

C.M.C. LTD.
v.
UNIT TRUST OF INDIA & ORS.

MARCH 1, 2007

[P.K. BALASUBRAMANYAN AND V.S. SIRPURKAR, JJ.]

Arbitration and Conciliation Act, 1996—Section 11(6)—Appointment of arbitrator—Application under—Case of other party to the dispute that appointment to be as per the Rules of Indian Council of Arbitration—Designated Judge interpreting the arbitration agreement and holding that parties retained the right to nominate respective arbitrators and no obligation to choose arbitrators as per the Rules—Correctness of—Held: There is no infirmity in the order since the power to appoint an arbitrator not ceded to the Council—On appointment of arbitrator and constitution of Arbitral Tribunals, the parties agreed that the proceedings would be conducted as per the Rules—Power retained by the parties to appoint arbitrator did not militate against the Act or the Rules—Indian Council of Arbitration Rules.

Appellant and respondent no. 1 entered into an agreement. Dispute arose between the parties. In terms of the arbitration agreement, respondent invoked arbitration clause. It called upon the appellant to refer the dispute to be settled through arbitrator. Respondent No. 1 named an arbitrator as sole arbitrator and if appellant was not willing to accept the arbitrator named, the appellant could appoint its arbitrator and the said two arbitrators would then appoint a Presiding Arbitrator. Appellant did not appoint arbitrator in terms of the arbitration agreement since the parties had agreed to follow Rules prescribed by Indian Council of Arbitration. Respondent no. 1 filed application before the Chief Justice of the High Court under section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator since the appellant had failed to act in terms of the procedure. Designated Judge of the High Court held that the arbitration agreement did not contemplate the appointment of the arbitrator to be as per the Rules of the Indian Council of Arbitration but only provided regarding the following of the procedure of the Rules of the Indian Council of Arbitration. It noticed that the appellant had also named an arbitrator without prejudice to its contentions and that the two arbitrators had nominated a Presiding Arbitrator and that Tribunal had come into

A existence and as such allowed the application. Appellant filed a petition under Article 226 challenging the decision of the designated Judge. Division Bench dismissed the petition. Hence the present appeal challenging the decision of Designated Judge interpreting the arbitration clause.

B Dismissing the appeal, the Court

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HELD: 1.1. There was no failure on the part of the appellant to follow the procedure agreed to between the parties for appointment of an arbitrator resulting in conferment of jurisdiction on the Chief Justice to appoint an arbitrator in terms of Section 11(6) of the Act. In this context, the appellant agreed that the arbitration was governed by the Arbitration and Conciliation Act, 1996. Respondent No.1 had, of course, invoked that very Act. [Para 6] [473-A-B]

C

D 1.2. It is clear from the comparison of the arbitration agreement suggested by the council and the arbitration agreement between the parties, that the arbitration agreement between the parties substantially differs from the one suggested by the Indian Council of Arbitration. Secondly, Rule 4(c) is specific that in case the parties had provided a different procedure for appointment of an arbitrator, the Council was not bound to process the case unless both the parties agreed to follow the entire procedure or Arbitration Rules of the Council. Obviously, a different procedure for appointment of an arbitrator or arbitrators had been agreed to by the parties and respondent No.1 had obviously not agreed to follow the entire procedure or have arbitration under the Rules of the Council. Therefore, even if one were to apply the Rules, it is difficult to accept the argument that respondent No.1 was bound to invoke the Rules of the Council to put in motion an effective machinery for arbitration.

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[Para 7] [473-G-H; 474-A]

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1.3. The argument that there is an incorporation of the Rules of the Council in the arbitration agreement and hence those Rules must be given effect to fully, does not take the appellant far in this case. On a true construction of the arbitration agreement, it is found that the parties retained in themselves the right to name an arbitrator of their own, who in turn had to name a Presiding Arbitrator so as to constitute an Arbitral Tribunal. The power to appoint has not been ceded to the Indian Council of Arbitration. Once the appointments are made and the Arbitral Tribunals are constituted, the parties have also agreed that the arbitration proceedings shall be conducted in accordance with the Rules prescribed by the Indian Council of Arbitration.

