(2004) 4 JCR 786

Jharkhand High Court

Case No: Writ Petition (C) No. 4755 of 2004

Sharda Construction		APPELLANT
	Vs	
State of Jharkhand and Others		RESPONDENT

Date of Decision: Nov. 5, 2004

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11(6)

Citation: (2004) 4 JCR 786

Hon'ble Judges: S.J. Mukhopadhaya, Acting C.J.; M.Y. Eqbal, J

Bench: Division Bench

Advocate: Navniti Prasad Singh, Anil Choudhary, R.K. Sinha and R.K. Prasad, for the Appellant; A.K. Sinha, AG and S. Saurabh, JC to AG, for the Respondent

Final Decision: Allowed

Judgement

M.Y. Eqbal, J.
This writ application is directed, against the order dated 20.8.2004 passed by the learned Chief Justice of this Court in AA Nos. 3 and 5 of 2004 in purported exercise of power u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") whereby the application filed by the petitioner for appointment of Arbitrator has been rejected.

2. The facts of the case lie in a narrow compass:

The petitioner-firm was allotted three contracts relating to widening of road at National Highway No 23 at different stages. These works were identified as job Nos. 515, 516 and 538. Petitioner"s case is that it completed both the works within the stipulated time to the satisfaction of the respondents-authorities, but due to some poor sanctioned specification in the agreement itself, the construction work which was carried out, subsequently became damaged and petitioner was directed to repair the same even after the lapse of

liability period and accordingly almost all the repair work was completed. Thereafter dispute between the parties cropped up and since then the respondent- authorities have been trying to shift their liability on the petitioner. The respondents-authorities have made the entire payment for job No. 538 except Rs, 20 lacs which was adjusted against the excess payment for the work relating to job No. 516. The petitioner alleged to have requested the respondents to finalise the entire bills of job Nos. 515 and 516 and close the agreement. It also requested not to make any deduction of any amount from the bills. The respondents having disputed the claim of the petitioner contended that they were entitled to make adjustment as the contractor had breached the agreement.

3. The petitioner thereafter filed a writ petitioner being WPG No. 6754 of 2002 for a direction Lo the respondents to close the agreement, of job Nos. 515 and 516 after final accounting and also for quashing the order of adjustment. The said writ application was disposed of on 31.1.2003 by this Court with the observation that, the matter is indirectly a money claim and, therefore, the writ petitioner can avail the alternative remedy of arbitration or may move the civil Court of competent jurisdiction. The petitioner challenged the said order by filing Letters Patent Appeal being LPA No. 119 of 2003 which was dismissed on 16.1.2004, The petitioner, thereafter, filed applications u/s 11(6) of the said Act which were registered as AA No. 3 of 2004 and AA No. 5 of 2004 seeking a direction for appointment of an Arbitrator as per Clause 23 of the contract entered into between the parties. The said applications were rejected by the learned Chief Justice by passing the impugned order.

4. The learned Chief Justice held that. there was no valid or legal arbitration clause in the contract entered into by the petitioner and, therefore, there was no question of referring the dispute for arbitration.

5. Mr. Navniti Prasad Singh, learned counsel appearing for the petitioner assailed the impugned order as being contrary to law and the facts available on record. Learned counsel submitted that Clause 23 of the contract entered into between the parties contained an arbitration clause and since disputes have arisen, the Chief Justice has no option but to appoint Arbitrator and refer the dispute for adjudication by the Arbitrator. Learned counsel further submitted that no adjudication by the Chief Justice or his nominee is contemplated in such an application and even the question whether there did exist arbitration clause, had to be left Lo the Arbitrator to adjudicate upon. Learned counsel submitted that the question with regard to existence or validity of the arbitration clause of the contract-can be decided only by the Arbitrator and not in a proceeding u/s 11(6) of the said Act. In this connection learned counsel relied upon the decisions of the Supreme Court in the case of Konkan Railway Corporation Ltd. v. Rani Construction Private (2000) 8 SCC 159. and in the latter constitution Bench judgment in the said case Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., .

6. Learned Advocate General, on the other hand, drawn our attention to the counter affidavit filed by the respondent and submitted that arbitration Clause. No. 23 of the

contract stood deleted by virtue of a Government Order dated 38.11.1992. which was duly published in the Gazette dated 18.11.1992. The said notification provided that with effect from the date of notification, Clause 23 of the contract in Form-2 will stand deleted. According to the learned counsel, in view of the Gazette notification duly published, there existed no arbitration clause and, therefore, the Chief Justice rightly rejected the application and refused to exercise power of performing the duty of appointing Arbitrator u/s 11(6) of the said Act. Learned counsel further submitted that merely because old forms were used and Clause 23 was not individually struck-out from the said contract, the petitioner can not take the benefit of the clause. In this regard learned counsel relied upon the decision of the Supreme Court in the case; of Tamil Nadu Electricity Board Vs. Sumathi and Others, , in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, .

