JUDGMENT:
J U D G M E N T
C.K. THAKKER, J.

This petition is filed by the petitioners under Section 11(6) and Section 11(12) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as \021the Act\022) read with paragraph 2 of the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 for appointment of Third/Presiding Arbitrator in accordance with the Agreement/Contract Package No. NS-23/AP dated May 31, 2001 entered into between the petitioners and the respondent.

The petitioners are a \021Joint Venture\022 who came together by virtue of Joint Venture Agreement dated May 10, 2001 for execution of certain contracts for National Highways Authority of India (\021NHAI\022 for short). Petitioner No.1 is a Company registered under the Laws of the Republic of Korea having its registered office at 75-95, Seosomoon Dong, Chung Ku, Seoul, Korea 100 110. Originally it was known as YOU ONE Engineering and Construction Co. Ltd. at the time of Joint Venture Agreement and also at the time of contract dated May 31, 2001 with NHAI. The Company has since merged with and known as Ultra Construction and Engineering Co. Ltd., Seoul, Korea; i.e. in a country other than India within the meaning of Section 2(f)(ii) of the Act. Petitioner No.2 is a Private Limited Company incorporated and registered under the Companies Act, 1956 having its registered office at A-10, Panchvati, Azadpur, Delhi 110 033.

According to the petitioners, they entered into an Agreement on May 31, 2001 with the respondent for execution of Contract Package No. NS-23/AP being a project for 4-Laning of KM. 464.000 to KM. 474.000 of Nagpur-Hyderabad section and KM. 9.400 and KM. 22.300 of Hyderabad-Bangalore section of National Highway 7 in the State of Andhra Pradesh at a contract price of Rs.74,88,79,544.69. The Agreement contains an arbitration clause which I will refer to at an appropriate stage.

According to the petitioners, in September, 2004, i.e. after more than three years of Contract-Agreement, it was alleged by the respondent that the petitioners had furnished forged Bank Guarantees for availing mobilization and other advances under the Contract Agreement. The respondent, in view of the Arbitration Clause, filed OMP No. 342 of 2004 in the High Court of Delhi against the petitioners under Section 9 of the Act

for interim relief. The High Court passed interim directions restraining the petitioners from removing and/or transferring machinery and stock placed by them at the site for execution of work. On December 13, 2004, the respondent invoked Clause 59 of the Agreement and terminated the contract. There was exchange of letters and notices between the parties. Ultimately, by a communication dated April 7, 2005, the petitioners intimated the respondent that in accordance with the Arbitration Clause, they had appointed Hon\022ble Mr. Justice A.K. Srivastava, a retired Judge of the High Court of Delhi as their nominee Arbitrator. According to the petitioners, in the second half of June, the respondent addressed a letter to Mr. C.S. Balaramamurthi, purported to have been written on April 7, 2005 appointing him as the nominee Arbitrator of NHAI. From the record, it appears that the two Arbitrators could not agree to an appointment of Third Arbitrator. The respondent intended to appoint a \021technical\022 man as the Third Arbitrator as the matter was of a \021highly technical nature\022, but the arbitrator appointed by the petitioners insisted that the Presiding Arbitrator should be a retired Chief Justice or a Judge of a High Court, who should be senior to him (Justice Srivastava). It is also on record that the respondent appointed Mr. K.P. Mohanty as the Presiding Arbitrator. Subsequently, however, his appointment was not continued. In February, 2006, Justice Srivastava had shown his unwillingness to continue as Arbitrator and the petitioners nominated Hon\022ble Mr. Justice V.A. Mohta, retired Chief Justice of High Court of Orissa as their nominee Arbitrator in place of Justice Srivastava. Since the parties could not agree as to appointment of Third/Presiding Arbitrator, the petitioners have filed the present petition praying therein that the Chief Justice of India may be pleased to appoint a retired Judge of the Supreme Court of India or a retired Chief Justice of a High Court as Presiding Arbitrator. The Hon\022ble Chief Justice of India designated me to deal with the matter and to pass an appropriate order on the application. Accordingly the petition was placed before me.

On January 24, 2007 notice was issued. Affidavits and further affidavits had been filed by the parties.

I have heard learned counsel on both the sides.

The learned counsel for the petitioners submitted that the respondent-NHAI ought to have agreed to appoint a retired Judge of the Supreme Court or a retired Chief Justice of a High Court as Presiding/Third Arbitrator. It was submitted that when the petitioners have nominated a retired Chief Justice of a High Court as their Arbitrator, the respondent ought to have considered the said fact and ought to have agreed to nominate a Judge, senior in rank to the Arbitrator appointed by the petitioners. It was also submitted that the dispute relates to interpretation of terms and conditions of the contract and there is no \021technical\022 element which requires appointment of a \021technical\022 man. It was also stated that in similar circumstances, between the same parties, a dispute had arisen earlier, arbitration petitions were filed before the Chief Justice of High Court of Delhi and the nominee of the Chief Justice had appointed Hon\022ble Mr. Justice Arun Kumar, retired Judge of this Court as the Presiding Arbitrator. In the instant case also, such a course ought to have been adopted by the respondent. Since it was not done, the petitioners are constrained to

approach this Court.