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The provision that the proceedings shall be conducted in accordance with the

Rules prescribed by the Indian Council of Arbitration does not in any manner militate against the retention of the power by the parties of appointing an arbitrator or constituting an Arbitral Tribunal. Only if there exists any inconsistency between the two provisions court parties would be called upon to undertake the existence of reading down one or ignoring one as ineffective or inconsistent and giving effect to the other. [Para 9] [474-E, F, G]

1.4. In the instant case, there is no difficulty in reconciling both the clauses in the arbitration agreement. Resolution of disputes by way of arbitration is a matter of agreement between the parties. If while contemplating such a resolution of disputes they also retain in themselves the power to constitute an Arbitral Tribunal, it cannot be said that there is anything wrong in such a provision or that the same cannot be given effect to. Therefore, the power retained by the parties to name an arbitrator each does not militate either against the provisions of the Act or against the Rules of the Indian Council of Arbitration. That Arbitral Tribunal once constituted in terms of the Act, may have to follow the Rules of Indian Council of Arbitration in that behalf. When an Arbitral Tribunal of persons well versed in law is constituted, surely, a proper procedure will be followed by them and there is no reason to insist on a particular procedure to be followed. Suffice it to say, that there is no infirmity in the interpretation of the arbitration agreement by the designated Judge and in the constitution of the Arbitral Tribunal as presently constituted. No prejudice is caused to the appellant and no injustice is involved in the constitution of the Arbitral Tribunal. Therefore the order of the designated Judge is upheld. [Paras 6 and 9] [473-A; 475-A-D]

Food Corporation of India v. Indian Council of Arbitration and Ors.; [2003] 6 S.C.C 564; *Gesellschaft Fur Biotechnologische Forschun GMBH v. Kopran Laboratories Ltd. and Anr.*, [2004] 13 S.C.C. 630, distinguished.

S.B.P and Co. v. Patel Engineering Ltd. and Anr., [2005] 8 S.C.C. 618, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1119 of 2007.

From the Final Judgment and Order dated 3.10.2003 of the High Court of Judicature at Bombay in W.P. No. 23/2003.

M.S. Ganesh, Soshila Ram, Nikhil Nayyar, Ankit Singhal and T.V.S. Raghavendra Sreyas for the Appellant.

A Gopal Subramaniam, A.S.G., Aslam Ahmed and Avijit Bhattacharjee for
the Respondents.

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. Leave granted.

B 1. The appellant and respondent No. 1 entered into an agreement dated
23.10.1992 for a Technology Upgrade Project of the latter. The said agreement
contained an arbitration clause. The same read:

C “20. In the event of any dispute or difference relating to the
interpretation or application of any of the provision of this
Agreement or as to the performance of any obligation by either
party shall be settled by arbitration. Each party shall appoint an
arbitrator and the arbitrators so appointed shall appoint an umpire
to whom the matter on which the arbitrators disagree will be
D referred. The decision of the arbitrators and in the event of there
being disagreement between the arbitrators, the decision of the
umpire shall be final, conclusive and binding on the parties with
respect to the matter referred to arbitration. The decision of the
arbitrators or the umpire as the case may be shall constitute
arbitrators award for the purpose of Indian Arbitration Act, 1940.
E The arbitration proceedings shall be conducted in accordance
with the rules prescribed by the Indian Council of Arbitration.”

F 2. Disputes arose between the parties. On 16.5.2002, respondent No. 1
issued a notice invoking the arbitration clause and calling upon the appellant
to refer the dispute and differences to be settled through arbitration in terms
of the arbitration agreement. Respondent No. 1 named an arbitrator with the
suggestion that he may be accepted as the sole arbitrator. But, if the appellant
was not willing to treat him as such, it was stated that the arbitrator named
by respondent No. 1 may be treated as the one appointed by it in terms of
the arbitration agreement and in that event, the appellant was called upon to
G name its arbitrator and the said two arbitrators can then appoint a Presiding
arbitrator. The appellant replied stating that the parties have agreed to follow
the Rules prescribed by the Indian Council of Arbitration by incorporating the
said Rules by reference in the arbitration clause and since respondent No. 1
had not acted in terms of the said Rules, the appellant regretted its inability
to accept the stand of respondent No. 1 or to appoint an arbitrator in terms
H of the arbitration agreement. The appellant regretted its inability to act on the

basis of the notice issued by respondent No.1.

3. Respondent No. 1 thereupon moved the Chief Justice of the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. Respondent No.1 contended that the appellant had failed to act in terms of the procedure for appointment of an arbitrator and hence the Chief Justice or his Judge designate, may appoint an arbitrator to act along with the arbitrator named by respondent No.1 and direct the two arbitrators to appoint the third, a Presiding Arbitrator, within the time fixed and to refer all disputes and differences between respondent No.1 and the appellant arising out of or in connection with the Technology Upgrade Agreement as per the provisions of the Act. The appellant resisted the application essentially pleading that the Rules of the Indian Council of Arbitration and the mandate thereof had not been complied with by the applicant before the Chief Justice and that the arbitration clause had not been properly invoked and there is no failure on the part of the appellant herein to act in accordance with the procedure accepted by the parties. No occasion had therefore arisen for the Chief Justice to appoint an arbitrator in terms of Section 11(6) of the Act. It is said that the appellant as directed by the court had named an arbitrator without prejudice to its contentions and it is common ground before us that the said two arbitrators have also named the Presiding Arbitrator and an Arbitral Tribunal had come into existence, but subject to the decision in this appeal filed by the appellant.

