

BALLI PETROCHEMICALS LIMITED
v.
NATIONAL ALUMINIUM COMPANY LTD.
(Arbitration Petition No. 7 of 2006)

JANUARY 20, 2009

[TARUN CHATTERJEE, J.]

Arbitration and Conciliation Act, 1996 – s.11(6) – Dispute between respondent and petitioner over a global tender – Arbitration clause in tender provided for appointment of sole arbitrator – Former Chief Justice of India appointed as sole arbitrator – He had resigned – For replacement of earlier arbitrator, respondent served upon the petitioner a list/panel of three names – Petitioner failed to select any one named in the list/panel within specified time – Respondent appointed and selected a retired Judge of Delhi High Court as sole arbitrator – Petitioner challenged the appointment contending that since earlier a former Chief Justice of India had been appointed as the sole arbitrator, only a former Chief Justice of India ought to have been appointed in his place – Held: Arbitration clause was very clear – In terms thereof, it was open to the respondent to select anyone from the panel of three persons in the event the petitioner failed to select any one of the persons named by respondent within the time specified – Challenge by petitioner cannot be sustained, particularly when it did not raise any objection on creditability of the new arbitrator appointed by respondent.

The petitioner is a company incorporated in London. The respondent is a Government of India undertaking. Disputes arose between the parties in respect of the global tender and the purchase order issued by the respondent pursuant to the tender.

The arbitration clause enumerated in clause 16 of the

A tender provided for appointment of a sole Arbitrator. The petitioner filed an application under s.11(6) of the Arbitration and Conciliation Act, 1996 for appointment of a Sole Arbitrator. A former Chief Justice of India was appointed as the Sole arbitrator who entered appearance in the arbitration proceedings but later resigned therefrom.

Subsequently, in terms of the said arbitration clause, respondent served upon the petitioner a list/panel of three names, out of which one was to be selected for appointment in replacement of the earlier arbitrator, but the petitioner failed to appoint or select any one of the persons named in the list/panel within the time specified. Respondent appointed and selected a retired Judge of the Delhi High Court as the sole Arbitrator.

Before this Court, the Petitioner challenged the appointment contending that since earlier a former Chief Justice of India had been appointed as the sole arbitrator, only a former Chief Justice of India ought to have been appointed in his place.

Dismissing the arbitration petition, the Court

HELD: 1. It was open to the respondent to select any one from the panel sent by the respondent after the expiry of the period for selecting a person by the petitioner. In this case, since the respondent has already exercised the arbitration clause and already replaced and selected a new sole arbitrator who has already entered appearance, there is no reason to replace the appointed arbitrator at this stage when no allegations have been put forward by the petitioner against such appointment excepting that since a former Chief Justice of India was appointed to arbitrate the disputes between the parties, this time also a former Chief Justice of India ought to have been appointed. [Para 2] [429-G-H; 430-A-B]

1.2. A plain reading of the arbitration clause would clearly show that it was solely on the respondent to select the person from the panel of three persons in the event the petitioner had failed to select any one of the persons named by the respondent. In view of the aforesaid fact and in view of the fact that the arbitration clause was very clear, it would not be necessary to go into the details in this matter as the appointment was already made and it is only a case of replacement of earlier sole arbitrator on the ground of his resignation. Therefore, the objections raised by the petitioner cannot be sustained at this stage particularly when the petitioner has not raised any objection on the creditability of the sole arbitrator now appointed by the respondent. [Para 2] [430-B-D]

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 7 of 2006.

A.K. Ganguli and Mamta Tewari (Fox Mandal & Co.) for the Petitioner.

