

(2002) 07 AP CK 0002

Andhra Pradesh High Court

Case No: Writ Petition No. 7712 of 2002

National Buildings Construction
Corporation Limited and Others

APPELLANT

Vs

M.V.V. Sathyanarayana and
Another

RESPONDENT

Date of Decision: July 17, 2002

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11(6)
- Constitution of India, 1950 - Article 226

Citation: (2003) 2 ALT 689

Hon'ble Judges: AR. Lakshmanan, C.J; Ghulam Mohammed, J

Bench: Division Bench

Advocate: Advocate General and E. Kalyan Ram, for the Appellant; Prasada Rao, for the Respondent

Judgement

AR. Lakshmanan, C.J.

The writ petition was filed to quash the order dated 17-8-2001 in arbitration application No. 48 of 2001 as illegal and contrary to the provisions of the Arbitration and Conciliation Act, 1996.

2. The facts in brief are as follows:

The petitioner which is a Government of India Undertaking inter alia carries business of construction activities namely, roads, buildings, bridges, office complexes etc., having its Corporate and registered Office at Lodhi Road, New Delhi. The respondent was awarded the work of construction of parallel bridge at Muslim Jung, Secunderabad. The total value of the tender work was approximately fixed at Rs. 2.04 crores. Agreement was entered into between the petitioner and the respondent on 31-7-1999. Clause 22 of the said agreement provides for arbitration in the event of dispute between the parties. It is useful to refer to the said Clause 22

hereunder:

All disputes, differences or questions arising out of or in connection with this agreement between the contractor and the corporation (except those disputes and differences or questions where the decision of the particular authority is stated to be final) shall be referred to sole arbitration of an engineer of the Corporation (not below the rank of the Project Manager) to be appointed by Chairman-cum-Managing Director of the Corporation whose decision shall be final and binding on the parties. If the abovementioned arbitrator resigns, abovementioned appointing authority shall appoint another arbitrator.

3. As the respondent was unable to carry out the work in accordance with the time schedule and in terms of the agreement despite various notices and reminders, the petitioner at the first instance terminated the contract vide order dated 29-1-2001. That subsequent to the negotiation and promise made by the respondent to accelerate the progress of work and timely completion, the petitioner on 7-2-2001 revoked the order of termination.

4. The respondent raised various disputes and invoked the arbitration clause vide notice dated 14-4-2001 to the Chairman and Managing Director, N.B.C.C. (hereinafter referred to as the Appointing Authority) to appoint an arbitrator in terms of Clause 22 of the Agreement and refer the matter to arbitration for adjudication of the disputes. The appointing authority in terms of the arbitration clause vide order dated 4-5-2001 appointed Sri A.K. Maiti, General Manager of NBCC Limited, South Zone, Hyderabad as a sole arbitrator to decide and make his reasoned award regarding the claims/disputes raised by the claimant respondent and the counter claim of the petitioner. Thereby the Appointing Authority has duly acted upon as required under Clause 22 of the Agreement. For all purposes the appointing authority has referred the disputes for adjudication to the arbitrator. The respondent sent a letter dated 8-5-2001 to the appointing authority (CMD, NBCC) to appoint another officer in place of Sri A.K. Maiti on the ground that Sri Maiti was the Officer in-charge of the work under execution and dispute. The petitioner through letter dated 23-5-2001 intimated to the respondent that it has no objection to appoint another arbitrator but the respondent should bear all the cost of arbitration proceedings which were to be conducted outside Hyderabad in the event of appointment of another arbitrator outside Hyderabad as desired by the respondent No. 1 herein. The respondent through its letter dated 29-5-2001 agreed for appointment of any person as arbitrator but refused to accept the suggestion of the petitioner to bear the cost of arbitration. The respondent requested for appointment of the arbitrator at the earliest. The work of the respondent was finally terminated by the petitioner through order dated 16-6-2001 in accordance with the terms of the agreement as the respondent failed and neglected to complete the work as per the terms of the agreement and subsequent assurances given by him. The appointing authority through order dated 9-7-2001 changed the arbitrator

