

(2017) 04 DEL CK 0055

DELHI HIGH COURT

Case No: 537 of 2016

RATNA INFRASTRUCTURE
PROJECTS PVT. LTD.

APPELLANT

Vs

MEJA URJA NIGAM PRIVATE
LIMITED [MUNPL]

RESPONDENT

Date of Decision: April 11, 2017

Acts Referred:

- Arbitration and Conciliation Act, 1996, Section 13, Section 12(5), Section 12, Section 11(6), Section 37(1)(a), Section 85(2)

Hon'ble Judges: S. Muralidhar

Bench: SINGLE BENCH

Advocate: P. V. Kapur, Kiran Suri, Abhay N. Dass, Purvesh Buttan, Fahad Imtiaz, Maninder Singh, L. B. Rai, Vijay Awana, Abhishek Yadav, Prashant Bajaj, Gaurav Rai

Judgement

1. This is a petition by Ratna Infrastructure Projects Pvt. Ltd. under Section 11(6) of the Arbitration & Conciliation Act, 1996 ("Act") seeking the appointment of an Arbitrator to adjudicate the disputes between the Petitioner, Ratna Infrastructure Projects Private Limited and the Respondent, Meja Urja Nigam Private Limited in Arbitration Case Nos. 1 of 2013 and 1 of 2014.

2. The facts are that the Respondent is a joint venture of National Thermal Power Corporation ("NTPC") and Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited. The Chief Executive Officer ("CEO") of the Respondent is the appointing authority authorised to appoint an Arbitrator.

3. The Petitioner was awarded the work of "Site Levelling and Infrastructure Works Package for Meja Thermal Power Project" (2 X 660 MW) by a letter of Award ("LoA")

on 18th May 2010. A formal contract was entered into between the parties in respect of the aforesaid LoA on 21 st September 2010.

The contract has a mechanism for dispute resolution by way of arbitration. This is contained in Clause 56 of the General Conditions of Contract ("GCC") which reads as follows:

"56.Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications designs drawings and instructions herein before mentioned and as of the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating the contract designs, drawing specifications, estimates, instructions orders or these conditions of otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of NTPC Limited (formerly National Thermal Power Corporation Ltd.), and if the General Manager is unable or unwilling to act, to the Sole Arbitration of some other person appointed by the Chairman and Managing Director, NTPC Limited (formerly National Thermal Power Corporation Ltd.) willing to act as such Arbitrator. There will be no objection if the Arbitrator so appointed is an employee of NTPC Limited (formerly National Thermal Power Corporation Ltd) and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer vacation of office or inability to act, Chairman and Managing Director NTPC Limited (formerly National Thermal Power Corporation Ltd.) shall appoint another person to act as arbitrator in accordance with the terms of the Contract. It is also a term of this contract that no person other than a person appointed by CMD NTPC Ltd. as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all.

Subject as aforesaid the provisions of Arbitration Act 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration under this Clause."

4. By an Amendment No.1, the contract was amended as under:

"A) the CMD NTPC stood replaced with CEO MUNPL,

B) in the line 9, 10 and 11, it was mandated to replace "Shall be referred to unable" with "Shall be referred to the Sole arbitration of the Project-in-Charge concerned of MUNPL and if the Project Incharge is unable "

C) Arbitration Act 1940 is to be read as Arbitration and Conciliation Act 1996 [necessary change may also be made in proforma contract agreement]."

5. Disputes arose during the pendency of the contract with the Petitioner claiming that it had to be paid Rs. 27,28,26,000 as on 28th February 2013 together with interest @ 18% per annum for the controlled blasting work. The dispute raised by the Petitioner was referred to arbitration by Mr. Narsingh, the Project Incharge of the Project. The said claim was registered as Arbitration Case No. 1 of 2013. The contract subsequently stood terminated and the Respondent raised a claim in the sum of Rs.207,56,42,531 as on 4th March 2014 for the losses and expenses suffered on account of termination of the contract, together with interest @ 18% per annum. This dispute was also referred to the same sole Arbitrator and was numbered as Arbitration Case No. 1 of 2014.

6. The arbitration proceedings were held at Allahabad in Uttar Pradesh. At the stage of examination of witnesses, the sole Arbitrator on 12th August 2016 informed both parties of the change of his address for correspondence as follows:

"Narsingh

General Manager (PP&M-CEG)

NTPC Ltd.

NTPC Bhawan, Scope Complex

Core 5, 2nd Floor,

7, Institutional Area,

Lodhi Road, New Delhi-110003."

7. On the following day i.e. 13th August 2016 the sole Arbitrator further clarified as under:

"In reference to change of correspondence address of Sole Arbitrator as communicated on 12.08.2016 M/s RIPPL inquired whether he is Incharge of the Project on date. The Sole Arbitrator informed that he is not Incharge of Project since 01.06.2016. However office of the Sole Arbitrator is functional at its previous venue as mentioned in earlier proceedings. The next date of hearing is fixed on 29.08.2016 at 3 00 PM onwards till 31.08.2016 (FIN)."

