

A OM CONSTRUCTION CO.
v.
AHMEDABAD MUNICIPAL CORP. & ANR.
(Civil Appeal No. 107 of 2009)

B JANUARY 13, 2009

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ.]

Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992:

C s.2(1)(k) and (i) – 'Works Contract' – 'Public Undertaking' – Held: The local authority could assume the garb of 'Public Undertaking' only pursuant to a notification published in that regard in official gazette.

D *Arbitration and Conciliation Act, 1996:*

E ss.11(2), (5) and (6) – Appointment of arbitrator – Arbitration clause in agreement not providing for any procedure for appointment of arbitrator – Held: Since parties have agreed to resolve their dispute by arbitration, provisions of sub-section (5) can be pressed into service to enable the parties to invoke powers of Chief Justice to appoint an arbitrator – In the circumstances of the case, in order to avoid delay, instead of remitting the matter to High Court, arbitrator appointed.

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G The appellant, a construction company, carried out the work entrusted to it by the respondent Corporation. Clause 30 of Form B-1, which was made applicable in the contract entered into between the parties when appellant's tender was accepted, provided for appointment of an arbitrator. Dispute arose with regard to payment. The applicant filed an application u/s.11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator to resolve the dispute. The High Court

noticing the provisions of s.2(1)(i) of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 held that since no notification was issued under the Act with respect to the respondent Corporation it was not a "Public Undertaking" and, therefore, the work entrusted to the appellant could not be termed as a "Work Contract" as defined u/s.2(1)(k) of the Gujarat Tribunal Act and, as such, the Arbitration Tribunal of the State would have no jurisdiction. The High Court further held that since the arbitration agreement between the parties did not lay down any procedure for appointing an arbitrator, the Designated Judge could not invoke the jurisdiction u/s.11(6) of the Act.

In the appeal filed by the Construction company, the questions for consideration before the Court were: whether in the absence of a Notification in the Official Gazette, the respondent Municipal Corporation could at all be considered as a Public Authority for the purpose of Section 2(1)(k) of the Gujarat Tribunal Act, 1992 and whether the absence of a procedure for appointment of an arbitrator in the arbitration agreement, would constitute a bar for appointment of an arbitrator u/s 11(6) or any other provision of the 1996 Act, when not only the parties to the proceedings, but the High Court also, had arrived at a conclusion that the provisions of the Gujarat Tribunal Act, 1992, would not be applicable in the case.

Allowing the appeal, the Court

HELD: 1. There is no dispute that the Ahmedabad Municipal Corporation is a local authority and it could assume the garb of a "Public Undertaking" as defined in s.2(1)(i) of the Gujarat Public Works Contracts Disputes Arbitration Tribunal, 1992, only pursuant to a Notification published in that regard in the Official Gazette. [Para 14] [240-B-C]

2.1. Even if Form B-I loses its relevance as far as the

A contract in question is concerned, since the parties have agreed to resolution of their disputes by arbitration, the provisions of Sub-section (5) of s.11 of the Arbitration and Conciliation Act, 1996 can be pressed into service to enable the parties to invoke the powers of the Chief Justice to appoint an Arbitrator. [Para 14] [240-D]

2.2. Order of the High Court is set aside. In the circumstances of the case, remitting the matter to the High Court would only mean another round of litigation, whereas if the appointment is made by this Court, the matter will achieve finality, which would ultimately be beneficial for all concerned. Accordingly, arbitrator is appointed. [Para 16] [241-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 107 of 2009.

From the Judgment and Order dated 30.11.2007 of the High Court of Gujarat at Ahmedabad in Petition under Arbitration Act No. 35 of 2007.

S.K. Gambhir, Sanjay Kapur, Rajiv Kapur and Arti Singh for the Appellant.

Shyam Divan, Rustam Marshall, Hemantika Wahi and K. Enatoli Sema for the Respondents.