already appointed and appointed Sri B.B. Kumar, Chief Engineer, NBCC Ltd., New Delhi as arbitrator. The respondent filed A.A.No. 48 of 2001 before this Court u/s 11(6) of the Arbitration and Conciliation Act, 1996 on the ground that the petitioner has forfeited the right to appoint arbitrator in terms of the contract and prayed for appointment of an independent arbitrator in terms of Section 11(6) of the said Act. On 20-7-2001, notice was ordered in the said A.A. and the matter was posted to 17-8-2001 for appearance of this petitioner. The Hon"ble Chief Justice Sri S.B. Sinha disposed of the matter vide impugned order dated 17-8-2001 on misapprehension of facts that the appointing authority has forfeited his right to appoint an arbitrator. The Hon"ble Chief Justice while allowing the arbitration application had appointed Sri M.R.K. Choudhary, senior advocate of the High Court as a sole arbitrator. The order of the Hon"ble Chief Justice reads as under:

Having heard the learned Counsel for the parties, I am of the opinion that as the respondent-Corporation had not appointed an arbitrator immediately after the demand was made, it would be deemed that it has waived the right to appoint its own arbitrator. An arbitrator is said to have been appointed on 9-7-2001 by which time the present application has been filed for appointment of an arbitrator as no arbitrator was appointed prior thereto.

In view of the fact that the claim of the petitioner is arbitrable one as the respondents have failed to appoint the arbitrator in time, this Court in exercise of its jurisdiction u/s 11(6) of the Arbitration and Conciliation Act, 1996 appoints Sri M.R.K. Choudhary, senior Advocate of this Court as an arbitrator on usual terms.

5. Aggrieved by the aforesaid order, the petitioner has preferred SLP No. 18807 of 2001 before the Hon"ble Supreme Court of India and the Supreme Court was pleased to issue notice and stayed the proceedings before the arbitrator. But in view of the Constitution Bench decision in [Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.,](#) , the Hon"ble Supreme Court dismissed the SLP as not maintainable by giving the liberty to the petitioner to approach appropriate forum challenging the order dated 17-8-2001. In pursuance of the order of the Supreme Court dated 30-1-2002, the present writ petition is filed before this Court. The order of the Supreme Court reads as under:

In view of the decision of Constitution Bench in [Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.,](#) , the petition is dismissed as not maintainable.

Needless to say that the petitioner is at liberty to have such remedy against the impugned order as may be available to him under the law.

6. A Division Bench of this Court (B. Sudershan Reddy, J. and V. Eswaraiah, J.) while referring the matter to this Bench observed:

In our considered opinion, the answer to the question as to whether the order passed by the learned Chief Justice or his nominee Judge at all can be reviewed by this Court in exercise of its judicial review jurisdiction under Article 226 of the Constitution of India to a very large extent depends upon the nature of the order passed by the learned Chief Justice or his nominee Judge u/s 11(6) of the Act.

The view taken by the subsequent Division Benches appears to be at variance with the decision rendered by a Division Bench of this Court in [Satyam Constructions Ltd. Vs. Registrar \(Judicial\), High Court of A.P.](#), . That apart, the issue may now have to be decided in the light of the judgment of a Constitutional Bench of the Supreme Court in M/s. Konkan Railway Corpn., (1 supra), the benefit of which was not obviously available to any one of the Division Benches while dealing with the interpretation of Section 11(6) of the Act.

In the circumstances, the Registry is directed to place the matter before the Hon"ble the Chief Justice for appropriate directions for placing it before an appropriate Bench to resolve the issues that fall for consideration viz.,

(1) What is the nature of the order that is passed by the Chief Justice or his nominee in exercise of the power under Sub-section (6) of Section 11 of the Act?

(2) Whether the remedy under Article 226 of the Constitution of India is not available to judicially review the order passed by the Chief Justice or his nominee in exercise of the power under Sub-section (6) of Section 11 of the Act?

(3) What are the parameters of judicial review if the remedy under Article 226 of the Constitution of India is available to judicially review the order passed by the Chief Justice or his nominee in exercise of the power under Sub-section (6) of Section 11 of the Act?