The learned counsel for the respondent, on the other hand, submitted that the relevant clause empowers the Council of Indian Road Congress (\021IRC\022 for short) to appoint Presiding Arbitrator in case of failure of the two Arbitrators to appoint Third Arbitrator. Since two Arbitrators appointed by the parties (the petitioners on the one hand and the respondent on the other hand) could not arrive at a consensus, it is the power of IRC to appoint a Third Arbitrator and the petition is liable to be dismissed. It was also submitted that a similar question came up for consideration before this Court between the same parties in *YOU ONE Engineering & Construction Co. Ltd. & Anr. v. National Highways Authority of India*, (2006) 4 SCC 372 and this Court has held that it is the right of IRC to appoint Third Arbitrator and the petitioners could not insist for a particular Arbitrator. Regarding the order passed by the Nominee of the Chief Justice of High Court of Delhi, it was submitted that it was an agreed order and the respondent had consented to in appointing Hon\022ble Mr. Justice Arun Kumar, retired Judge of this Court as the Third Arbitrator. The said decision, therefore, does not help the petitioner. It was also urged that the question is of \021highly technical\022 nature and hence IRC is insisting to appoint a \021technical\022 man as the Third/Presiding Arbitrator. It was, therefore, prayed that the petition be dismissed.

Having considered rival contentions of the parties and having gone through the Agreement and Arbitration Clause, I am of the view that the prayer of the petitioners cannot be granted. It is not in dispute that the Agreement, dated May 31, 2001 contains an Arbitration Clause (Clause 3). The relevant part of the said Clause reads thus:

\023In case of dispute or difference arising between the employer and a domestic contractor relating to any matter arising out of or connected with this Agreement, such dispute or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The Arbitral Tribunal shall consist of 3 Arbitrators, one each to be appointed by the employer and the contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Council of Indian Road Congress\024.

(emphasis supplied)

A bare reading of the above clause leaves no room for doubt that in case of failure of the two Arbitrators appointed by the parties to reach upon a consensus, the Presiding Arbitrator \021shall be appointed by the Council of IRC\022.

It may be stated at this stage that when the matter was placed before me on April 24, 2007, the parties invited my attention to the aforesaid clause and it was submitted that no consensus could be arrived at by the

parties. Considering the fact situation and the Agreement, I thought it proper that the parties should undertake fresh exercise in the direction. I accordingly passed an order to make one more attempt.

Unfortunately, however, the effort could not succeed and both the counsel stated that the matter will have to be decided on merits. Accordingly, the matter was heard.

In my opinion, the learned counsel for the respondent is right that apart from clear language of Arbitration Clause, the point is also covered by YOU ONE Engineering. Almost in identical circumstances, this Court was called upon to consider the provisions of the Act and the right of the respondent to appoint Presiding Arbitrator under the Agreement. The Court held that it is the right of IRC to appoint Presiding Arbitrator in case the parties are not ad idem in appointment of Third/Presiding Arbitrator.

This Court stated:

\023The arbitration agreement clearly envisages the appointment of the presiding arbitrator by IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6)\024.

(emphasis supplied)

It is, no doubt, true that the High Court of Delhi has appointed Hon\022ble Mr. Justice Arun Kumar, retired Judge of this Court as Presiding Arbitrator in OMP No. 342 of 2004 vide its order dated May 22, 2006. The said order is on record of this case. Three paragraphs of the said order are important and they read as under:

\0233. Learned counsel for the parties jointly state that whole issue can be sorted out by having a panel of three arbitrators, with one arbitrator as nominated by each of the parties and the presiding arbitrator to be appointed by this Court with the joint consent of the learned counsel for the parties. It may be noticed that as on date the petitioner has nominated Mr.L.R.Gupta, Director General Works, CPWD (Retd.) while respondent has nominated Justice S.B.Wad (Retd.). Justice S.B.Wad was nominated in place of Justice A.K.Srivastava (Retd.), who expressed his inability to act as an arbitrator.

4. Learned counsel for the parties propose that Justice Arun Kumar (Retd. Judge of the Supreme Court), 10, Krishna Menon Marg, New Delhi - 110 001 (Phone : 2301-2175) be appointed as the presiding arbitrator and arbitral tribunal be constituted accordingly.

5. The constitution of the presiding arbitrator and arbitral tribunal as proposed by learned counsel for the parties is accepted by this Court and the said tribunal shall proceed to enter upon reference

and determine the dispute between the parties. Ordered accordingly. The constitution of the tribunal be Justice Arun Kumar (Retd.) as the presiding arbitrator, Mr.L.R. Gupta and Justice S.B. Wad (Retd.) as the two other members of the arbitral tribunal. The fee shall be fixed by the tribunal itself\024.

(emphasis supplied)

The learned counsel for the respondent was right when he submitted that the order was based on \021consent\022 of the parties. As in the present case, there is no such consent, the Court has to consider the matter by interpreting an Arbitration Clause. Clause 3, as observed earlier, is explicitly clear and there is no ambiguity. Again, the controversy is decided by this Court in YOU ONE Engineering. In my view, therefore, the petitioners cannot compel the respondent to agree for a retired Judge of this Court or retired Chief Justice of a High Court, senior to Hon\022ble Mr. Justice Mohta as Presiding Arbitrator.

It was finally submitted that even if this Court is of the view that no such direction can be issued or order can be passed, it may be appreciated that the petitioners have chosen a retired Chief Justice of a High Court as their Arbitrator and appropriate observations may be made so that IRC may appoint retired Judge of this Court or a retired Chief Justice of a High Court to be the Presiding Arbitrator. That would enable the petitioners to avail services of an Arbitrator appointed by them.

I appreciate the anxiety of the petitioners. In my view, however, when the Arbitration Clause is clear and the point is concluded by a decision of this Court, it would not be proper on my part to make any such observation. It is, however, open to the respondent to take an appropriate decision in the matter keeping in view the facts in their entirety. I may only state that this decision will not inhibit the respondent in taking any decision as it thinks fit.

In view of the above legal position, I express no opinion on the contention of the parties as to whether the controversy raised is or is not of a \021technical\022 nature. Since it is not necessary for me to enter into that question, I leave the matter there.

For the foregoing reasons, the application deserves to be dismissed and is accordingly dismissed, however, leaving the parties to bear their own costs.