

Orissa High Court

D.K. Gupta And Co. vs Indian Oil Corporation Ltd. And ... on 15 March, 2002

Equivalent citations: AIR 2003 Ori 32, 2003 (1) ARBLR 450 Orissa

Author: P Balasubramanyan

Bench: P Balasubramanyan

ORDER P.K. Balasubramanyan, J.

1. On my allowing Miscellaneous Case No. 238 of 2001 and recalling the order passed in this case on 24-8-2001, with the consent of parties, the main case itself was taken up for fresh hearing.

2. This petition is filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (in short, the 'Act') for appointment of an Arbitrator in terms of the Act. According to the petitioner, in the original, contract between the parties, there was an arbitration clause as contemplated in Section 7 of the Act, and in spite of the petitioner invoking Clauses 17 and 18 of the contract containing the arbitration clause, the opposite parties have not responded or have failed to name the Arbitrator, and in that situation, the petitioner was entitled to move the Chief Justice under Section 11 of the Act for appointment of an Arbitrator.

3. The contention raised in defence is that there was no proper invocation of the arbitration clause by the petitioner and Section 11 (6) of the Act has not been complied with or satisfied before the matter was brought before this Court under Section 11 of the Act. Alternatively it was contended that the parties had agreed to a named Arbitrator or his nominee to arbitrate upon the dispute that may arise out of the contract entered into by them and going by Clause 18 of the contract, the arbitration has to be taken up either by the Executive Director of the first opposite party--Corporation or by a person nominated by him. It is submitted that while exercising power under Section 11 of the Act, the Chief Justice or his nominee has also to take note of the agreement between the parties and the procedure adopted by them for nominating an Arbitrator as far as possible. The Court would be justified at least initially, only in directing the authority concerned so act in terms of the contract between the parties and appoint an Arbitrator as agreed to by the parties. It is submitted that only if in spite of the request made, there is failure on the part of the person in whom the authority is vested to enter upon the dispute or to name an Arbitrator, there would arise the question of nominating an Arbitrator in exercise of power under Section 11(6) of the Act. The learned counsel for the petitioner on the other hand submitted that the power under Section 11 of the Act is wide and the learned Chief Justice is not controlled by the terms of the agreement between the parties in the matter of nominating the Arbitrator and in such a situation, if an impartial third person is appointed as Arbitrator by the Chief Justice, such an order could not be reviewed merely on the basis of the stipulation in the arbitration clause in the agreement between the parties. According to the learned counsel, even those aspects are now concluded by the decision of the Supreme Court in M/s. Konkan Railways Corporation Ltd.'s case referred to in Miscellaneous Case No. 238 of 2001.

4. In a series of decisions the Supreme Court has held that when the parties have named an Arbitrator or have provided for the procedure for appointing an Arbitrator, and the Court finds that an Arbitrator has to be appointed, the Court must initially call upon the concerned contracting party or the authority agreed upon to appoint an Arbitrator or to direct the named Arbitrator to proceed in

terms of the agreement. This position has been settled by the Supreme Court in *S. Rajan v. State of Kerala*, AIR 1992 SC 1918 and *M/s. Konkan Railways Corporation Ltd. v. M/s. Rani Construction Pvt. Ltd.*, 2002 (1) SCALE 465 : (AIR 2002 SC 778). When the parties decide to have an arbitration clause for the redressal of their grievance instead of the Civil Court, the parties are agreeing to a resolution of their disputes extra cursum curiae. The parties have chosen the authority to adjudicate on any dispute that may arise between them out of the contract. Therefore, when the agreement for arbitration provides that the parties will have to name an Arbitrator or confer the power on a third person or one of them to nominate the Arbitrator, such an agreement is binding on the parties. Therefore, when the parties in the case on hand agreed to have their claims and disputes arising out of the contract adjudicated upon by the Executive Director of the Indian Oil Corporation Ltd., or another person to be appointed by him, that contract cannot be said to be not binding on the petitioner in M.J.C. No. 336 of 2000. Since normally the Court must respect the agreement of the parties in the matter of appointing an Arbitrator, nothing stands in the way of permitting the named person to arbitrate on the dispute, or to name an Arbitrator as agreed to by the parties. That does not mean that the Court does not have power to appoint an Arbitrator on its own if it is satisfied that the procedure does not bind the parties or the Arbitrator named by the parties cannot justly arbitrate on the dispute and/or that it would be more expedient and in consonance with justice if the dispute is arbitrated upon by a third party or person. But the Court exercises that power only in extraordinary situations or only when it is satisfied that some injustice may be caused to either of the contracting parties if the procedure chosen by the parties was to be insisted upon. Learned counsel for the petitioner submitted that in the case on hand the petitioner had invoked the jurisdiction of the Executive Director and he had not responded. In that situation, it was a fit case where an independent person could be appointed as Arbitrator. The learned counsel for the opposite parties on the other hand pointed out that there was no proper invocation of the arbitration clause and in fact the petitioner even without waiting for the reply to the notice earlier sent, has sought the appointment of an Arbitrator, and in that situation, no ground was made out for going behind the contract between the parties and appointing a third party as the Arbitrator.

5. Having anxiously considered the rival submissions, it appears to me that the prayer for choosing an Arbitrator to arbitrate upon the dispute between the parties should be left to the parties as per the agreement wherever and whenever it is possible and unless there are compelling circumstances justifying a departure from that course. On going through the relevant materials, I am not satisfied that such compelling circumstances exist in this case so as to justify the appointment of an Arbitrator outside the terms of the agreement between the parties. Obviously the Executive Director referred to in the agreement is an Executive Director unconnected with the work or the contract relating to the work in question. No doubt, he is a higher officer of one of the contracting parties. But, the parties have named him as the Arbitrator to resolve the disputes between them arising out of the contract in question. Since I am satisfied that no case of bias is made out against the Executive Director of the opposite party-Corporation, I am of the view that no departure from the agreement is warranted in the case on hand. I am, therefore, satisfied that the prayer of the petitioner could be allowed to the extent of directing the Executive Director of the opposite party-Corporation, to enter upon the reference and to arbitrate upon the claim made by the petitioner and sought to be resisted by the opposite parties. I, therefore, direct the Executive Director, Market Division, Eastern Region, Indian Oil Corporation Ltd., Calcutta-68, to enter upon the reference and take up the dispute raised

by the petitioner and to render a decision thereon in accordance with law within a period of six months from the date of his entering upon the reference.

6. The learned counsel for the petitioner submitted that the petitioner had incurred expenditure for payment of initial fees and other expenses to the Arbitrator appointed by this Court by order dated 24-8-2001, and there is no justification in directing the Executive Director to arbitrate upon the dispute, especially when there was no response from him in spite of the request made by the petitioner. I think the proper course to adopt is to hold that the petitioner would be entitled to make a claim before the Arbitrator regarding the expenses thus incurred by him, and the Executive Director will consider that claim also and render a decision on that claim also, along with the other claims raised by the petitioner.

7. Thus, the application is allowed in part and the Executive Director, Market Division, Eastern Region, Indian Oil Corporation, Calcutta-68 is appointed Arbitrator and he is called upon to enter the reference expeditiously and at any rate within two months from the date of receipt of a copy of this judgment and complete the proceeding within six months from the date of his entering on the reference. In the circumstances, I think that the petitioner should be awarded the costs of this proceeding which I quantify at Rs. 1500/-.