4. The learned designated Judge of the High Court held that on a true construction of clause 20 of the Agreement which is the arbitration agreement, the right or duty to appoint or name an arbitrator each, rested with the parties to the contract and what was provided for in the arbitration agreement was only regarding the following of the procedure of the Rules of the Indian Council of Arbitration. The arbitration agreement did not contemplate the appointment of the arbitrator to be as per the Rules of the Indian Council of Arbitration or only from the panel of arbitrators maintained by the Council. Thus, on a construction of the arbitration agreement in the light of the decisions brought to his notice, the designated Judge, noticing that the appellant had also named an arbitrator without prejudice to its contentions and that the two arbitrators had nominated a Presiding Arbitrator and that Tribunal can proceed to arbitrate on the dispute allowed the application and constituted the Tribunal as chosen by the parties. The designated Judge also noticed that the question about the jurisdiction of the Arbitral Tribunal could be decided by the Tribunal itself.

A 5. It may be noted that his decision was rendered before this Court spoke on the nature of the jurisdiction of the Chief Justice or of the designated Judge in *SBP & CO. v. PATEL ENGINEERING LTD. & ANR.* [2005] 8 S.C.C. 618 and held it as a judicial function. The appellant therefore, filed a petition under Article 226 of the Constitution of India challenging the decision of the designated Judge, on the basis that the said order was only an administrative order. The Division Bench held that in view of the restricted jurisdiction that the court had in such matters and in the absence of any injury of any kind to the appellant, there was no reason to interfere with the decision of the designated Judge merely because a writ petition was maintainable to challenge the same. The Petition for Special Leave to appeal was filed originally challenging the decision of the Division Bench in the writ petition. But subsequent to the decision in *SBP & Company* (supra), the appellant was permitted to convert the Petition for Special Leave to Appeal as one challenging the order of the designated Judge and pursue its challenge thereto directly in this Court. Thus, this appeal challenges the decision of the designated Judge interpreting the arbitration clause quoted above and holding that the parties retained the right to nominate the respective arbitrators and there was no obligation on any of the parties to choose only an arbitrator as per the Rules of Arbitration of the Indian Council of Arbitration or to proceed only in terms of those Rules for appointment of an arbitrator.

E 6. It is settled that getting resolution of a dispute by arbitration is a matter of contract between the parties. So long as the contract does not militate against the provisions of the Arbitration Act, nothing in law prevents the arbitration agreement between the parties being given effect to in full. What is contended by learned counsel for the appellant is that the arbitration agreement clearly specifies that “the arbitration proceedings shall be conducted in accordance with the Rules prescribed by the Indian Council of Arbitration” and this would mean that the procedure for appointment of an arbitrator and making a claim for arbitration must all be in terms of the Rules of the Indian Council of Arbitration. Learned counsel points out that under Rule 15 any party wishing to commence arbitration proceedings under the Rules of the Council had to give a notice of the request for arbitration to the Registrar of Indian Council of Arbitration and to the opposite party and had to follow the procedure laid down in those Rules. Learned counsel submits that the Rules of the Indian Council of Arbitration had been incorporated in the arbitration agreement by the parties and any mode of exercise of right for invoking an arbitration clause other than the one prescribed by the Rules of the Council would be futile. Therefore, the notice issued on behalf of respondent No.1

intimating the appellant of the appointment of an arbitrator and calling upon the appellant to appoint an arbitrator, would not amount to a proper invocation of the arbitration agreement and there is no failure on the part of the appellant to follow the procedure agreed to between the parties for appointment of an arbitrator resulting in conferment of jurisdiction on the Chief Justice to appoint an arbitrator in terms of Section 11(6) of the Act. In this context, we may specifically record that the learned counsel for the appellant agreed that the arbitration was governed by the Arbitration and Conciliation Act, 1996. Respondent No.1 had, of course, invoked that very Act.

7. Even going by the Rules of arbitration of the Indian Council of Arbitration, it is seen that the parties are not precluded from having a different procedure for appointment of an arbitrator. The Rules, even at the inception, suggests the incorporation by the parties of an arbitration clause in writing in their contracts in the following terms:

“Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.”

