[2023] 15 S.C.R. 463 : 2023 INSC 916

CASE DETAILS

SOLARIS CHEM TECH INDUSTRIES LTD

v.

ASSISTANT EXECUTIVE ENGINEER KARNATAKA URBAN WATER SUPPLY AND DRAINAGE BOARD & ANR.

(Civil Appeal No. 6609 of 2023)

OCTOBER 10, 2023

[DR. DHANANJAYA Y. CHANDRACHUD, CJI, J.B. PARDIWALA AND MANOJ MISRA, JJ.]

HEADNOTES

Issue for consideration: Whether the High Court was justified in dismissing the Writ Petition and the Writ Appeal on the strength of Clause 11 of the agreements between the parties; and whether there was a valid arbitration agreement between the parties, justifying the referral to the Chief Engineer under Clause 11.

Arbitration and Conciliation Act, 1996 – ss. 7(1), 2(b) – Valid arbitration agreement – On facts, in terms of Clause 11 of the agreements, any dispute that would arise between the parties would be resolved firstly by mutual discussion and on a failure of the process, by referring the matter to the Chief Engineer whose decision would be final and binding – Writ petition challenging the notice demanding arrears of tariff for the supply of water – Single Judge declined to entertain the petition and relegated the petitioner to the contractual remedy in terms of the agreement – Division Bench upheld the same – Correctness:

Held: Clause 11 does not constitute an arbitration agreement – Clause 11.2 of the agreement does not constitute the Chief Engineer as an arbitral tribunal – Agreements do not postulate that the Chief Engineer would adjudicate upon the disputes between the parties nor is there any provision to the effect that the Chief Engineer would resolve the dispute after letting in evidence or allowing the parties an opportunity of presenting their respective cases before them – Forum comprising the Chief Engineer lacks the trappings of an arbitral forum – Chief Engineer is an employee of the Board – Though

the Single Judge was of the view that Clause 4 of the agreement empowered the Board to revise its rates, nonetheless, without dealing with the power and the manner of its exercise any further, the High Court relegated the appellant to the remedy under Clause 11 before the Chief Engineer – High Court ought not to have relegated the parties to the Chief Engineer on the strength of Clause 11 – It would have been appropriate if the High Court had finally determined the challenge addressed by the appellant in the writ proceedings u/Art. 226 of the Constitution – Division Bench exclusively relied on the provisions of Clause 11 while coming to the conclusion that the dispute between the parties fell within the ambit of the clause – Provision for settlement of disputes contained in Clause 11 does not constitute the Chief Engineer as an arbitral tribunal since he cannot be regarded as an impartial officer nor do the provisions of Clause 11 incorporate the trappings of an arbitral tribunal – Both the judgment of the Single Judge and the Division Bench set aside. [Paras 16-18, 22-26]

Arbitration – Valid arbitration agreement – Conditions to be satisfied – Stated. [Para 19]

LIST OF CITATIONS AND OTHER REFERENCES

Jagdish Chander v. Ramesh Chander (2007) 5 SCC 719 : [2007] 5 SCR 720; *Jaipur Jila Dugdh Utpadak Sahkari Sangh Limited v. Ajay Sales and Suppliers* 2021 SCC OnLine SC 730; *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665 : [2017] 1 SCR 798; *Ellora Paper Mills Ltd. v. State of M.P* (2022) 3 SCC 1 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6609 of 2023.

From the Judgment and Order dated 18.06.2018 of the High Court of Karnataka Circuit Bench at Dharwad in WA No. 100073 of 2018.

Appearances:

Dalip Kumar Malhotra, Adv. for the Appellant.

Darpan KM, Ms. Amrita Sharma, Ms. Rashi Bansal, Rajat Jonathan Shaw, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

ORDER

1. Leave granted.

2. This appeal arises from a judgment dated 18 June 2018 of a Division Bench of the High Court of Karnataka at the Dharwad Bench. The Division Bench has dismissed a Writ Appeal and thereby affirmed the correctness of an order dated 27 February 2018 of a Single Judge dismissing the writ petition filed by the appellant.

3. The appellant set up a factory in 1975 for the manufacture of Caustic Soda at Village Binaga in North Kanara District, Mysore. On 5 July 1971, an agreement was entered into between the Government of Mysore and the appellant for the continuous supply of water at concessional rates for the operation of the factory. The agreement was valid for a period of 20 years from the commencement of production. On 3 April 1987, the State Government constituted the Karnataka Urban Water Supply and Drainage Board[1] in accordance with the Karnataka Urban Water Supply and Drainage Board Act, 1973. The Board was supplying water to the appellant for industrial use as well as for non-domestic use.

