(2009) 10 DEL CK 0362

Delhi High Court

Case No: F.A.O. (OS) No. 21 of 2008 and C.M. No''s. 606-607 of 2008

Airport Authority of India		APPELLANT
	Vs	
Hindustan Steel Works Construction Ltd.		RESPONDENT

Date of Decision: Oct. 15, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(6), 11(8), 16, 2

Hon'ble Judges: Vikramajit Sen, J; Rajiv Shakdher, J

Bench: Division Bench

Advocate: Amarendra Sharan, P.R. Tiwary and Amit Anand Tiwari, for the Appellant; C.M. Oberoi and Surekha Raman, for the Respondent

Judgement

Vikramajit Sen

1. This Appeal assails the Order of the learned Single Judge dated 1.8.2007 referring the disputes and claims made by the plaintiff, namely, Hindustan Steel Works Construction Limited, who is the Respondent before us, to the Permanent Machinery of Arbitrators (PMA). It is noteworthy that both the parties are ''public sector enterprises'' and hence ought to have respected and implemented the legal regime set-down by the Supreme Court in 1992 (61) ELT 3 (SC) It is indeed a matter of regret that the Appellant, who is the Defendant in the Suit, had elected not to do so and apart from spending large sums of monies in frivolous and needless litigation, has exhausted a large chunk of time available to the Courts, which we feel could have been better utilized.

2. In the impugned Order, the learned Single Judge has recorded the existence of an Arbitration Clause in the General Conditions of Contract (GCC) which empowers the Chairman, National Airport Authority (NAA) or the Administrative Head of the NAA to appoint the Sole Arbitrator. It appears that before the filing of the Suit, the plaintiff had made repeated efforts to have the disputes referred to Arbitration, all of which

met with no fruition due to the obduracy on the part of NAA. In the first instance, the Appellant/Defendant had called upon the plaintiff to make specific claims and when this was done, the request for arbitration was declined on the ground that since more than ninety days had elapsed, the request for arbitration contained in Clause 25 of GCC has been rendered ineffectual. At this juncture, the plaintiff addressed a communication dated 10.2.2005 to the Secretary, Department of Public Enterprises, requesting for a Reference of the claims to the PMA which declined to intervene on the specious ground that the Arbitration Clause did not contemplate a Reference of disputes to the PMA. If ONGC is properly and comprehensively understood, NAA should have welcomed the PMA as the forum for a resolution of its disputes as an alter ego, as it were, to the Cabinet Committee of Disputes. We have been informed that the PMA has, in the interregnum thereafter, issued notice to the parties hereto for entering and completing the arbitration process. A suggestion, however, was made by the PMA that the parties may agree to fresh Arbitration Clause empowering the PMA to enter upon the Reference. The plaintiffs request to this effect was declined by the Appellant/Defendant, leaving the former with no alternative but to file a suit for the recovery of Rupees 2,95,75,162/-.

3. In response to the Plaint, the Appellant made a complete turn around and has raised a Preliminary Objection pertaining to the alleged non-maintainability of the suit in view of the existence of the Arbitration Clause. The submission made before the learned Single Judge was that it was open to the plaintiff/Respondent to invoke the provisions of Section 11(b) of the Arbitration Act, 1996 (for short ''A & C Act'') for the purposes of appointment of an arbitrator. In the impugned Order it has been opined that once a Defendant has repudiated the arbitration agreement, the plaintiff could pursue either of the two options - firstly, to file a suit for recovery and secondly, to invoke Section 11 of the A & C Act. The learned Single Judge has applied the decisions of the Supreme Court in Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, and S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, to arrive at the conclusion that the appointment in terms of Section 25 of the GCC had been deliberately delayed, leaving it to the Court to adopt the option of appointing an arbitrator itself. Implementing the dicta in P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, , the learned Single Judge has referred the parties to arbitration in respect of all the claims of the plaintiff/Respondent under the aegis of the PMA.

4. Even in respect of this decision the Appellant has decided to file the present vexatious and indubitably time-barred Appeal. The gravamen of the ONGC, that disputes between public sector enterprises should not be brought to Court as a last resort, has accordingly been willfully challenged at every conceivable stage by the Appellant, thereby wasting scarce government resources and Court time. It would indeed be significant to make an inquiry of the legal costs incurred by the Appellant/Defendant in the course of this litigation. We have touched upon the merits of the case because we are, in the first instance, called upon to decide the

Appellant''s Application for condonation of delay in filing the Appeal.