Cicco Mukhopadhaya and Viplav Sharma (for Suresh A. Shroff & Co.) for the Respondent.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. The petitioner is a company incorporated in London. The respondent is a Government of India undertaking having its corporate office at NALCO Bhawan, P-1 Nayapalli, Bhubaneswar, Orissa. The petitioner filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of a Sole Arbitrator to adjudicate the disputes, which arose between the parties in respect of the global tender and the purchase order dated 29th of September, 2000 issued by the respondent pursuant to the tender. Clause 16.0 of the tender contained the Arbitration Clause which reads

A thus :-

B "All disputes or differences arising under the contract
whether during or after completion of the contract or
whether before or after determination, for closure or breach
of the contract (other than those in respect of which the
decision of any person is by the contract expressed to be
final and binding) shall after written notice by either party
to the contract to the other of them and to the appointing
authority herein after mentioned be referred to adjudication
C to a sole arbitrator to be appointed as hereinafter
provided.

D For the purpose of appointing the sole Arbitrator referred
to above, the CMD NALCO who shall be Appointing
Authority will send within thirty days of receipt of the notice
to the seller a panel of three names of persons.

E The contractor shall on receipt of the names as referred
select any one of the person name to be appointed as a
sole arbitrator and communicate his name to the
Appointing Authority shall thereupon appoint the said
person as the sole Arbitrator.

F If the seller fails to communicate such selection as
provided above within the period specified, the Appointing
Authority shall make the selection and appoint the selected
person as the sole Arbitrator.

G If the Arbitrator so appointed is unable to/ unwilling to act
or resign his appointment or vacates his office due to any
reason whatsoever sole arbitrator shall be appointed as
aforesaid. The work under the contract shall not be stopped
during the arbitration proceedings.

H The Arbitrator shall be deemed to have entered on the
reference on the date he issues notices to both the parties
fixing the date of the first hearing.

The Arbitrator may, from time to time, with the consent of the parties, enlarge the time for making and publishing the award.

A

The Arbitrator shall give a separate award in respect of each dispute of difference and shall give a reasoned and speaking award/awards.

B

The venue of arbitration shall be at Bhubaneswar. However, if the situation so warrants, it may as and when required, be held at the place where the site of work is situated.

C

The fees, if any, of the Arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award including the fees, if any, of the Arbitrator shall be in the discretion of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof shall be paid and may fix or settle the amount of costs to be paid. The award of the Arbitrator shall be final and binding on both the parties.

D

Subject to aforesaid provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder, and for the time being in force, shall apply to the arbitration proceedings under this clause."

E

2. On account of breach between the parties, disputes and differences had arisen which were referred to the arbitration of Hon. Mr. Justice R.S. Pathak, (since deceased) Former Chief Justice of India and Former Judge of the International Court of Justice (as His Lordship then was). The learned Arbitrator, so appointed, entered appearance and the arbitration proceedings went on till 25th of November, 2005 when the learned Arbitrator by an order dated 25th of November, 2005 resigned and had withdrawn as Arbitrator from the arbitration stating that as the issues involved in the arbitration were similar to the issues

F

G

H

A involved in an earlier award passed by him and, therefore, it was thought fit that he should withdraw from the arbitration. At this juncture, we may examine the arbitration clause which is enumerated in clause 16 of the tender, as noted herein before. From a plain reading of the arbitration clause, it is evident that

B for the purpose of appointing the sole Arbitrator, the Chief Managing Director of the respondent, i.e. NALCO who shall be the appointing authority will send within 30 days of receipt of the notice of the seller a panel of three names of persons. It will also be evident from the said arbitration clause that the

C contractor shall on receipt of the names, as referred, select any one of the persons' named to be appointed as a sole Arbitrator and communicate his name to the appointing authority who shall thereupon appoint the said person as sole Arbitrator. This clause further provides that if the seller fails to communicate such selection, as noted above, within the period specified, the

D appointing authority shall make the selection and appoint the selected person as the sole Arbitrator. An over all look of the aforesaid provision of the arbitration clause makes it clear that the appointing authority for appointment of an Arbitrator under the arbitration clause is the Chief Managing Director of the