The Judgement of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The appellant herein is a "C" class approved contractor, whose tender was accepted by the Ahmedabad Municipal Corporation for providing and fixing Nibhada Stone for paving and Footpath in Kalupur and Dariapur wards in Central Zone within the City of Ahmedabad. The Work Order was issued on 6th June, 2006, and as per the appellant's version the work was completed by the end of October, 2006. According to the

appellant, after giving credit for payments which had been made by the Corporation, a sum of Rs.68,46,872/- was still due towards the work performed in the Dariapur ward, while a sum of Rs.8,61,760/- was also due for the work carried out in Kalupur ward. It is the case of the appellant that despite notice having been served on the Corporation on 24th May, 2007, the said amounts remained unpaid. Ultimately, on 6th June, 2007, the appellant issued a notice to the Corporation setting out the facts relating to the work performed and the claim made in detail and claimed a sum of Rs.77,08,632/-, together with interest at the rate of 18% per annum, from the due date till the date of realization, which the appellant claimed, was the total outstanding amount. In the notice it was also indicated that the claim made by the appellant should be accepted and payment should be made within a period of 30 days from the date of receipt of the notice or that an Arbitrator should be appointed by the Corporation within a period of 30 days from the date of receipt of the notice.

3. As there was no response to the said notice from the Municipal Corporation nor was any payment made or Arbitrator appointed, the appellant invoked clause 30 of Form B-I, which provided for the appointment of an Arbitrator and was made applicable in the contract entered into between the parties when the appellant's tender was accepted. It appears that under General Conditions of Contract of the Engineering Department of the Ahmedabad Municipal Corporation, under its General Specifications it is provided that certain conditions are required to be followed which includes the condition that Form B-I would be applicable to the contract and clause 30 of Form B-I is relevant for this case. The relevant portions of clause 30 of Form B-I reads as follows :-

"Clause 30(1) Disputes to be referred to Tribunal: The disputes relating to this contract, so far as they relate to any of the following matters, whether such disputes arise during the progress of the work or after the completion or

A abandonment thereof, shall be referred to the Arbitration Tribunal, Gujarat State;

(2)

B (3) The provision of Arbitration Act, shall in so far as they are inconsistent with the provision of this Act, cease to apply to any dispute arising from a works contract and all arbitration proceedings in relation to such dispute before an Arbitrator, Court or authority shall stand transferred to the Tribunal."

C 4. The appellant filed a petition before the Gujarat High Court on 9th July, 2007, being Arbitration Petition No. 35 of 2007, under Section 11 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act", inter alia, D praying for the appointment of an Arbitrator to resolve the disputes between the parties. The High Court by its order dated 20th November, 2007, rejected the said petition. While doing so, the High Court took note of Section 2(1)(k) of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, hereinafter referred to as the "Gujarat Tribunal Act", E which defines "works contract" to mean a contract made by the State Government or Public Undertaking which is notified in the Official Gazette by the State Government. The High Court also noticed Section 2(1) (l) of the aforesaid Act, which defines F "Public Undertaking" to, inter alia, mean such class of local authorities as the State Government specifies by Notification in the Official Gazette. It was further noticed that in the absence of such Notification, the Ahmedabad Municipal Corporation was not a "Public Undertaking" and the contract entered into by it with the appellant could not, therefore, be termed as a G "Works Contract" as defined in Section 2(1)(k) of the aforesaid Act. The High Court, therefore, held that the Arbitration Tribunal, Gujarat State, would have no jurisdiction to entertain the disputes between the parties emanating from the Work Order in-question.

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5. The High Court then went on to consider the applicability of the Arbitration and Conciliation Act, 1996, to the facts of the case. The High Court took note of the fact that the Agreement between the parties, and more particularly the Arbitration Agreement, did not lay down any procedure for appointing an Arbitrator or Arbitrators. Accordingly, in the absence of such procedure, the Designated Court could not invoke its jurisdiction under Sub-section (6) of Section 11 of the 1996 Act, which contemplates a situation, where the appointment procedure as agreed to by the parties under Sub-section (2) of Section 11 is not followed. The High Court, therefore, while rejecting the applicability of the Gujarat Tribunal Act, also closed the doors for relief under the provisions of the 1996 Act.

