

CASE NO.:
Arbitration Petition 25 of 2005

PETITIONER:
Rodemadan India Limited

RESPONDENT:
International Trade Expo Centre Limited

DATE OF JUDGMENT: 17/04/2006

BENCH:
B.N. Srikrishna

JUDGMENT:
J U D G M E N T

B.N Srikrishna, J.

This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of a Presiding Arbitrator/ Chairperson of the Arbitral Tribunal under the arbitration agreement. It has been placed before me as the person designated by the Chief Justice to act under Section 11(6) of the Act.

The Respondent-Company has a lease of the land situated at Plot No. A-11, Sector-62, Noida from the New Okhla Industrial Development Authority for a period of ninety years. The Respondent wanted to construct and develop an Exhibition Centre on the said land. There were negotiations between the Petitioner-Company and the Respondent-Company, as a result of which an exclusive Management Agreement was arrived at on 29.10.2003. Under the said agreement, the Petitioner was granted the exclusive right to manage the said plot of land for a period of ten years from the date on which 'Vacant Possession' was handed over to it. Certain other terms as to payments were agreed to between the parties. Two clauses, 8.0 and 8.1 of the said agreement, which are of relevance, are as under: "8.0 In the event of breach of warranties by any of the parties the other party can seek relief by way of specific performance of the contract.

8.1 Arbitration: Any dispute, controversy or claim arising out of or in relation to this exclusive Management Agreement shall be settled by a panel of three arbitrators (the "Arbitration Panel") in accordance with the provisions of the Arbitration and Conciliation Act, 1996. ITEC and Rodemadan shall appoint one arbitrator each and such arbitrators shall, within seven days of their appointment, designate a third person to act as the chairman and the presiding arbitrator. The arbitral proceedings shall take place in Delhi and shall be conducted in the English language. Any such dispute, controversy or claim submitted for arbitration shall be considered a commercial dispute arising under the Arbitration and Conciliation Act, 1996. The award of the Arbitration Panel shall be a reasoned one, and shall be final and binding on the Parties."

Certain disputes had arisen between the parties, as a result of which, on 16.3.2005 the Petitioner filed an application under Section 9 of the Act before the High Court of Delhi (OMP No. 98/2005) and obtained an order directing the Respondent to maintain status quo with regard to the possession and title of the said plot of land.

On 8.4.2005, the Petitioner sent a legal notice to the Respondent

invoking Clause 8.1 of the said agreement. By the said notice invoking arbitration, the Petitioner appointed Dr. L.M. Singhvi, Senior Advocate, as its nominee arbitrator in terms of the Management Agreement and requested the Respondent to nominate its arbitrator in terms of the said clause within a period of thirty days from the date of receipt of the notice. It was clarified in the said notice that since the agreement provided for Indian Law as the applicable law, an Indian jurist had been appointed. It was stated that this would not be deemed or construed to be a waiver of the Petitioner's right to have the third or Presiding Arbitrator from a neutral country (i.e. other than India and Cyprus), the arbitration invoked being an "International Commercial Arbitration" within the meaning of Section 2(1)(f) of the Act. On 4.5.2005, the Respondent replied to the said notice of the Petitioner, raising several contentions, inter alia taking the stand that there was no arbitration agreement in existence. Nonetheless, it appointed Justice S.C. Jain, a retired Judge of the Allahabad High Court as its nominee arbitrator "without prejudice" to their right to challenge the validity of the arbitration proceedings. By a letter dated 20.5.2005, Justice Jain accepted his appointment as an arbitrator. However, since the two arbitrators were not able to arrive at a consensus with regard to the appointment of the Presiding Arbitrator/ Chairperson of the Arbitral Tribunal, the Petitioner moved this application under Section 11(6) of the Act on 29.8.2005 for appointment of a Presiding Arbitrator/ Chairperson of the Arbitral Tribunal.