Rule 4(c) which is relevant reads:

“In case the parties have provided a different procedure for appointment of arbitrator or schedule of cost including the arbitrator’s fee, the Council shall not be bound to process the case unless both the parties agree to follow entire procedure or arbitration under Rules of Arbitration of the Council.”

It is clear from the comparison of the arbitration agreement suggested by the council and the arbitration agreement between the parties, that the arbitration agreement between the parties substantially differs from the one suggested by the Indian Council of Arbitration. Secondly, Rule 4(c) is specific that in case the parties had provided a different procedure for appointment of an arbitrator, the Council was not bound to process the case unless both the parties agreed to follow the entire procedure or Arbitration Rules of the Council. Obviously, a different procedure for appointment of an arbitrator or arbitrators had been agreed to by the parties and respondent No.1 had obviously not agreed to follow the entire procedure or have an arbitration

A under the Rules of the Council. Therefore, even if one were to apply the Rules, it is difficult to accept the argument that respondent No.1 was bound to invoke the Rules of the Council to put in motion an effective machinery for arbitration.

B 8. Learned counsel has referred to the decisions in *Food Corporation of India v. Indian Council of Arbitration & Ors.*, [2003] 6 S.C.C 564] and in *Gesellschaft Fur Biotechnologische Forchun GMBH v. Koppan Laboratories Ltd. & Anr.*, [2004] 13 S.C.C. 630 in support of his submission that respondent No.1 was bound to proceed in terms of the Rules of the Council. But on a scrutiny of those decisions, it is clear that the arbitration clauses in those cases were substantially in conformity with the model arbitration clause prescribed by the Council as quoted earlier and it was in that context that this Court observed that the Rules of the Council must be followed. The very appointment of the Arbitral Tribunal was to be according to those Rules. But in this case, it is clear that the arbitration clause differs considerably from the agreements involved in those cases and the parties retained in themselves the right to appoint the arbitrators. Hence, those decisions cannot be relied on for the purpose of non-suiting respondent No.1.

E 9. The argument that there is an incorporation of the Rules of the Council in the arbitration agreement and hence those Rules must be given effect to fully, does not take the appellant far in this case. On a true construction of the arbitration agreement, what we find is that the parties retained in themselves the right to name an arbitrator of their own, who in turn had to name a Presiding Arbitrator so as to constitute an Arbitral Tribunal. The power to appoint has not been ceded to the Indian Council of Arbitration. Once the appointments are made and the Arbitral Tribunals are constituted, F the parties have also agreed that the arbitration proceedings shall be conducted in accordance with the Rules prescribed by the Indian Council of Arbitration. The provision that the proceedings shall be conducted in accordance with the Rules prescribed by the Indian Council of Arbitration does not in any manner militate against the retention of the power by the parties of appointing an arbitrator or constituting an Arbitral Tribunal. Only if there exists any G inconsistency between the two provisions we would be called upon to undertake the existence of reading down one or ignoring one as ineffective or inconsistent and giving effect to the other. Here in this case, there is no difficulty in reconciling both the clauses in the arbitration agreement. As we have noticed, resolution of disputes by way of arbitration is a matter of H agreement between the parties. If while contemplating such a resolution of

disputes they also retain in themselves the power to constitute an Arbitral Tribunal, it cannot be said that there is anything wrong in such a provision or that the same cannot be given effect to. Therefore, the power retained by the parties to name an arbitrator each, does not militate either against the provisions of the Act or against the Rules of the Indian Council of Arbitration. That Arbitral Tribunal once constituted in terms of the Act, may have to follow the Rules of Indian Council of Arbitration in that behalf. But as rightly pointed out by the learned Additional Solicitor General who appeared on behalf of respondent No.1, when an Arbitral Tribunal of persons well versed in law is constituted, surely, a proper procedure will be followed by them and there is no reason to insist on a particular procedure to be followed. But obviously, it is not a matter on which we need pronounce now. Suffice it to say, that we find no infirmity in the interpretation of the arbitration agreement by the designated Judge and in the constitution of the Arbitral Tribunal as presently constituted. We are also inclined to think that no prejudice is caused to the appellant and no injustice is involved in the constitution of the Arbitral Tribunal. We therefore affirm the order of the designated Judge and dismiss this appeal. We expect the Arbitral Tribunal to enter upon the reference without any further delay and pronounce its award within nine months of its entering upon the reference.

10. The appeal is thus dismissed with the above expectation. The parties are directed to suffer their respective costs.

N.J.

Appeal dismissed.