6. The said order of the High Court, which has been challenged in this appeal, therefore, gives rise to the question as to whether in the absence of any procedure in the Arbitration clause for the appointment of an Arbitrator, can the Chief Justice of the High Court or the Designated Court appoint an Arbitrator under Section 11(6) of the 1996 Act in terms of the Agreement between the parties to have their disputes settled by arbitration.

7. Mr. S.K. Gambhir, learned Senior Advocate appearing for the appellant company, submitted that having regard to the specific condition contained in the General Conditions of Contract regarding the application of Form B-I, the parties to the Arbitration Agreement could not be forced to file a suit simply because the procedure for arbitration, as required under Section 11(6) of the 1996 Act, had not been agreed upon by the parties or specified therein. Mr. Gambhir urged that when there was a specific Arbitration Agreement between the parties, the remedy in respect thereof under the 1996 Act could not be denied on a mere technicality and if no procedure had been mentioned in the Arbitration Agreement, it could not be contended that on such ground alone the provisions of Sub-

A section (6) of Section 11 could not be invoked in view of the provisions of Sub-section (2) thereof. Mr. Gambhir submitted that, in any event, Sub-section (2) of Section 11 would have to be read with Sub-clauses (3) to (5) as well and the powers of the Chief Justice or the Designated Court could not be fettered by Sub-section (6). It was submitted that the Chief Justice or the Designated Court could in given circumstances appoint an Arbitrator by applying the provisions of Sub-section (6) of Section 11 of the said Act. It was submitted that while the High Court had correctly held that the provisions of the Gujarat Tribunal Act would have no application in the present case, it had gone wrong in holding that no relief could be provided to the appellant under the provisions of the 1996 Act also.

8. Mr. Gambhir also contended that the requirements of Sub-section (6) of Section 11 of the 1996 Act have all been fulfilled, although, the appointment procedure had not been indicated by the parties. He submitted that what was most important is that the parties had failed to reach an agreement regarding the appointment of an Arbitrator to resolve their disputes, which was the basic requirement to request the Chief Justice or the Designated Court to secure the appointment of an Arbitrator. Mr. Gambhir drew our attention to the opinion provided by the Legal Department of the Ahmedabad Municipal Corporation itself indicating that in the event of a dispute between a contractor and the Corporation in the work of the Engineering Department, proceedings will have to be initiated under the Arbitration and Conciliation Act, 1996. Mr. Gambhir also drew our attention to an earlier order passed by the Designated Court of the Gujarat High Court in Arbitration Petition Nos.46-55 of 2003 in respect of a similar contract, where a retired Judge of the said High Court was appointed as Sole Arbitrator to resolve the disputes between the parties after the parties had arrived at a consensus regarding the passing of such an order.

H 9. Mr. Gambhir submitted that the Ahmedabad Municipal

Corporation had themselves agreed to the appointment of an Arbitrator under the 1996 Act and could not, therefore, resile from such position in the instant case. A

10. The stand taken by Mr. Gambhir was opposed by Mr. Shyam Divan, learned Senior Advocate, who supported the view taken by the High Court and submitted that the appellant's remedy lay in the filing of a suit. In the alternative, it was also submitted that the decision in the matter could be deferred and a notice could be issued to the State of Gujarat to indicate as to whether it had any intention of publishing a Notification as contemplated in Section 2(k) of the Gujarat Tribunal Act. B C

11. Mr. Divan further submitted that in the absence of such Notification, clause 30 of Form B-I would remain inoperative and consequently the provisions relating to the settlement of disputes by arbitration would also not be available to the parties. D