Mr. Ranjit Kumar, learned Senior Counsel for the Respondent, has raised a preliminary objection that the petition has been filed by the Petitioner-Company through Mr. Roger Shashoua, authorized representative of the Petitioner-Company, but verified and signed by Mr. Raj Manek holding a Power of Attorney from Mr. Roger Shashoua. The contention is that the Power of Attorney only permits Mr. Raj Manek to represent Mr. Roger Shashoua in his personal capacity but does not empower him to represent the Petitioner-Company. Mr. R.F. Nariman, learned Senior Counsel for the Petitioner, has drawn our attention to Exhibit P/R-2 filed along with the rejoinder. The document Exhibit P/R-2, which is a certificate by Mr. Roger Shashoua, Director of the Petitioner-Company, clarifies that Mr. Raj Manek is duly authorized to represent him in his personal capacity as well as the Petitioner-Company:

"\005before any court or other judicial authority or any other concerned authority to file petitions, applications, documents etc. and to appoint any advocate in connection thereto and to do all acts, deeds and things that the above Mr. Raj Manek may deem fit and proper in pursuance thereof."

In view of this document, I find no substance in the contention.

Mr. Ranjit Kumar, learned Senior Counsel for the Respondent, raised a further preliminary contention that in view of the decision of the Constitution Bench in *SBP & Co. v. Patel Engineering Ltd.*, it has now been conclusively held that the power exercised by the Chief Justice or his designate under Section 11(6) of the Act, is not an administrative but a judicial power and that the designate of the Chief Justice has to judicially determine the issues arising under Section 11(6) of the Act. He contends that under Article 145 of the Constitution of India, the Supreme Court is empowered to frame "rules for regulating generally the practice and procedure of the Court", and under Clause (2), the minimum number of Judges, who were to sit for any purpose, is also to be fixed by the rules. The Supreme Court has framed rules known as the Supreme Court Rules, 1966 (hereinafter referred to as "the Rules"). Under Order VII Rule 1 of the Rules, "Every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice". Exception is made for those matters specifically provided thereunder, which could be heard by a Judge sitting singly nominated by the Chief Justice. The contention is that since a petition under Section 11(6) of the Act is not specifically enumerated under the proviso to Order VII Rule 1 of the Rules, such a petition would have to be heard by a Bench consisting of not less than two Judges.

In my view, this contention is entirely misconceived for two reasons. In the first place, Article 145 of the Constitution itself proceeds by declaring that the provisions of the Article were "subject to the provisions of any law made by Parliament". The Act is definitely a "law made by Parliament" and it does not prescribe that a petition under Section 11(6) has to be heard by a Bench consisting of at least two Judges. Second, the power under Article 145 of the Constitution and the Rules framed thereunder, are intended to govern the practice and procedure of the Supreme Court. I am unable to persuade myself to believe that, the power exercisable by the Chief Justice under Section 11(6) of the Act is the power of the Supreme Court under the Constitution. My first impression on this issue is also confirmed by the judgment of this court in Patel Engineering (supra), where it was observed that:

"It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration, but at the same time, it has made some departures from the Model Law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11 of the Act are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. "Court" is defined in the Act to be the Principal Civil Court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The Principal Civil Court of original jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the court concerned would be the District Court. Obviously, Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an Arbitral Tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post-arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of "court" in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on the Chief Justices of the High Courts and on the Chief Justice of India."

In short, the power under Section 11(6) is the power of a designate referred to under the Section and not that of the Supreme Court, albeit that it has now been held to have judicial characteristics by reason of the judgment in Patel Engineering (supra). Since this is the power of the Chief Justice and not the power of the Supreme Court, the specification in Order VII Rule 1 of the Rules as to the minimum number of Judges, would have no application thereto. If the argument of the learned counsel is right, then even the Chief Justice cannot pass such an order unless he is sitting in a Bench with one or more companion Judge. No such intention is evidenced by Parliament in enacting Section 11(6) of the Act. Since Parliament has enacted a law under which the power is exercisable by the Chief Justice or his designate, who could be "any person or institution", I do not think that the requirement of Order VII Rule 1 of the Rules would apply to such a situation at all. The contention is, therefore, rejected.

