

Huawei Technologies Co. Ltd vs Sterlite Technologies Ltd on 4 September, 2015

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Bench: Ranjan Gogoi

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION CASE (CIVIL) NO.27 OF 2015

HUAWEI TECHNOLOGIES CO. LTD. . . . PETITIONER

VERSUS

STERLITE TECHNOLOGIES LTD. . . . RESPONDENT

J U D G M E N T

1. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) has been filed seeking appointment of a Sole Arbitrator in terms of clause 22.3 of the Supply Contract between the parties which was entered into in the following circumstances:

In March 2006, MTNL issued a tender for supply, installation, testing, commissioning of Broadband Access Network. Both the petitioner and the respondent together bid against the tender floated and the respondent acted as the lead bidder. The contract was awarded in favour of the respondent by the MTNL. On 9th April, 2007, the parties entered into a Supply Contract for the aforesaid project. According to the petitioner, though it had complied with all the terms and conditions of the said supply contract and had shipped/delivered all equipments on time, the respondent had failed to make full payment of the amounts due and an amount quantified at USD 13,390,000 is due and payable. The petitioner sent a legal notice dated 28th November, 2014 calling upon the respondent to make payment of the outstanding dues along with interest thereon within seven days failing which it was stated in the notice that the petitioner would be invoking clause 22 of the Supply Contract which provided for arbitration and will proceed to appoint Mr. Justice S.K. Dubey, a former judge of the High Court of Madhya Pradesh as the sole Arbitrator.

As no response was received to the aforesaid notice, the petitioner by letter dated 29th December, 2014 appointed Shri Justice S.K. Dubey which appointment was accepted. Thereafter the respondent raised a dispute with regard to the reference to the arbitration and rejected the appointment of Shri Justice S.K. Dubey as the sole Arbitrator.

In these facts the learned sole Arbitrator Shri Justice S.K. Dubey by order dated 21st January, 2015 recused himself from the proceedings. It is in the aforesaid circumstances that the present application/arbitration petition has been filed under Section 11(6) of the Act for appointment of a sole Arbitrator.

2. A counter affidavit has been filed on behalf of the respondent wherein it has been, inter alia, stated that upon appointment of Shri Justice S.K. Dubey as the sole Arbitrator the notice invoking the arbitration clause had spent its force; Shri Justice S.K. Dubey having recused himself from the proceedings the fresh appointment of a learned sole Arbitrator has to be made by, once again, resorting to the provisions of clause 22 of the Supply Contract and by following the procedure prescribed therein. Certain other objections have also been raised on the merits of the dispute contending that the petitioner had not fulfilled its obligations under the Supply Contract so as to be entitled to the amounts as claimed.

3. The Court has heard the learned counsels for the parties.

4. Under Section 15(2) of the Act in a situation where the mandate of an arbitrator terminates, a substitute arbitrator is required to be appointed according to the rules that were applicable to the appointment of the arbitrator who is replaced. In *Yashwith Constructions (P) Ltd. Versus Simplex concrete Piles India Ltd.* and another [(2006) 6 SCC 204], the term 'rules' appearing in Section 15(2) of the Act has been understood to be referring to the provisions for appointment contained in the arbitration agreement or any rules of any institution under which the disputes are to be referred to arbitration. In the present case, admittedly, there are no institutional rules under which the disputes between the parties are to be referred to arbitration and, therefore, the expression "rules" appearing in Section 15(2) of the Act will have to be understood with reference to the provisions for appointment contained in the Supply Contract.

5. Clause 22.3 of the Supply Contract which deals with the matter may be extracted at this stage:

"22.3 All disputes, controversies or claims arising out of or in connection with or in relation to this Contract of its negotiation, performance, breach, existence or validity, whether contractual or tortuous, shall be referred to arbitration in accordance with the Indian Conciliation and Arbitration Act, 1996 and conducted by a single arbitrator to be appointed by the Parties by mutual consent. The cost of arbitration shall be shared by the Parties. The place of the arbitration shall be India and the applicable law in relation to the procedure of the arbitration shall be determined by reference to the law of the place of the arbitration is to be held. The arbitration proceedings shall be conducted in English language. The award of the arbitration

shall be final and binding against the Parties hereto.”

6. Clause 22.3 of the Supply Contract contemplates appointment of a sole arbitrator by the parties by mutual consent. In a situation where the original arbitrator i.e. Shri Justice S.K. Dubey had recused himself the substitute or new arbitrator is required to be appointed according to the rules that were applicable to the appointment of the original arbitrator. This is the mandate of Section 15(2) of the Act. It was, therefore, incumbent on the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent and only on failure thereof the present application under Section 11(6) of the Act could/should have been filed. The above recourse is required to be followed by virtue of the provisions of Section 15(2) of the Act and the decision of this Court in Yashwith Constructions (P) Ltd. (supra). Admittedly, the same had not been followed. In these circumstances, the Court will understand the present application/arbitration petition to be premature. It is accordingly not entertained leaving it open for the petitioner to act appropriately, if so advised, in terms of the present order and thereafter seek its remedies as provided by law.

7. The Arbitration Petition is disposed of in the above terms.

.....,J.

(RANJAN GOGOI) NEW DELHI SEPTEMBER 04, 2015