12. Mr. Divan urged that other than Clause 30 of Form B-I, there was no other provision for arbitration in the contract between the parties and the question of invoking jurisdiction under the 1996 Act was, therefore, misconceived. Mr. Divan urged that as the basic requirement of Sub-section (6) of Section 11 regarding an agreed procedure had not been fulfilled, neither the Chief Justice nor the Designated Court could assume jurisdiction thereunder for appointing an Arbitrator. E

13. We have carefully considered the submissions made on behalf of the respective parties and it appears that we are called upon to decide two questions in order to decide this appeal. The first and possibly basic question is whether in the absence of a Notification in the Official Gazette, the Municipal Corporation can at all be considered as a Public Authority for the purpose of Section 2(1)(k) of the Gujarat Tribunal Act, 1992. The other question is whether the absence of a procedure for appointment of an Arbitrator in the Arbitration Agreement itself, would constitute a bar for the appointment of an Arbitrator under Section 11(6) or any other provision of the 1996 Act, when not F G H

A only the parties to these proceedings, but the High Court as well, had arrived at a conclusion that the provisions of the Gujarat Tribunal Act, 1992, would not be applicable in the instant case.

B 14. In this regard, we are inclined to accept the submissions of Mr. Gambhir notwithstanding the fact that the Ahmedabad Municipal Corporation had not been notified to be a "Public Undertaking" as defined in Section 2(1)(iii) of the Gujarat Tribunal Act, 1992. There is no dispute that the Ahmedabad Municipal Corporation is a local authority and it could assume the garb of a "Public Undertaking" only pursuant to a Notification published in that regard in the Official Gazette. On the other hand, even if Form B-I loses its relevance as far as the present contract is concerned, since the parties have agreed to resolution of their disputes by arbitration, the provisions of Sub-section (5) of the 1996 Act can be pressed into service to enable the parties to invoke the powers of the Chief Justice to appoint an Arbitrator. The stand taken by Mr. Divan is highly technical and is not in aid of resolution of the disputes between the parties by an Arbitral Tribunal. While recognizing the right of the appellant to approach the Chief Justice or the Designated Court under Section 11(6) of the 1996 Act, the stand of the respondent Corporation has been that the party should be relegated to suit, which is quite contrary to the stand taken by it in the case of other employees.

F 15. Section 11 of the 1996 Act deals exclusively with the appointment of Arbitrators. Sub-section (2) provides that the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators but subject to Sub-section (6) which provides that if an agreed procedure had not been acted upon, the parties could approach the Chief Justice or his Designate for appointment of an Arbitrator. Sub-sections (3), (4) and (5) contemplate different situations in which the Chief Justice or his Designate could be requested to appoint an Arbitrator. In our view, in the facts of this case, the answer to the question

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thrown up in this appeal lies in Sub-clause (5) of Section 11 of the 1996 Act, which reads as follows :-

"(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him."

16. Having arrived at the aforesaid conclusion, the only question that remains to be decided is whether this matter should be remitted to the High Court for appointment of an Arbitrator or whether we should ourselves appoint an Arbitrator in terms of the Arbitration Agreement. Remitting the matter to the High Court would only mean another round of litigation, whereas if the appointment is made by us, the matter will achieve finality, which would ultimately be beneficial for all concerned.

17. We, accordingly, allow the appeal and appoint Hon'ble Mr. Justice C.K. Thakker, a former Judge of the Supreme Court, presently settled at D-64, Akash Towers, Judges' Bungalow Road, Vastrapur, Ahmedabad to be the Arbitrator for settlement of the disputes which have arisen between the parties. The learned Arbitrator shall fix his own fees and shall also formulate the procedure to be adopted by him during the arbitration proceedings. The Arbitrator shall try and publish his Award as expeditiously as possible, but positively within six months from the date of entering upon the Reference. The Arbitrator will also decide the venue and sittings of the Arbitral Tribunal in consultation with the parties. The judgment and order of the High Court impugned in this appeal is, accordingly, set aside. The costs of this appeal shall be the costs in the arbitration proceedings.