7. Before appreciating the submissions of the learned counsels, I would first like to refer the finding recorded by the learned Chief Justice while rejecting the application of the petitioner u/s 11(6) of the said Act. Learned Chief Justice decided the issue as to whether there is an arbitration agreement whereby parties have agreed to resolve; the disputes by appointing an Arbitrator. His Lordship observing as under :-

"The question then is whether there is an arbitration agreement in these eases and the parties have agreed on the procedure for resolution of the disputes and one of the parties had failed to act, justifying my interference by appointing an Arbitrator u/s 11(6) of the Act, I find that the contract entered into by the petitioner with the respondents if Form F2 contract. In this Form F2 contract, there was a clause for arbitration, which was Clause 23. But pursuant to the decision taken in that behalf by the Government. Clause 23 was deleted from all Form F2 contracts, This was done by issuing an appropriate Gazette notification at the appropriate time. The notification was on 18.1 1.1992. The contracts relied on by the petitioner were all entered into in the year 1998-99, long after the deletion of Clause 23 from all Form F2 contracts. Merely because in the Form F2 contract signed by the petitioner and the concerned Engineer. Clause 23 had not been struck-out in my view, would not make any difference. That Clause 23 left in the old forms used and left un-struck has no efficacy in view of the Gazette notification deleting clause 23 from all Form K2 contracts. The petitioner as a contractor is bound by that deletion. Therefore. I am inclined to agree with the submission of counsel for the respondents that there was no valid or live arbitration clause in the contracts entered into by the petitioner and. therefore, there was no question of this Court postulating that one of the parties had failed to perform the obligation cast on him by the arbitration clause. I am not impressed by the argument of learned counsel for the petitioner that there was no Gazette notification or a due publication by way of a Gazette notification. When a notification is duly published in the Official Gazette, in the absence of any communication to the contrary in the notification itself, it shall come into force with effect, from the date of that notification. There is no obligation on the part of the Government to communicate the Gazette notification to each and every individual, who might be affected by the notification. Mere,

when the petitioner entered into the agreement in Form F2 with the Government, he being an experienced contractor, is normally expected to know of the notification published in the year 1992 in the Official Gazette deleting the arbitration clause in all Form F2 agreements. Apart from this, as I have noticed. I am not in a position to accept the case that the publication of the Gazette notification in the due manner is not enough notice of the deletion of the arbitration clause to the public in general. Publication in the Official Gazette is normally the mode of publication of any Government notification. Therefore, the argument that this Court must proceed on the basis that the arbitration clause continues to subsist cannot be accepted."

8. Admittedly, in Form F2 contract entered into between the parties there is an arbitration clause as Clause 23 which reads as under :-

"In any case dispute or difference shall arise between the parties or either of there upon any question relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned or as to the quality of workmanship or materials used on the work, or as be the construction of any of the conditions or any clause or thins there is contained, or as to any question, claim, rights on liabilities of the parties, or any clause or thing whatsoever, in my way arising out of, or relating to the contract, designs drawing, specification, estimates, instructions order, or these conditions, or otherwise concerning the work, or the execution, or failure to execute the same whether arising during the progress of the work, or as to the breach or this contract, then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be referred to the Superintending Engineer of the circle and his decision thereon shall be final conclusive and binding on all the parties."

9. The contract was entered into in 1998-99. Although by notification dated 18.11.1992 Clause 23 of Form F2 contract alleged to have been deleted but the said Clause 23 was not struck out from the said contract entered into between the parties, Prima facie therefore in the contact between the parties there is an arbitration clause for referring the disputes to Arbitrator for adjudication. According to the respondents since Clause 23 stood deleted by general notification dated 18.11.1992 there does not exists arbitration clause in the contract. In other words respondents have challenged the existence and validity of the arbitration agreement as contained in Clause 23 of the said contract. The question therefore that falls for consideration is whether the learned Chief Justice is correct in law in holding that the question whether there exists an arbitration clause is to be looked into and to be decided by the Chief Justice or his nominee and cannot be left to the Arbitrator to decide the existence of the arbitration agreement.