4. It appears that the original agreements were replaced by subsequent agreements dealing with the supply of water for industrial and non-domestic use. The last of the agreements, relevant to the present dispute, was entered into on 11 November 2011 for the supply of water to be charged for non-domestic use and industrial use respectively. These agreements were effective from 27 October 2011 until 26 October 2014. In terms of the agreements, the tariff for the supply of water for industrial use was fixed at Rs 18.40 per kL and Rs 9.20 per kL for non-domestic use. Between 6 June 2014 and 16 September 2014, water bills were raised on the appellant based on the tariff fixed in the agreements dated 11 November 2011.

5. On 18 July 2014, a demand notice was received by the appellant from the Assistant Executive Engineer by which new water rates were sought to be implemented and the appellant was called upon to pay the differential

1 "The Board".

amount with effect from 20 July 2011 till 30 June 2014. The relevant part of the communication is extracted below:

> "…the Board is supplying bulk water to your Industry & Quarters at Binaga, Karwar @ Rs.18.40/KL & Rs.9.20/KL respectively vide rate approved under ref (1). In the Government order under ref (2) the water rates are revised as under :

Slabs	Industrial Rates	Non-domestic Rates
0-8 KL	@ Rs.28.00/- KL	@ Rs.14.00/KL
8-15 KL	@ Rs.36.00/ KL	@ Rs. 18.00/KL
15 - 25 KL	@ Rs.44.00/ KL	@ Rs.22.00/ KL
Above 25 KL	@ Rs.52.00/KL	@ Rs.26.00/KL

> During the audit of this Sub-Division, the Board's Resident Audit Officer have raised an audit para for non-revision of water rate & instructed to implement the new water rates & collect the difference amount from all the consumers from the date of G.O. Accordingly the 2Nos. difference bills for the period from 20-07-2011 to 30-06-2014 including arrears for your industrial & Non-domestic supply total amounting to **Rs.8,22,62,337.00** are submitted for making payment."

6. The appellant responded to the demand on 5 August 2014 and expressed readiness to enter into negotiations with the Karnataka Urban Water Supply and Drainage Board. On 22 September 2014, another notice was issued stating that the Board operates on a no-profit-no-loss basis, and is liable to pay dues to HESCOM[2]. The notice stated that the Board's failure to pay HESCOM its dues would impact upon electricity and water supply. Citing losses caused to the Board, and the audit officers' objections against the non-revision of water bills under government orders, the notice requested payment of arrears, in accordance with the revised rates.

7. On 15 October 2014, the appellant requested the respondent to withdraw the notice demanding arrears. In a Writ Petition under Article 226 of the Constitution of India before the High Court, the appellant challenged the notices dated 18 July 2014 and 22 September 2014.

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2 Hubli Electricity Supply Company Limited.

8. The appellant argued that i) the impugned notices were contrary to clause 4 of the agreements between the parties; ii) the 20 July 2011 Notification, being prior in time to the agreements, was inapplicable and could not be relied on in order to enhance the water tariff; and iii) the enhancement of charges was against the principles of natural justice since the respondent had acted suo motu, without hearing the appellant.

9. The Writ Petition was dismissed by the Single Judge primarily on the ground that Clause 11 of the agreements stipulated that any dispute that would arise between the parties would be resolved firstly by mutual discussion and on a failure of the process, by referring the matter to the Chief Engineer, the second respondent, whose decision would be final and binding. The Single Judge also observed that in terms of clause 4 of the agreements, the Board was entitled to increase the rates. However, in view of the dispute resolution mechanism provided in Clause 11, the Single Judge declined to entertain the petition and relegated the petitioner to the contractual remedy in terms of the agreement.

10. The Division Bench, in a Writ Appeal, has confirmed the judgment of the Single Judge. The Division Bench adverted to the language of Clause 11 of the agreement ("all disputes and differences that may arise") and rejected the appellant's argument that the "demand" made by way of the impugned notices was beyond the purview of "disputes" under Clause 11. Hence, the Division Bench held that the dispute arising out of the impugned notices was covered by the scope of the agreement, and no interference under Article 226 of the Constitution of India was warranted.

11. Following the issuance of notice in these proceedings under Article 136 of the Constitution, the respondent has entered appearance and has filed a counter affidavit.

12. We have heard Mr Dalip Kumar Malhotra, counsel appearing on behalf of the appellant, and Ms Amrita Sharma, counsel appearing on behalf of the respondents.