7. The respondent filed the counter affidavit stating that the writ petition is not maintainable in view of the settled law and on this ground alone, the writ petition is liable to be dismissed in limine; that the writ petition is vexatious and is filed only to drag on the matter before the arbitrator and that the petitioner did not appoint the arbitrator even after two months and therefore, the respondent has rightly invoked Section 11(6) of the Act.

8. Thus on the date of filing the arbitration application, there was no appointment made by the petitioner in respect to the request of the respondent. The invocation of Section 11(6) of the Arbitration Act by the respondent was proper and in accordance with the provisions of the Act. The appointment of earlier arbitrator is revoked by the petitioner's letter dated 23-5-2001 and from that date till filing of Arbitration Application No. 48 of 2001, there was no appointed arbitrator and the finding of the Hon"ble Chief Justice cannot be faulted with and needs no interference by this Court. It is submitted that the judgments relied on by the petitioner have no relevance in view of the judgment of the Supreme Court in

Konkan Railways (1 supra) affirming the decision in [Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.,](#) . The learned counsel submitted compilation of decisions including the two decisions in M/s. Konkan Railways (supra).

9. We heard Sri T. Ananta Babu, learned Advocate General for the petitioner and Sri V. Prasada Rao, learned counsel for the respondent No. 1.

10. The learned Advocate General submitted that the then Hon"ble Chief Justice ought not have entertained the application u/s 11(6) of the Act without appreciating that the respondent had no cause of action to sustain the said application since the petitioner did not fail to act as contemplated u/s 11(6) of the Act. He further submitted that the application is not maintainable in law especially when the arbitrator is duly appointed in terms of the arbitration clause and in terms of provisions of the said Act. Furthermore, the respondent had categorically stated vide letters dated 8-5-2001, 29-5-2001 and 18-6-2001 that it has no objection if any other person is appointed as arbitrator in place of Sri A.K. Maiti and these letters do not amount to invocation of Arbitration Clause for appointment of arbitrator. The learned Advocate General further submitted that the learned Chief Justice ought to have appreciated that impugned order issued by him is wholly without jurisdiction.

11. The learned counsel further submits that this Court would not have held that "the respondent Corporation had not appointed arbitrator immediately after demand was made, it would be deemed that it has waived the right to appoint its own arbitrator" and contends that the finding is ex facie erroneous, contradictory and suffer from error on the face of record as admittedly arbitrator was appointed by petitioner on 4-5-2001 within 30 days from the date of receipt of the notice dated 14-4-2001 invoking the arbitration. In fact on the specific request of the respondent through letters dt. 8-5-2001 and 18-6-2001 duly changed the arbitrator by appointing Sri B.B. Kumar, Chief Engineer as an arbitrator through orders dt. 9-7-2001. The appointing authority had also referred the additional disputes/claims raised by the respondent in letter dt. 18-6-2001 to the arbitrator. The learned Advocate General in support of his contentions placed reliance on [Bhupinder Singh Bindra Vs. Union of India and another](#) , Konkan Railway Corporation Ltd., v. Rani Construction Pvt. Ltd., (1 supra) (30-1-2002), Konkan Railway Corporation v. Mehul Constructions (3 supra) (21-8-2000), [Union of India Vs. Vengamamba Engineering Co., Juputi, Krishna Dist. and another](#) ,

12. In this context, we may also usefully refer to the decisions rendered by this Court in [Union of India and Others Vs. Vijayalakshmi Enterprises and Another](#) , [Chief Project Manager, Railway Electrification Vs. Electrical Constructions and Equipment Co. Ltd. and Another](#) , Satyam Constructions Limited v. Registrar (Judicial), High Court of A.P. (2 supra) (1-10-1999).