10. Prior to enactment of Arbitration and Conciliation Act, 1996 the law which held the filed on the subject of arbitration was the Arbitration Act, 1940. In the said Act, 1940, ordinarily an Arbitrator had no power to decide on his own jurisdiction. The Supreme Court in the case of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, . observed that ordinarily as a rule an Arbitrator cannot clothe himself with power

to decide the question of his own jurisdiction and it will be for the Court to decide those question, but there is nothing to prevent the parties from investing him with power to decide the those question.

11. The earlier law has been completely reversed by the said Act, 1996, according to which the power has been vested with the Arbitral Tribunal to decide objection with respect to the existence or validity of the arbitration agreement. Section 16 of the said Act reads as under :-

"Competence of Arbitral Tribunal to rule on its jurisdiction.-(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence of validity of the arbitration agreement, and for that purpose :-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the in- validity of the arbitration clause.

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment, of, an Arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The Arbitral Tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The Arbitral Tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and. where the Arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

12. The aforesaid section correspondence to Article 16 of the of UNCITRAL Model Law and also to Article 21 of UNCITRAL Arbitration Rules. It completely reversed the law, on the subject of jurisdiction which had held the field until the repeal of Arbitration Act, 1940. For better appreciation, Article 16 of UNCITRAL Model Law is reproduced herein below ;-

"Article 16. Competence of Arbitral Tribunal to rule on its jurisdiction.-(1) The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the

existence or validity of the arbitration agreement. For that purpose an arbitration clause which forma part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A pica that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that be has appointed, or participated in the appointment of, an Arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The Arbitral Tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the Arbitral Tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the Court specified in Article 6 to decide the matter which decision shall be subject to no appeal, while such a request is pending, the Arbitral Tribunal may continue the arbitral proceedings and make an award.

13. Similarly, for better appreciation Article 21, of UNCITRAL Arbitration" Rules is also reproduced herein below :-

"(1) The Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to "the existence or validity of the arbitration clause or of the separate arbitration agreement.

(2) The Arbitral Tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(3) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counterclaim in the reply to the counter-claim.

(4) In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in their final award."

14. From bare perusal of the aforesaid provision, it is manifest that the legislature has specifically conferred power on the Arbitrator himself to decide the issue of his jurisdiction or the existence of arbitration agreement. Consequently, the jurisdiction of the Chief

Justice u/s 11(6) of the Act being merely administrative and not adjudicatory. the Chief Justice or his nominee can not usurp the said jurisdiction or authority. It is well settled that when the Act specifically confers power on a specific authority to decide an issue, it implies that only such authority has the necessary power and all other authorities are excluded from exercising that power by necessary implication.

15. In the Constitution Bench judgment the in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., the Supreme Court reconsidered the earlier three Bench judgment on the question of nature of the order that is to be passed by the Chief Justice or his nominee in exercise of power u/s 11(6) of the Act and the remedy upon the person concerned if his request for appointment of Arbitrator is turned down by the learned Chief Justice or his nominee for some reason or other. Their Lordships of the Constitution Bench while deciding the issue also considered the scope of Section 16 of the said Act and observed as under :-

"It might also be that in a given case the Chief Justice or his designate may have nominated an Arbitrator although the period of thirty days had not expired. If so, the Arbitrator Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the Arbitral Tribunal"s authority u/s 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designated had nominated an Arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."

16. In the case of Food Corporation of India Vs. Indian Council of Arbitration and Others etc. etc., their Lordships reiterated the law with respect to the power of the Chief Justice or his nominee u/s 11(6) of the said Act and held that the decision of the Chief Justice or his nominee is merely an administrative order, the nature of the function performed by them being essentially to aid the constitution of an Arbitral Tribunal, just by appointing an Arbitrator. Even in case of refusal of the request to make an appointment of an Arbitrator, there is no involvement of any judicial or quasi-judicial function. Their Lordships observed :-

"So far as the questions relating to the relevant scope, meaning, purport and the effect of the arbitration clause found in the agreement between parties are concerned and the legality, or propriety of the constitution of an Arbitral Tribunal, in the teeth of Rules 21 and 22 of the ICA Rules as well as the question relating to alleged contradictions or inconsistencies among those provisions are matters which go to the jurisdiction of the Arbitral Tribunal or as to the existence or validity of the arbitration agreement itself which, as enjoined u/s 16 of the 1996 Act, falls within the jurisdiction of the Arbitral Tribunal

constituted, which. has been enabled to "adjudicate on such questions also before embarking upon an exercise to decide the dispute between the parties or decide them simultaneously. This is the* inescapable position which inevitably flows not only from the statutory provisions contained in Section 16 of the 1996 Act, but that such position came to be firmly settled by more than one decision of this Court, including the one rendered by the Constitution Bench, noticed above. Though elaborate and extensive arguments have been urged on both sides to justify their respective stands or to justify the orders of the ICA and the High Court in these cases, we refrain from expressing any opinion on the same out of deference to the -consistent view of this Court that such decisions have to be made or taken only by the Arbitral Tribunal itself to which the reference had been made, and avoid committing the very same mistake committed by the High Court.

