

Court No. - 46

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 137 of 2022

Applicant :- Purvanchal Vidyut Vitaran Nigam Ltd. (Puvvnl)

Opposite Party :- M/S Prabha Mvomni (Jv)

Counsel for Applicant :- Udit Chandra

Counsel for Opposite Party :- Katyayini

Hon'ble Ashwani Kumar Mishra,J.

This application has been filed by the applicant for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

It is not in dispute that an agreement has been entered into between the applicant and the opposite party in respect of certain work to be performed by the opposite party. The agreement contains an arbitration clause. Clause 39.1 to 39.3 is relevant for the present controversy and is extracted hereinafter:-

"39.1 All disputes or differences in respect of which the decision, if any, of the Project Manager and/or the head of the Implementing Authority has not become final or binding as aforesaid shall be settled by arbitration in the manner provided herein below:

39.2 The arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Employer and the third to be appointed by both the arbitrators in accordance with the Indian Arbitration Act. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration clause, the arbitrator appointed by the party invoking the arbitration cause shall become the sole arbitrator to conduct the arbitration.

39.3 The language of the arbitration proceedings and that of the documents and communications between the parties shall be English. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The venue of arbitration shall be xxxxx (headquarter of Employer)."

It appears that on account of accrual of dispute between the parties, the opposite party appointed its arbitrator vide notice dated 6.3.2022 by calling upon the applicant also to appoint their arbitrator. The applicant, however, did not appoint an arbitrator in response to such notice. The case of the applicant is that they invited opposite party for conciliation and as the parties had agreed upon to conciliate on the point of differences, as such they did not appoint their arbitrator.

The arbitrator appointed by the opposite party has proceeded by treating himself to be the sole arbitrator, as the applicant had

not appointed their arbitrator. An objection has been raised by the applicant to the appointment of arbitrator by the opposite party, which has since been rejected on 17.7.2023 by the arbitrator, who has then proceeded further in the matter.

The instant application has been preferred on 6.9.2022 for appointment of arbitrator. An objection is taken to the maintainability of the present application on the ground that once an objection is taken to the jurisdiction of the arbitrator and such objection is rejected, then the only remedy available would be to challenge the ultimate award under the statutory scheme.

On behalf of the applicant, it is contended that the manner in which the opposite party is trying to project its arbitrator as the sole arbitrator cannot be countenanced in the statutory scheme, as also the agreement between the parties. Reliance is placed upon a judgment of the Supreme Court in Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd., reported in 2020 AIR (Supreme Court) 59.

In order to appreciate the contentions raised, it would be necessary to refer to the statutory scheme contained in the Act of 1996. Section 11 of the Act of 1996 refers to appointment of arbitrator in a case where parties have agreed to get their dispute resolved by way of arbitration. Section 16 of the Act of 1996 contemplates challenge to the competence of Arbitral Tribunal, wherein objection is raised to its jurisdiction. Section 16 is categorical and vests jurisdiction in the arbitrator to adjudicate upon his own jurisdiction. Sub-section 5 and sub-section 6 of Section 16 of the Act, 1996 are relevant for the present purposes and are reproduced hereinafter:-

"16. Competence of arbitral tribunal to rule on its jurisdiction.—

(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."

From the statutory scheme, noticed above, it is abundantly clear that where objection to the jurisdiction of arbitrator is rejected by the Arbitral Tribunal, the only way in which such challenge can be pursued is by challenging the award, as and when it is made by the arbitrator. The applicant cannot be permitted to circumvent the statutory scheme by invoking the jurisdiction of this Court under Section 11 of the Act of 1996, on the premise that the appointment of arbitrator itself is bad.

So far as the judgment in Perkins Eastman Architects DPC (supra), relied upon by the learned counsel for the applicant, is concerned, the Court had merely followed previous judgment of the Supreme Court in TRF Limited Vs. Energo Engineering Projects Limited, (2017) 8 SCC 377, which arises out of a different exigency altogether. In TRF Limited (supra) the Court was dealing with the appointment of an arbitrator, who was ineligible to act by virtue of the embargo contained in 7th Schedule read with Section 12(5) of the Act. A person, who becomes ineligible on account of the said embargo becomes de jure unable to perform his functions, and therefore jurisdiction under Section 11 could be invoked for appointment of arbitrator. In the facts of this case, no such exigency has arisen. It is not a case that the arbitrator is competent to arbitrate by virtue of Section 12(5) read with 7th Schedule of the Act. In such view of the matter, the filing of the application under Section 11 of the Act of 1996 would be misconceived, inasmuch as the remedy of the applicant would be to resort to the scheme contemplated in Chapter IV of the Act of 1996 and challenge the award, as and when the occasion so arises.

Subject to the observations made above, this application filed under Section 11 fails and is rejected.

Order Date :- 11.8.2023

Anil