13. The learned Counsel for the respondent submitted that admittedly as on the date of filing of the A.A. on 9-7-2001, there was no arbitrator appointed by the petitioner and therefore, the finding of the Hon"ble Chief Justice in this regard needs no interference by this Court. He would further submit that the writ petition is not maintainable in view of the law laid down by the Apex Court and on this ground alone, the writ petition is liable to be dismissed in limine. It is also submitted that as the petitioner did not appoint the arbitrator even after two months, the respondent rightly invoked Section 11(6) of the Act and requested the Chief Justice to appoint an independent arbitrator. When the matter came up for consideration on 17-8-2001, the appointment of Sri B.B. Kumar by the petitioner was brought to the notice of the Hon"ble Chief Justice and the Hon"ble Chief Justice was of the view that the said appointment is no appointment as the arbitrator was appointed beyond thirty days and after filing of the application. Thus the finding of the Hon"ble Chief Justice cannot be faulted with and needs no interference by this Court. The submission to the said effect has been made in para 6 of the counter-affidavit filed by the respondent.

14. We have gone through the entire pleadings and the decisions cited by both the parties and also annexures filed along with the writ petition. Before proceeding further, it is useful to refer to the correspondence that got exchanged between the parties. The first letter dated 14-4-2001 from the respondent herein addressed to the petitioner mentions that certain disputes have arisen with regard to the payment of bills, quantity of work done, loss sustained by virtue of idling of labour and hike in various commodities etc. Therefore, without prejudice to his rights, he called upon the petitioner herein to refer the matter for arbitration to resolve the disputes as per the terms of the agreement within 15 days failing which the respondent herein will seek appropriate relief in appropriate forum holding the petitioner liable for all the costs and consequences arising therein. On 4-5-2001, the petitioner passed an order appointing Sri A.K. Maiti, General Manager, NBCC Ltd., as sole Arbitrator to decide and make his reasoned award regarding the claims/disputes raised by the claimant through letter dated 14-4-2001 and the counter claims of the Corporation. This letter was followed by another letter dated 8-5-2001 by the respondent herein expressing its grievance for the prompt action taken by the petitioner herein in appointing Arbitrator Sri A.K. Maiti as he is the officer in-charge of the work under execution and under dispute. Therefore, the respondent requested the petitioner to appoint any other Officer who has neither expressed his views on the subject work or who is not connected with the agreement under dispute to have fair hearing for both the parties. The petitioner-Corporation sent the reply dated 23-5-2001 stating that the CMD is agreeable to appoint a new arbitrator in place of Sri A.K. Maiti provided the respondent has no objection if the proceedings are held outside Hyderabad and that the costs and expenses for the arbitration shall be borne by him. On 29th May, 2001, the respondent sent the reply in the following terms:

M.V.V. Satyanarayana,

B.Com.,

Special Class Contractor.

Dated: 29-5-2001.

To

The Chairman-cum-Managing Director,

National Building Construction Corporation Ltd., Integrated Office Complex, Lodhi Road,

New Delhi: 110003.

Sir,

Sub: Construction of Parallel Bridge at Muslimjung, Hyderabad-Agreement No. NBCC/RUB/ AGM/3 dated 31-7-1999.

Ref: (1) Our Letter dated 14-4-2001, 8-5-2001.

(2) Your Letter No. Engg (CC)/ Arbhn./275/506 dated 23-5-2001 received on 28-05-2001.

While thanking for considering my letter dated 8-5-2001, I am agreeable for appointment of any person as Arbitrator, but others suggestions with regard to the place of arbitration and the costs thereon are not acceptable to me for the following reasons:

(1) The agreement was entered into and signed at Hyderabad.

(2) The works are being executed at Hyderabad.

(3) The site of execution will be easily accessible. If the arbitration is conducted at Hyderabad.

(4) If the award is to be questioned a jurisdiction point may arise and finally,

(5) It is for the arbitrator to decide about the costs of the proceedings.

In view of the above, I would be grateful if the arbitrator is appointed at the earliest and the matter is settled amicably.

Thanking you,

Yours Truly,

Sd. M.V.V. Satyanarayana.

Copy to Chief Manager (Law). This is for your information with regard to your letter cited above. Kindly do the needful.

15. Again by letter dated 18-6-2001, the respondent requested the petitioner to include further claims. On 9-7-2001, the petitioner-Corporation passed the following order acceding to the request of the respondent to change the Arbitrator. The letter is reproduced hereunder:

M.V.V. Satyanarayana,

B.Com.,

Special Class Contractor

Dated: 18-6-2001.