E respondent who shall send a notice to the petitioner within 30 days of receipt of a panel of three names. It would be obligatory on the part of the petitioner to select any one of the persons' named by the appointing authority to be appointed as the sole Arbitrator and communicate his name to the appointing authority and thereupon the appointing authority shall appoint the said

F person as the sole Arbitrator. If the seller fails to communicate such selection as provided above within the period specified, the appointing authority shall make the selection and appoint the selected person as the sole Arbitrator. On the resignation

G of the sole Arbitrator, namely, Hon. Mr. Justice R.S. Pathak, (since deceased) in terms of the aforesaid clause, a list of three names were admittedly served upon the petitioner out of which one was to be selected for appointment in replacement of Hon. Mr. Justice R.S. Pathak, (since deceased). It is not in

H dispute that the said notice was duly served on the petitioner,

but in spite of such service of notice, the petitioner had failed to appoint or select any one of the persons named in the panel of three persons from the list sent by the respondent within the time specified therein. Since the arbitration clause clearly provides for selection of one of the persons named in the panel to be appointed as the sole Arbitrator by the respondents, it was open for the respondent to select one persons' named from the panel and appoint as the sole Arbitrator. In this case admittedly the respondent has already appointed and selected a retired Judge of the Delhi High Court as the sole Arbitrator to replace Justice R.S. Pathak (since deceased). After such appointment having been made, the petitioner has filed this application saying that since the former Chief Justice of India was appointed as the sole Arbitrator, it would not be possible for the petitioner to accept a retired Judge of the Delhi High Court for being appointed as the sole Arbitrator. As noted herein above, it is not in dispute that a panel of three persons in compliance with the arbitration clause was sent by the respondent which was duly received by the petitioner. In spite of receipt of the said notice to select any one of the persons named in the panel and the petitioner having failed to select or choose any one of them and had started saying that as a former Chief Justice of India was appointed to arbitrate the disputes between the parties, the question of accepting a retired Judge of the High Court as the sole Arbitrator in replacement of a former Chief Justice of India was not acceptable to the petitioner. We are unable to accept the submissions made by Mr. Ganguly, learned senior counsel appearing on behalf of the petitioner and after going through the arbitration clause in depth and in detail, in my view, it was open to the respondent to select any one from the panel sent by the respondent after the expiry of the period for selecting a person by the petitioner. In this case, since the respondent has already exercised the arbitration clause and already replaced and selected a sole arbitrator in place of Justice R.S. Pathak (since deceased) who has already entered appearance, I do not find any reason to replace the appointed arbitrator at this stage when admittedly

A

B

C

D

E

F

G

H

A no allegations have been put forward by the petitioner against such appointment excepting that since a former Chief Justice of India was appointed to arbitrate the disputes between the parties, this time also a former Chief Justice of India ought to have been appointed. As noted herein earlier, a plain reading of the arbitration clause would clearly show that it was solely on the respondent to select the person from the panel of three persons in the event the petitioner had failed to select any one of the persons named by the respondent. In view of the aforesaid admitted fact and in view of the fact that the arbitration clause was very clear, it would not be necessary for me to go into the details in this matter as I find that the appointment was already made and it is only a case of replacement of earlier sole arbitrator on the ground of his resignation. Therefore, the objections raised by Mr. Ganguly, learned senior counsel appearing for the petitioner cannot be sustained at this stage particularly when the petitioner has not raised any objection on the creditability of the sole arbitrator now appointed by the respondent.

3. It is to be kept on record that although comprehensive submissions were filed by both the parties before me, but in view of the admitted fact, as stated hereinabove and on a plain reading of the arbitration clause itself I do not find any justification to deal with the submissions put forward by the parties. I, however, request the sole arbitrator to start with the arbitration at an early date and it is expected that he will pass the award in accordance with law within six months from the date of supply of a copy of this order to him.

4. For the reasons aforesaid, I do not find any ground to allow this application and accordingly the application is rejected. There will be no order as to costs.

B.B.B.

Arbitration petition dismissed.