13. The appellant argues that the Division Bench has misconstrued the issue while declining to interfere. It is argued that the principal ground of challenge is the Board's non-compliance with the statutory procedure under the Karnataka Urban Water Supply and Sewerage Boards Act in issuing the

impugned notices. According to the appellant, the High Court ought to have dealt with the Board's authority to i) increase the tariffs over and above the agreed rates, ii) do so on the basis of a Government Notification that pre-dated the agreement, iii) act in violation of the agreements and the statute which is the source of its power. It has been submitted that the dispute was in rem and not in personam and that the jurisdiction of the High Court was validly invoked. It has been argued that by relegating the parties to Clause 11 of the agreements, the Court erroneously refused interference.

14. The issue that arises for our consideration is whether the High Court was justified in dismissing the Writ Petition and the Writ Appeal on the strength of Clause 11 of the agreements between the parties. We must examine whether there was a valid arbitration agreement between the parties, justifying the referral to the Chief Engineer under Clause 11.

15. While dismissing the Writ Petition, the Single Judge of the High Court relied on Clause 11 of the agreements. Clause 11 reads as follows:

> **"CLAUSE:11 SETTLEMENT OF DISPUTES**
>
> 11.1 All disputes or differences that may arise between the parties hereto pertaining to the meaning of any provision or in connection with the agreement shall be resolved by mutual discussions.
>
> 11.2 In case the mutual discussions falls then all such disputes which have arisen between the Board and the consumer hereto pertaining to the meaning of my provisions in the agreement, shall be resolved by referring the matter in writing to the Chief Engineer (North), K.U.W.S. & D Board, Dharwad, whose decision will be final and binding on the consumer and the Board."

16. Clause 11 is titled, "Settlement of Disputes". Clause 11.1 stipulates that all disputes or differences that may arise between the parties pertaining to the meaning of any provision in the agreement or in connection with it, would be resolved by mutual discussion. However, if mutual discussions fail, Clause 11.2 postulates that all such disputes which have arisen between the Board and the consumer pertaining to the meaning of the provisions of the agreements would be resolved by referring the matter to the Chief Engineer whose decision would be final and binding.

17. Bearing in mind the provisions of the Arbitration and Conciliation Act 1996[3], we are of the view that Clause 11 does not constitute an arbitration agreement. The expression "arbitration agreement" is defined by Section 2(b) to mean an agreement referred to in Section 7. Section 7 is extracted below:

> **"7. Arbitration agreement.**—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in—
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
>
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

18. Sub-section (1) of Section 7 indicates that an arbitration agreement is an agreement by parties to submit to arbitration "all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". It is well settled that in determining whether there is an arbitration agreement, the terms of the contract between the parties must be read as a whole. The 1996 Act does

3 "The 1996 Act"/ "The Act"

not prescribe a certain form of an arbitration agreement. The use or the absence of the word 'arbitration' is not conclusive and the intention of the parties to resolve the disputes through arbitration should be clear from the terms of the clause. In **Jagdish Chander vs Ramesh Chander,** the Court summarised the relevant factors for determining whether an agreement is an arbitration agreement within the meaning of S. 7 of the 1996 Act. The Court held[4]:

> "(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. **(c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it.** (d)The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them." (emphasis added).

19. The following conditions must be satisfied by a valid arbitration agreement:

(i) The agreement must be in writing, as stipulated by sub-section (3) of Section 7;

(ii) Parties should have agreed to refer any disputes, present or future, between them to an arbitral tribunal;

(iii) The arbitral tribunal should be empowered to adjudicate upon the disputes in an impartial manner giving due opportunity to the parties; and

4 (2007) 5 SCC 719, 724.

(iv) The parties should have agreed that the decision of the tribunal would be binding between them.

20. In the present case, Clause 11.2 of the agreement does not constitute the Chief Engineer as an arbitral tribunal. A similar clause was considered by this Court in ***Jaipur Jila Dugdh Utpadak Sahkari Sangh Limited vs Ajay Sales and Suppliers***.[5] A distributorship agreement between the parties contained an arbitration clause in clause 13, stipulating that all disputes arising out of or in any way touching or concerning the agreement, whatsoever shall be referred to the sole Arbitrator, the Chairman, Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. and his decision shall be final and binding upon the parties. Accordingly, the respondent in the case approached the Chairman and while the dispute was pending before the Chairman, the respondent made an application for appointment of an arbitrator and an arbitrator came to be appointed by the High Court. Aggrieved by this, the appellant moved this Court. Section 12(5) of the Arbitration Act, which was introduced in the year 2015 by way of an amendment indicates that notwithstanding any prior agreement to the contrary, certain persons whose relationships with the parties fall under the Seventh Schedule of the Act, are ineligible to be appointed as an arbitrator. The issue was whether this disqualification applied to arbitration agreements executed prior to the amendment which came into effect on 23 October 2015. Dismissing the appeal, the Court answered the question in the affirmative. Reiterating the observations in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited***[6], the Court held that the object and purpose of Section 12(5) of the Act is to ensure the "neutrality of arbitrators". The non-obstante clause makes the application of this provision to pre-amendment agreements abundantly clear.