The Respondent's main opposition to this petition is on the ground that there is no arbitration agreement in existence since the Management Agreement was merely a proposal, which was subject to approval of the

shareholders of the company; that a meeting was called for the shareholders of the company at which the said proposal was put forward for approval and was specifically rejected by a resolution passed by the shareholders; that the nomination of Justice Jain was without prejudice to the rights and contentions of the Respondent and that this petition was misconceived and untenable as the High Court of Delhi would have exclusive jurisdiction in the matter, as it had already been moved under Section 9 of the Act. For the said reasons, the Respondent has sought dismissal of this petition.

Before examining the facts of the present petition, it is necessary to encapsulate the conditions necessary for the exercise of the designate's power under Section 11(6) and the judicial determinations necessary by the designate at the stage of Section 11(6). In addition to the conditions already enumerated in the Section, the judgment in Patel Engineering (supra) provides that:

"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\005"

Further, it has also been held that determination of certain preliminary jurisdictional issues is mandatory for the designate:

"It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act."

I am, therefore, required to decide whether the preliminary conditions necessary for the exercise of the designate's power under Section 11(6) are satisfied, especially whether there exists a valid arbitral agreement.

One more issue needs appraisal here: what kind of evidence is the designate under Section 11(6) required to place reliance on to arrive at a finding on the preliminary jurisdictional issues? According to the judgment in Patel Engineering (supra):

"For the purpose of taking a decision on these aspects (preliminary jurisdictional issues), the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."

Accordingly, I am given wide discretion to decide what evidence\027

oral or documentary\027is necessary for me to make an effective finding on the preliminary jurisdictional issues.

That an agreement dated 29.10.2003 was signed by the Directors of the Respondent-Company for and on behalf of the Respondent as well as by the Directors of the Petitioner-Company for and on behalf of the Petitioner is not in dispute. What is in dispute is that, subsequent thereto, the said agreement has been repudiated in an Extraordinary General Meeting alleged to have been held on 14.9.2004. It is further alleged that the Management Agreement dated 29.10.2003, which was signed by the Directors of the Petitioner on the one hand and the Directors of the Respondent on the other hand was merely a proposal subject to approval of the shareholders of the Respondent-Company. Certain documents are placed on record and my attention has been drawn thereto in support of this stand of the Respondent.

The Petitioner, however, has emphatically denied that any resolution was passed in the Board Meeting of 14.9.2004, as alleged, by which the Management Agreement has been repudiated or rendered ineffective. One Roger Shashoua, who is a major shareholder and Director of the Petitioner-Company, is also a major shareholder and Director of the Respondent-Company, had personal knowledge as to the affairs of the Respondent-Company and, therefore, the Petitioner is aware that no such Extraordinary General Meeting of the Respondent-Company was held on 14.9.2004 at all, as alleged. However, in support of his stand, Mr. Ranjit Kumar drew my attention to copies of certain resolutions purporting to be the extract of the resolution passed on 14.9.2004 at 11:00 A.M. in an Extraordinary General Meeting held at Business Centre, Hotel Park Royal Intercontinental, Nehru Place, New Delhi. This resolution is vehemently disputed by Mr. Nariman, appearing for the Petitioner-Company.

It is not possible to accept the correctness of the disputed documents or to proceed on the footing that there was such a resolution passed in an Extraordinary General Meeting by which the Management Agreement of 29.10.2003 was not approved and, therefore, resolved to be treated as null and void. Mr. Ranjit Kumar then suggested that he be given an opportunity to lead evidence, including oral evidence to substantiate his stand. Exercising the discretion granted to me in Patel Engineering (supra), I decline Mr. Ranjit Kumar's request as I do not believe that oral evidence is necessary to determine the present issue. I decline to do so for even if the power under Section 11(6) be judicial in the sense of requiring a judicial determination by the designate of the Chief Justice, it surely does not render the designate of the Chief Justice into a trial court.

Mr. Ranjit Kumar then placed reliance on Clause (6) of the Minutes of the Meeting of the Respondent-Company dated 29.10.2003 in which there was a Resolution passed with regard to 'Management Agreement', which inter alia reads as under:

"6. Management Agreement

Mr. Roger Shashoua proposed to grant a (sic) exclusive Management Agreement to Rodemadan India Ltd. to manage the upcoming expocentre on a minimum guarantee basis. The way the Expocentre will have confirmed income from the beginning and will enjoy the worldwide experience of Rodemadan India Ltd. The Board members agreed to the proposals, subject to statutory approvals.