5. The Application filed by the Appellant seeking condonation of delay is carelessly cryptic and blissfully devoid of necessary details. The non-exercise of mind is palpably clear from the statement made in paragraph 4 of the Application which is to the effect that - "The Petitioner most humbly pray that the delay in filing SLP may be condoned in the interest of Justice." The narration of facts, which may be germane for the Court to reach a decision whether or not to condone the delay in filing the Appeal, are as follows:

2.(a) The Hon''ble High Court delivered its judgment on 1.8.2007. It is submitted that the application for certified copy of the impugned order was moved on 3.8.2007 and the certified copy was made ready on 18.9.2007. The Advocate sent the copy to department of law, Airport Authority of India and thereafter the Department of Law sent the copy to Directorate of Engineering Southern Region. On 18.10.2007 General Manager (Engg.) informed to the General Manager Airports Authority of India. Since the present matter is purely a legal issue, therefore only legal wing can take final decision.

(b) It is after that file has been sent to Chairman Airport Authority of India to take final decision.

(c) Thereafter the Airport Authority sent the papers to advocate for drafting the FAO(OS). The drafting counsel after preparing FAO(OS) returned the file to Airport Authority of India.

(d) After receiving the reasons for day to day delay the Airport Authority of India sent the file to the drafting counsel on 23.11.2007 on the drafting counsel after preparing the applicant sent the same to the Airport Authority of India.

....

(3) That the above is sole cause of delay. There is sufficient cause which has prevented not to file present LPA within a period of 30 days. The delay was not intentional but due to aforesaid circumstances.

6. The Appellant has not considered it necessary to disclose to the Court the "reasons for the day to day delay" stated in paragraph 2(d) of the Application. In fact, the reasons for delay have not been spelt out at all. Since no reasons have been presented in the Application, referring to the circumstances in which their Lordships had condoned the delay in several cases, including State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, can be of no avail to the Appellant. In any event, what ought not to be lost sight of is the fact that the learned Single Judge had referred the parties to the arbitration of the PMA, which, in the tenor of the ONGC decision, is best and ideally suited to resolve the disputes between the public sector enterprises. Furthermore, on the failure of the Appellant to appoint an arbitrator and in light of its reliance on the Arbitration Clause in defence to the suit for

recovery filed by the Respondent, the learned Single Judge was fully empowered to appoint an arbitrator, which is precisely what it has done in the present case.

7. Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Others, a Two Judge Bench has held in paragraph 14 that the question whether an Arbitration Clause in fact existed should properly be decided by the Arbitral Tribunal. In India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., the learned Single Judge has observed that "as and when a question in regard to the validity or otherwise of the arbitration agreement arises, a judicial authority would have the jurisdiction under certain circumstances to go into the said question". The definitive opinion on this legal labyrinth is available in paragraph 19 of the Seven Judge Bench decision in Patel Engineering Ltd. which reads thus:

19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi, . When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the same power for making orders as it has for the purpose of

and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication see AIR 1948 12 (Privy Council)

8. The following observations in K.V. Aerner Cementation India Ltd. v. Bajranglal Agarwal 2001 (6) Supreme 265 are noteworthy even though it needs to be clarified that when a Civil Court is called upon to pass an injunction order u/s 9 of the A & C Act, it must be satisfied that it enjoys jurisdiction under that Act:

...the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.

9. In Patel Engineering Ltd. the Court had itself formulated the question that had been posed before it to be what is the nature of the function of the Chief Justice or his designate u/s 11 of the A & C Act. Their Lordships returned twelve conclusions, of which the fourth is pertinent to the conundrum before us, viz. - "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. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the

matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge". The neat and vexed question which arises is whether such a decision is final or prima facie in nature, especially in view of Section 16 of the A & C Act which imparts to the Arbitral Tribunal the power to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. In paragraph 19 their Lordships in Patel Engineering Ltd. (reproduced above) have opined that before passing an interim order u/s 9 of the A & C Act it is necessary for it to decide whether it has jurisdiction and/or whether there is a valid arbitration agreement and/or whether the dispute is covered by that Agreement. It appears to us that the conclusion arrived at by the Court in such circumstances would be binding on the Arbitral Tribunal since the Court would not grant interim relief unless it was positively satisfied that it possessed and could exercise jurisdiction under the A & C Act. It appears to us that the situation is different when the Chief Justice or his designate discharges the functions, albeit judicial, postulated u/s 11(6) of the A & C Act. While doing so, it may direct parties in the direction of the Arbitral Tribunal, leaving it open to the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of an arbitration agreement. This is despite the fact that it is now well-settled that it is a judicial function that is performed u/s 11(6) of the A & C Act. We are of the opinion that the judge exercising powers u/s 11(6) should clearly indicate whether it has a prima facie or final ruling on the existence or validity of the arbitration agreement.

10. We cannot lose sight of the fact that an appointment made u/s 11(6) of the A & C Act is not appealable, as would be evident from a reading of Section 37 of the said Act. In this context, we think it necessary to briefly discuss Ludhiana Improvement Trust and Another Vs. Today Homes and Infrastructure (Pvt.) Limited, to dispel any discussion on this very interesting aspect of the law. Their Lordships had clarified that all appointments made u/s 11(6) of the A & C Act prior to Patel Engineering Ltd. would be valid, leaving it to the parties to raise objections to the existence or validity of an arbitration agreement before the Arbitral Tribunal. Their Lordships have not stated that post Patel Engineering Ltd. the statutory provisions of Section 16 have been rendered otiose. A harmonious construction of both provisions convinces us to conclude that while exercising its judicial functions u/s 11(6), the Judge may give either a prima facie or a final finding on that point. To this, we add that as presently advised, we will lean towards a prima facie character of the opinion, leaving it to the Arbitral Tribunal to give a detailed final finding. The enunciation in Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another, should be noted here even though it was in the context of Section 45 of the A & C Act. Firstly, their Lordships opined that the ratio of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, could not be extrapolated into cases post A & C Act because the avowed intention of the Legislature was to minimize curial interference in arbitrations since

it would invariably cause delays in the final adjudication of disputes. Secondly, if the decision to refer parties to the Arbitral Tribunal was not prima facie but final, the challenge to the Award on this ground would be foreclosed because of res judicata. This would work injustice for the reason that a final finding would have been given on insufficient material and not after a full-fledged adjudication. We think it proper to reiterate that Patel Engineering Ltd. prescribes that before granting relief u/s 9 of the A & C Act the Court must be fully satisfied with regard to the existence of an arbitration clause (see paragraph 19). Their Lordships did not opine that this finality should be present in other decisions under the A & C Act. This position commends itself to us also, Firstly for the reason that by virtue of Section 34 as well as Section 48(1) of the A & C Act an arbitral award may be set aside by the Court if the arbitration agreement is not valid under the applicable law; Secondly, for the reason that Section 16 of the A & C Act, which extends the legislative intent of minimal curial interference by enabling the Arbitral Tribunal to rule on any objections with respect to existence or validity of the arbitration agreement or even on its own jurisdiction etc., would become otiose. Finally, the avenue to assail the conclusion of the Arbitral Tribunal on this point either u/s 34 or Section 48 of the A & C Act should not be rendered untraversable. In these circumstances, it is built into the statutory framework that a Court will have a final say on the important aspect of the existence or validity of an arbitration agreement.

11. As no grounds or facts whatsoever have been disclosed which we may have seen as sufficient for condoning the delay in preferring the present Appeal, it is liable for dismissal on this short ground. However, assuming that delay stands condoned, we are of the view that the Appeal is not maintainable, leaving it to the parties to raise all issues available to them in law before the Arbitral Tribunal. It is ordered accordingly. Pending applications also stand dismissed. Furthermore, since both the parties are public sector enterprises, we are convinced that they cannot have any cavil to the resolution of their disputes by the PMA, of the Bureau of Public Enterprises, which functions under the Central Government.

12. Since the adversaries are public sector enterprises, we would not like to compound the immense wastage of finances by imposing costs.

13. A copy of this Order be dispatched to the PMA for further requisite action on expeditious speed.