21. The Court noted that the effect of Section 12(5) of the Act is that the party cannot insist on the appointment of an arbitrator in terms of such an agreement. Reading Section 12(5) with the Seventh Schedule of the Act, it was held that the Chairman in that case, was disqualified

5 2021 SCC OnLine SC 730, para 10.
6 (2017) 4 SCC 665.

and that the High Court was justified in appointing an arbitrator other than the Chairman.

> "Disqualification/ineligible under Sub-section (5) of Section 12 read with Seventh Schedule to the Act is to be read as a whole and considering the object and purpose for which Sub-section (5) of Section 12 read with Seventh Schedule to the Act came to be inserted. Sub-section (5) of Section 12 read with Seventh Schedule has been inserted bearing in mind the 'impartiality and independence' of the arbitrators. It has been inserted with the purpose of 'neutrality of arbitrators'. Independence and impartiality of the arbitrators are the hallmarks of any arbitration proceedings as observed in the case of Voestalpine Schienen (Supra). Rule against bias is one of the fundamental principles of natural justice which apply to all judicial proceedings and quasi-judicial proceedings and it is for this reason that despite the contractually agreed upon, the persons mentioned in Sub-section (5) of Section 12 read with Seventh Schedule to the Act would render himself ineligible to conduct the arbitration."[7]

22. In the present case, the agreements do not postulate that the Chief Engineer would adjudicate upon the disputes between the parties nor is there any provision to the effect that the Chief Engineer would resolve the dispute after letting in evidence or allowing the parties an opportunity of presenting their respective cases before them. The forum comprising the Chief Engineer lacks the trappings of an arbitral forum. More importantly, the Chief Engineer is an employee of the Board. In view of the decision in ***Jaipur Jila Dugdh Utpadak Sahkari Sangh Limited (supra), which has been upheld in Ellora Paper Mills Ltd. v. State of M.P,***[8] arbitration proceedings must account for the rule against bias and due process. Clause (1) of the Seventh Schedule of the Act disqualifies an employee of one of the parties from being appointed as an arbitrator. This prohibition applies notwithstanding an agreement to the contrary. Read conjointly with the requirements of a valid arbitration

7 2021 SCC OnLine SC 730, para 17.
8 (2022) 3 SCC 1.

agreement stipulated in ***Jagdish Chander (supra),*** Section 12 (5) of the Act and the Seventh Schedule would indicate that such a person cannot be considered fit to resolve the dispute between the parties independently and without bias.

23. Though the Single Judge was of the view that Clause 4 of the agreement empowered the Board to revise its rates, nonetheless, without dealing with the power and the manner of its exercise any further, the High Court relegated the appellant to the remedy under Clause 11 before the Chief Engineer.

24. Once we have come to the conclusion that the provisions of Clause 11 do not constitute an arbitration agreement, the corollary is that the High Court ought not to have relegated the parties to the Chief Engineer on the strength of Clause 11. It would have been appropriate if the High Court had finally determined the challenge addressed by the appellant in the writ proceedings under Article 226 of the Constitution. Though the Single Judge has adverted to Clause 4, evidently there is no final determination in that regard.

25. The judgment of the Division Bench has exclusively relied on the provisions of Clause 11 while coming to the conclusion that the dispute between the parties fell within the ambit of the clause. The fundamental aspect of the matter, however, is that the provision for settlement of disputes which is contained in Clause 11 does not constitute the Chief Engineer as an arbitral tribunal since he cannot be regarded as an impartial officer nor do the provisions of Clause 11 incorporate the trappings of an arbitral tribunal.

26. For the above reasons, we allow the appeal and set aside both, the judgment of the Single Judge dated 27 February 2018 and the judgment of the Division Bench dated 18 June 2018. The Writ Petition, being Writ Petition No 111298/2014 (GM-RES), shall stand restored to the file of the Single Judge of the High Court of Karnataka at Dharwad Bench for decision afresh.

27. We clarify that we have not expressed any view on the merits of the case which is sought to be set up by the appellant in the Writ Petition or on the defence which has been urged on behalf of the respondents.

28. The Court has been apprised of the fact that in the meantime, the appellant, which has been taken over by the Aditya Birla Group, has continued to pay the revised water rates and has cleared the arrears while reserving its rights to avail of the remedies. The appellant shall continue to pay the rates as fixed by the Board from time to time subject to such final orders as may be passed by the High Court in the Writ Petition which is restored to the file of the High Court.

29. The Appeal is accordingly disposed of.

30. Pending applications, if any, stand disposed of.

Headnotes prepared by:
Nidhi Jain.

Appeal disposed of.