Resolved that the management contract with Rodemadan India Ltd. for the management of the centre be approved by all board members present subject to statutory approvals from the respective authorities, if any\005."

There is no dispute on this resolution. Admittedly, the Director of the Petitioner-Company had attended this meeting and, in fact, it is pursuant to this resolution that the Management Agreement dated 29.10.2003 was

entered into between the Petitioner and the Respondent. Mr. Ranjit Kumar contended that the said resolution proved that the Management Contract was "subject to statutory approval from the respective authorities, if any". According to him, Mr. Roger Shashoua is a Director of Rodemadan India Limited (the Petitioner-Company) and another company, known as, Rodemadan Holdings Ltd., and also a shareholder in the Respondent-Company. He contends that Section 299 of the Companies Act, 1956 contemplates that:

"Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into, by or on behalf of the company, shall disclose the nature of his concern or interest at a meeting of the Board of directors".

Under Section 300, such a Director is precluded from taking any part in the discussion of the Board of Directors nor allowed to vote with regard to a resolution touching upon such a contract. Learned counsel contended that Mr. Roger Shashoua was interested in the contract, and therefore, the Management Contract was null and void because an interested director had voted thereupon.

To say the least, the argument appears to be one of sheer desperation, in my view. It is nobody's case that Mr. Roger Shashoua is a party to the Management Agreement. The Management Agreement is between the Petitioner-Company and the Respondent-Company. Merely because Mr. Roger Shashoua happens to be a Director of the Petitioner-Company as well as, a shareholder in the Respondent-Company, I do not think that the provisions of Sections 299 or 300 of the Companies Act were attracted to the situation, which required approval of the Government.

The next contention raised by Mr. Ranjit Kumar is that the Petitioner is attempting to obtain specific performance when specific performance of the contract cannot be granted in arbitral proceedings. In fact, this contention has been squarely rejected by the judgment of this Court in Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and ors.

Further, it was urged that Clauses 8.0 and 8.1 of the Management Agreement are mutually exclusive and, therefore, the relief for specific performance cannot be asked for and since no consideration had been paid the contract was void and unenforceable. In my view, these are not issues to be considered in a petition under Section 11(6) of the Act, as they can all be raised during the arbitral proceedings.

In short, I am not satisfied that the arbitral agreement was vitiated on any of the grounds averred by Mr. Ranjit Kumar. I am satisfied that there exists a valid arbitration agreement which contemplates that that all disputes between the parties under that agreement be referred to arbitration.

Finally, it is contended that as recourse had been taken by the Petitioner under Section 9 of the Act to obtain interim relief by moving the Delhi High Court by their Original Petition OMP No. 98/2005 dated 24.3.2005, by reason of Section 42 of the Act that court alone could have jurisdiction upon the arbitral tribunal. In my view, this contention has no merit as I have held earlier, neither the Chief Justice nor his designate under Section 11(6) is a "court" as contemplated under the Act. Section 2(1)(e) of the Act defines the expression "court". The bar of jurisdiction under Section 42 is only intended to apply to a "court" as defined in Section 2(1)(e). The objection, therefore, has no merit and is rejected. The situation is one of a dispute between the Petitioner, which is a foreign company and the Respondent and is therefore, an "International Commercial Arbitration" within the meaning of Section 2(1)(f) of the Act. There is a dispute between the parties where both parties are subject to an arbitration agreement. Further, the appointed arbitrators have failed to reach an agreement upon a Chairperson/ Presiding Arbitrator of the Arbitral

Tribunal. Hence, I am satisfied that all the preliminary conditions specified in Section 11(6) and Patel Engineering (supra) have been met.

In the result, I allow the petition and appoint Justice Arun Kumar, a retired Judge of the Supreme Court of India, as the Chairman/ Presiding Arbitrator of the Arbitral Tribunal, subject to his consent and on such terms as he fixes.

The petition is accordingly allowed with no order as to costs.

JUDIS