To

The Chairman-cum-Managing Director, National Building Construction Corporation Ltd., Integrated Office Complex, Lodhi Road, New Delhi: 110003.

Sir,

Sub: Construction of Parallel Bridge at Muslimjung, Hyderabad-Agreement No. NBCC/RUB/ AGM/3 dated 31-7-1999.

Ref: (1) Our Letter dated 14-4-2001, 8-5-2001 and 29-5-2001.

(2) Your Letter No. Engg (CC)/ Arbbtn./275/506 dated 23-5-2001 received on 28-5-2001.

(3) DPM Letter No. DPM/ROB/ HYD/2001/300 dated 13-5-2001.

(4) My reply to DPM's letter dated 13-6-2001.

With reference to the above cited matter please include the following as claim to declare the withdrawing the foundation work of P7 to P9 and abutment from the contract on risk and cost basis is arbitrary, illegal and void.

Kindly do the needful and oblige.

Thanking you,

Yours truly,

Sd. M.V.V. Satyanarayana.

16. From the above correspondence, the following undisputed facts would emerge:

31-7-1999 - An agreement was entered between the petitioner and the respondent.

29-1-2001 - The contract was terminated.

7-2-2001 - The termination order was revoked.

14-4-2001 - Respondent raised various disputes and invoked the arbitration clause.

4-5-2001 - The petitioner appointed Sri A.K. Maiti, General Manager, NBCC Limited., as the sole arbitrator thereby the appointing authority has duly acted as required under Clause 22 of the Agreement.

8-5-2001 - Respondent sent a letter to appoint another officer in place of Sri A.K. Maiti on the ground that Sri Maiti was the Officer in-charge of the work under execution and dispute.

23-5-2001 - The petitioner intimated the respondent that it has no objection to appoint another arbitrator, but the respondent would bear the costs of arbitration proceedings, which were to be conducted outside Hyderabad in the event of appointment of another arbitrator.

29-5-2001 - Respondent sent reply agreeing for the appointment of any other person as arbitrator, but refused to accept the suggestion to bear the cost of litigation.

16-6-2001 - The work of the respondent was finally terminated by the petitioner.

18-6-2001- The respondent sent a letter to the appointing authority requesting for the inclusion of some additional claims pertaining to the work after termination of the contract.

9-7-2001 - The appointing authority changed the arbitrator already appointed and appointed Sri B.B. Kumar, Chief Engineer, NBCC as new arbitrator.

9-7-2001 - Respondent filed A.A.No. 48 of 2001 u/s 11(6) of the Arbitration Act on the ground that the petitioner forfeited the right to appoint arbitrator in terms of the contract and prayed for appointment of an independent arbitrator in terms of Section 11(6) of the Act.

20-7-2001 - The Chief Justice ordered notice and posted the matter to 17-8-2001.

28-7-2001 - Petitioner received the notice in A.A.No. 48 of 2001 for appearance on 17-8-2001.

17-8-2001 - The Hon"ble Chief Justice disposed of the matter on misapprehension of the facts that the appointing authority has forfeited the right to appoint the arbitrator and appointed Sri M.R.K. Chaudhury, senior advocate as the arbitrator holding that "as the respondent-Corporation had not appointed arbitrator after the demands were made it would be deemed that it has waived the right to appoint its own arbitrator. An arbitrator is said to have been appointed on 9-7-2001 by which time the present application has been filed for the appointment of arbitrator as no arbitrator was appointed prior thereto."

17-8-2001 - Aggrieved by this order dated 17-8-2001, S.L.P.No. 18807 of 2001 was filed before the Hon"ble Supreme Court.

11-1-2002 - The Supreme Court ordered notice and stayed the proceedings.

18-3-2002 - The Supreme Court dismissed the SLP as not maintainable in view of the subsequent decision in *Konkan Railway Corporation Limited v. Rani Construction Private Limited*, (1 supra) by giving liberty to the petitioner to challenge the order dated 17-8-2001 before the appropriate forum.