17. Their Lordships further observed :-

"The fact that mere is an agreement between parties to have their disputes resolved by reference to an arbitration and that it should be through the ICA and in accordance with the rules or procedure: prescribed by the ICA is not in controversy. As indicated earlier, even assuming without accepting for purposes of consideration that there is any infirmity in the arbitration clause which goes to undermine as claimed by the respondents the legality, propriety and validity of the constitution of the Tribunal and/or even if there be any abjections as to the existence of an enforceable or valid arbitration agreement, it has to be adjudicated by the very Arbitral Tribunal after a reference is made to it on being so constituted and it is not for the ICA or the learned Judge in the High Court to undertake this impermissible adjudicatory task of ad- judging highly contentious issues between the parties. As observed by the Constitution Bench of this Court, there is nothing in Section 11 of the 1996 Act that requires the party other than the party making the request to be noticed and that it neither does contemplate a response from the other party nor contemplates any decisions by the Chief Justice or his nominee on any controversy that the other party may raise, even in regard to its failure to appoint an Arbitrator within the stipulated period. The legislative intent underlying the 1996 Act is to minimize the supervisory roles of Courts in the arbitral process and nominate/appoint the Arbitrator without wasting time, leaving all contentious issues to be urged and agitated before the Arbitral Tribunal itself. Even, under the old law, common sense approach alone was commended for being adopted in construing an arbitration clause more to perpetuate the intention of parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thwart it by adopting a narrow, pedantic and legalistic interpretation."

18. Similarly, in the case of State of Orissa and Others Vs. Gokulananda Jena, , their Lordships held :-

"However, we must notice that in view of Section 16 read with Sections 12 and 13 of the Act, as interpreted by the Constitution Bench of this Court in Konkan Railway almost all disputes which Could be presently contemplated can be raised and agitated before the

Arbitrator appointed by the Designated Judge u/s 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the Arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy us available before the Arbitrator, a writ Court normally would not entertain a challenge to an order of the Designated Judge made u/s 11(6) of the Act which includes considering the question of jurisdiction of the Arbitrator himself. Therefore, in our view even though a writ petition under Article 226 of the Constitution is available to an aggrieved party, ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself.

19. In the light of the law laid down by the Supreme Court, in my considered opinion, learned Chief Justice has erred in law in adjudicating upon the question of existence and validity of the arbitration agreement contained in the contract. As noticed above, prima facie there is an arbitration clause contained in the contract entered into between the parties. The stand of the petitioner is that neither the notification deleting the arbitration clause was communicated by the respondents nor the petitioners were aware about the deletion of arbitration clause by Gazette notification. On the other hand, the stand of the respondents is that Clause 23 of the contract which is the arbitration clause stood deleted by Gazette notification in the year 1992 but because of inadvertence such clause was not struck-out from the contract. In my opinion, all these questions relates to existence and validity of arbitration agreement is to be adjudicated upon only by Arbitral Tribunal. It is beyond the power of the learned Chief Justice to have gone into these questions and adjudicate upon the issue of existence and validity of the arbitration clause.

20. Admittedly. Clause 23 which is the arbitration clause exists in the contract entered into between the parties. The said contract is not a statutory contract which was signed by both the parties. Whether the arbitration clause in the said contract which has no statutory force can be said to have been deleted merely because of some executive order issued by the Government by a notification, is also an issue to be considered while deciding the existence and validity of the arbitration agreement contained in the said contract. In my considered opinion, therefore, the finding of the learned Chief Justice on this issue is wholly without jurisdiction.

21. This writ application is, therefore. allowed and the impugned order passed by the learned Chief Justice is set aside. Consequently, the application filed by the petitioner under Sub-section (6) of the Section 11 of the Arbitration and Conciliation Act, 1996 is allowed and the disputes is referred to the named Arbitrator for adjudication of the dispute between the parties along with the dispute with regard to existence and validity of the arbitration agreement contained in the contract.