8. The case of the Petitioner was that the sole Arbitrator had to be Project Incharge and, therefore, Mr Narsingh could no longer continue as sole Arbitrator with respect to the said two disputes. He ought to have recused himself. Not satisfied with the conduct of Mr. Narsingh in both cases, the Petitioner filed an application under Sections 12 and 13 of the Act challenging the said Arbitrator. These applications were dismissed by the Arbitrator by a common order dated 19th February 2016 in both arbitration cases.

9. The case of the Petitioner is that the CEO of the Respondent was required under the contract to appoint an Arbitrator to replace Mr Narsingh within 30 days from 1st June 2016 the date from which the latter ceased to be the Project Incharge. With the CEO of the Respondent failing to do so, the present petition was filed on 23rd August 2016.

10. It is stated that on 24th August 2016 an advance copy of the present petition was served on learned counsel for the Respondent. The case of the Respondent is that in

the meanwhile, with a view to avoiding any dispute on that score, on 21st August 2016 it appointed Mr. Ramesh Kher who is also one of its General Managers as a new sole Arbitrator. A copy of the said letter does not appear to have been delivered to the Petitioner before the filing of the present petition.

11. At the hearing of the case on 30th August 2016, the learned Additional Solicitor General ("ASG") of India was present and counsel for the Respondent accepted notice. While the learned ASG appearing on behalf of the Respondent questioned the maintainability of the petition, the Court was not informed that the Respondent had in fact appointed Mr. Kher. At the hearings on 4 th October 2016, 24th November 2016 and 2nd December 2016 the Court was informed that the parties would make a joint request for postponement of the arbitral proceedings.

12. In the reply filed by the Respondent it is stated that inasmuch as the Respondent on its own, out of abundant caution, had appointed Mr. Kher as sole Arbitrator, the prayer in the petition did not survive. It was submitted that the Petitioner could not insist upon the appointment of another Arbitrator by the Court.

13. Mr. P.V. Kapur and Ms. Kiran Suri, learned Senior counsel appearing for the Petitioner first submitted that the Respondent was bound to appoint a fresh Arbitrator within 30 days from 1st June 2016 the date on which Mr. Narsingh ceased to be an Arbitrator. Since that was not done, the Respondent should be taken to have waived its right appoint an Arbitrator under Clause 56 of the GCC. Reliance is placed on the decision in *Datar Switchgears Ltd. v. Tata Finance Ltd.* (2000) 8 SCC 151. Secondly, it is submitted that the arbitration clause in question states that the Arbitration Act 1940 (substituted by the Act by an amendment) and all amendments subsequent thereto would apply. It is accordingly submitted that the Act as amended with effect from 23 rd October 2015 would apply and in that event the appointment of a General Manager of the Respondent as sole Arbitrator cannot be legally sustained.

14. Mr. Maninder Singh, learned ASG appearing for the Respondent on the other hand submitted that there was in fact no need to appoint any Arbitrator in place of Mr. Narsingh because the question of appointing a new Arbitrator would arise only when the original Arbitrator would be unable to act by reason of transfer or vacation of office. However, having appointed Mr. Kher, the Respondent submits that the said proceedings should now be carried to its logical end. As regards the applicability of the Act as amended with effect from 23rd October 2015, emphasis was laid by the learned ASG on the expression "unless the parties otherwise agree." According to him the parties would have to agree, after coming into force of the Amendment Act, 2015 that the said Amendment Act would apply to the pending arbitration proceedings. A distinction is drawn between the words used in Section 26 of the Amendment Act and Section 37(1)(a) of the Act where the expression used

is "unless the parties have otherwise agreed or the parties have agreed." It is stated that the legislature has made a conscious departure and employed the expression "unless the parties otherwise agree" which makes it clear that the Amendment Act would apply to pending arbitral proceedings only after the parties enter into an agreement to this effect. Consequently, it is urged that Section 12(5) of the Act as amended is not applicable in the present case.

15. The Court would like to first take up the latter point for consideration. The short question is whether the Act as amended with effect from 23rd October 2015 would apply to the present proceedings? Section 26 of the Amendment Act reads as under:

"26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree that this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

16. The wording of the above Section 26 is slightly different from the wording of the Section 85(2)(a) of the Act which reads as under:

"(2) Notwithstanding such repeal, -(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force."

17. In *Ardee Infrastructure Private Limited v. Anuradha Bhatia & Ors.* 237 (2017) DLT 140 (DB) a Division Bench of this Court analysed the effect of the slight difference in the wording in the two sections. It referred to the decision in *Thyssen Stahlunion GmbH v. Steel Authority of India Limited* 1999 (9) SCC 334 where the expression "in relation to" was examined. There the Supreme Court was examining the applicability of the Arbitration Act, 1940 which had been repealed in relation to arbitration proceedings that had commenced prior to the enactment of the said Act (i.e. the 1996 Act). The conclusions of the Supreme Court in the above decision were as under:

"22. For the reasons to follow, we hold:

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder.

3. In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act."

4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

5. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force.

6. If a narrow meaning of the phrase "in relation to arbitral proceedings" is to be accepted, it is likely to create a great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

7. A foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act [Foreign Awards (Recognition and Enforcement) Act, 1961]."