17. From the above, it is seen that the order passed by the then Chief Justice is not correct and that the learned Chief Justice has passed the order without appreciating that the respondent had no cause of action to sustain the said application, since the petitioner did not fail to act as contemplated u/s 11(6) of the Act. We have extracted the findings of the learned Chief Justice in the above paras, which in our opinion are ex facie incorrect, contradictory and suffer from error on the face of the record. Admittedly, the arbitrator was appointed by the petitioner on 4-5-2001 within 30 days from the date of receipt of the notice dated 14-4-2001 invoking the arbitration clause. Again the arbitrator was duly changed at the instance of the respondent herein. In fact, the arbitrator was appointed much before that order u/s 11(6) of the Act. The petitioner had duly replaced the first arbitrator on 9-7-2001 by acting upon the request of the respondent's letters dated 8-5-2001 and 18-6-2001. Therefore, the right to appoint an arbitrator cannot be held to have been waived/ceased on mere filing of the application u/s 11(6) on 9-7-2001 which is clearly misconceived. The impugned order is contrary to law as laid down by Apex Court in *Bhupinder Singh Bindra v. Union of India* (4 supra) wherein it was held that "it is settled law that the Court cannot interpose and interdict the appointment of an arbitrator whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc., is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with consent".

18. The appointment of arbitrator by the Hon"ble Chief Justice is clearly contrary to the catena of decisions rendered by the Apex Court and also of this Court wherein it has been held that the terms of the agreement should also be given respect and the Court has no power or jurisdiction to take upon itself the duty/power of appointment of an arbitrator in disregard of the terms of the agreement. The appointment of the arbitrator by the Hon"ble Chief Justice is clearly contrary to the terms of the agreement and in clear disregard to the qualification required of the arbitrator in the agreement between the parties in securing the nomination of the arbitrator. Therefore, the impugned order is liable to be set aside in view of the judgment dated 30-1-2002 passed by the Constitution Bench in *Konkan Railway Corporation v. Rani Construction Private Limited* (1 supra) and *Konkan Railway Corporation v. Mehul Construction Company* (3 supra) wherein, it was held that "while discharging the functions under Sub-section (6), the Chief Justice or his nominee will be acting in his administrative capacity. The order of the learned Chief Justice is also not sustainable in view of the decision rendered in *Union of India v. Vijayalakshmi Enterprises* (6 supra). We have already referred to the other judgments which were all rendered prior to 31st January, 2002 i.e., the date of

decision of the Apex Court in *Konkan Railways Corporation Limited v. Rani Constructions* (1 supra) affirming the decision rendered in *Konkan Railways Corporation v. Mehul Constructions* (3 supra). In our opinion, the judicial review is the basic structure of the Constitution of India and when alternative efficacious remedy is not available, the writ jurisdiction of this Court can be invoked to set right the jurisdictional errors in the matter. We have already pointed out the errors committed by this Court in passing the impugned orders in the writ petition. We have in our discussion in the earlier part of this judgment clearly pointed out as to how the finding of the Hon"ble Chief Justice is ex facie incorrect, contradictory and suffers from the error on the face of the record as admittedly an arbitrator was appointed by the petitioner on 4-5-2001 within 30 days invoking the arbitration clause. We have therefore no hesitation in holding that the writ petition of this nature is maintainable when the parties to the arbitration application are in a position to point out this Court that the finding is ex facie incorrect and suffers from error on the face of the record. This writ petition can be entertained and error committed by the order in the arbitration application can be set right. Above all, the Hon"ble Supreme Court while disposing of the SLP also gave liberty to the petitioner to have such remedy against the impugned order as may be available to him under law.

19. In our opinion, the petitioner has no other efficacious remedy except to approach this Court by invoking its jurisdiction under Article, 226. The WP is therefore allowed and with utmost respect to the learned Chief Justice, we hold that the order suffers from error on the face of record and we accordingly quash the same and is contrary to the provisions of the Arbitration Act. Since the arbitrator has already been appointed, both the parties shall approach the arbitrator Sri B.B. Kumar, Chief Engineer and proceed further in accordance with law. Both the parties are at liberty to file additional and other documents that may be deemed necessary and the arbitrator Sri B.B. Kumar shall proceed further and dispose of the arbitration as expeditiously as possible. No costs.