18. The Division Bench in *Ardee Infrastructure Private Limited v. Anuradha Bhatia* (supra) in the above background proceeded to analyse Section 26 of the Amendment Act and concluded as under:

"It is clear that insofar as the second limb of Section 26 is concerned, it takes within its fold every type of situation, which may arise in relation to arbitral proceedings, including both proceedings before the arbitral tribunal and court proceedings in relation thereto or connected therewith. Therefore, insofar as the second limb is concerned, there is no dispute that for all arbitration proceedings commenced on or after 23.10.2015, the Amending Act would apply and, therefore, the amended provisions of the said Act would be applicable."

19. As regards the first part of Section 26 of the Amendment Act it was held as under:

"30. Now, if the argument of the respondents is to be accepted that the first limb of Section 26 applies only to arbitral proceedings in the sense of proceedings before arbitral tribunals and not to court proceedings, then, it is obvious that Section 26 is silent with regard to the second and third categories of cases to which we have already referred above. In other words, in respect of these categories, no contrary intention of retrospectivity is evinced upon a reading of Section 26 of the Amending Act. Therefore, even if we take the argument of the respondents to be correct, the result would still be the same and, that is, that in respect of all the arbitral proceedings commenced prior to 23.10.2015, the unamended provisions of the said Act would continue to operate till the enforcement of the award."

20. Ultimately the conclusions reached by the Division Bench were as under:

"1) Section 26 of the Amending Act, if a narrow view of the expression "to the arbitral proceedings" is to be taken, is silent on those categories of cases where the arbitral proceedings commenced prior to 23.10.2015 and where even the award was made prior to 23.10.2015, but where either a petition under Section 34 was under contemplation or was already pending on 23.10.2015;

2) In such eventuality, the amended provisions pertaining to those categories would apply only if they were merely procedural and did not affect any accrued right;

3) In the facts of the present case, the amendment to Sections 34 and 36, which pertain to the enforceability of an award, certainly affect the accrued rights of the parties;

4) As a result, the petitions filed by the appellants under Section 34 of the said Act would have to be considered under the unamended provisions of the said Act and consequently, the appellants would be entitled to automatic stay of enforcement of the award till the disposal of the said petitions."

21. In the present case not all of the above conclusions are relevant. What is, however, significant is the explanation of the law and in particular the expression "arbitral proceedings" occurring in Section 26 of the Amendment Act. In terms of Section 26 of the Amendment Act, the Act as amended would apply as long as parties "otherwise agree" that the Amendment Act "shall apply in relation to arbitration proceedings commenced on or after the date of amendment of this Act."

22. The Court is unable to accept the submission on behalf of the Respondent that in terms of the wordings of Clause 56 of the GCC as amended the parties have to hereafter again agree that the Act as amended with effect from 23rd October 2015 would apply to them. The words "any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration..." satisfies the requirement of Section 26 of there being an agreement between the parties that the Act as amended with effect from 23rd October 2015 will apply. The Court is not prepared to draw the fine distinction

between "agree" and "agreed". Once the amendment to the clause clearly stated that all statutory modifications and re-enactments would apply, then there is no need for further agreement in that respect after 23rd October 2015. The plea of the Respondent in this regard is rejected.

23. The net result is that Section 12(5) as amended with effect from 23rd October 2015 would apply. Section 12 (5) clearly prohibits the employee of one of the parties from being an Arbitrator. This would straightway disqualify Mr. Kher who happens to be a serving GM of the Respondent. Therefore it is to no avail that the Respondent has by its letter dated 21st August 2016 appointed Mr. Kher as an Arbitrator to adjudicate the Arbitration Case Nos. 1 of 2013 and 1 of 2014. His mandate stands terminated.

24. The arbitration clause does specify that the venue of the arbitration should be in Allahabad. It is plain that the Respondent themselves have no problem in arbitration taking place in Delhi. In fact Mr. Narsingh gave the new address of correspondence as the Delhi address and the Respondent has its office in Delhi and the witness examination has already concluded. For the mere completion of the arbitration from the stage where it was, the arbitration could well take place in Delhi particularly since there is no contrary intention appearing anywhere in the contract. The office of the Respondent is in fact located in Delhi.

25. For all the aforementioned reasons, the Court appoints Justice G.S. Singhvi, a former judge of the Supreme Court of India, as sole Arbitrator to adjudicate the disputes between the parties, including their claims and counterclaims. Justice Singhvi will fix his own terms and communicate them to the parties. The Act as amended with effect from 23rd October 2015 would apply to the proceedings which would continue from the stage at which they were on 1st June 2016. It will be the responsibility of the Respondent to collect the entire arbitral record and place it before Justice Singhvi within a period of four weeks.

26. The parties will appear before Justice Singhvi on 8th May 2017 at 4 pm or on any other date as the learned Arbitrator may find convenient and which will be communicated to the parties at least one week in advance. The venue for the first hearing will be arranged by the Respondent and the expenses thereof shall be shared equally by the parties.

27. The petition is disposed of in the above terms but, in the circumstances, with no order as to costs. A certified copy of this order be delivered forthwith by a Special Messenger to Justice Singhvi.