DELTA MECHCONS (INDIA) LTD. A

*v.*

M/S MARUBENI CORPORATION

MAY 18, 2007

[P.K. BALASUBRAMANYAN, J.] B

*Arbitration and Conciliation Act, 1996:*

*s. 11—Appointment of Chairman of arbitral tribunal—Arbitration agreement providing for appointment of one arbitrator by each party and Chairman of arbitral tribunal to be nominated by the two arbitrators—Presiding arbitrator not to be of the nationality of contracting parties—Two arbitrators so appointed, failed to nominate presiding arbitrator—As per agreement when the International Chamber of Commerce was approached, it declined to appoint Chairman of arbitration tribunal—Application u/s 11 filed before Chief Justice of India for appointment of presiding arbitrator—Held: Though parties have agreed that arbitration should be conducted in accordance with Rules of Conciliation and Arbitration of the International Chamber of Commerce, but agreement to follow Rules of ICC with conduct of arbitration proceedings is different from the agreement regarding appointment of arbitral tribunal—There is no obligation on parties to undertake before ICC, to have the arbitration in accordance with its procedure—The procedure agreed upon the parties to constitute arbitral tribunal having broken down, petitioner is justified in approaching the Chief Justice of India of appointment of a presiding arbitrator—As per arbitration agreement, Chairman of arbitral tribunal has to be of a nationality different form the nationality of contracting parties—It cannot be said that since arbitrator was in the circumstances to be appointed by the Chief Justice of India or his nominee in terms of s.11 of the Act, the restriction of nationality would not apply—Chairman of arbitral to be appointed has to be a nationality different from nationality of either parties—Parties would, therefore, submit an agreed name with consent of that person or in case they are not able to agree, they would submit two names each with consent of nominees for being considered for appointment as Chairman of arbitral tribunal—Rules of Conciliation and Arbitration of the International Chamber of Commerce.* C D E F G

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A CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 11 of 2006.

(Under Section 11(6) of the Arbitration and Conciliation Act 1998)

M.C. Dhingra, Dr. V.K. Agrawal, Sunil Goel and Aarti Topu for the Petitioners.

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Harish N. Salve, Sr. Adv., Manu Nair and Viplav Sharma (for Suresh A. Shroff & Co.) for the Respondent.

The Order of the Court was delivered by

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**ORDER**

1. The respondent took up the project of construction of a thermal power plant at Ramagundam in Karimnagar District of the State of Andhra Pradesh. It entered into four sub-contracts with the petitioner relating to that work. The general conditions of sub-contracts were to be part of the four separate contracts. The sub-contracts were terminated on 25.7.2001 with effect D from 7.8.2001. It appears that there were subsequent discussions between the parties and on the basis of ascertainment of the sums due to the petitioner the same were paid by the respondent and the petitioner in return gave in writing that it had received full and final payment from the respondent in terms of the settlement between the two and also a certificate that all payments E against the said four sub-contracts have been made by the respondent to the petitioner and received by the petitioner and that no bills are pending with the respondent for settlement. After the matters rested on this basis, the petitioner made a claim in respect of the four sub-contracts. The petitioner also named an arbitrator and called upon the respondent to name an arbitrator in terms of the arbitration agreement. The respondent disputed the claims of F the petitioner and pleaded that there was no subsisting claim for the petitioner based on any of the four sub-contracts. Even then without prejudice to its contentions the respondent also named an arbitrator. In terms of the arbitration agreement, the two nominated arbitrators had together to name the Chairman of the Arbitral Tribunal or the presiding arbitrator. The nominated arbitrators failed to do so.

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2. Meanwhile the petitioner had also moved the concerned District Court under Section 9 of the Arbitration and Conciliation Act seeking what it called interim protection pending an arbitration. Four separate applications were filed. The applications were dismissed by the District Court. The petitioner filed appeals in the High Court of Gujarat. The High Court disposed of the H appeals recording the following:

"After having argued at some length, learned counsel on both sides agreed and submitted that the main dispute between the parties is the subject-matter of separate arbitration proceedings and at this stage it may not be necessary or advisable to invite observations of this Court as regards the legality and validity of any of the claims or liability of any of the parties to satisfy such claims. It was, therefore, jointly submitted that all the appeals may be disposed as withdrawn with the observation that the parties may put forward their case before the arbitral tribunal, which may decide the dispute referred to it without being influenced by any observation made in the impugned judgment as also the fact that these appeals were not pressed for any orders on merits."

3. The relevant clauses relating to arbitration, as contained in the agreement between the parties are as under:

*"21. SETTLEMENT OF DISPUTES*

If at any time any question, dispute, or difference arise between the Contractor and the Subcontractor in connection with or arising out of the Subcontract or the Subcontract Works, either party shall give to the other notice in writing specifying the nature of such question, dispute or difference and the point at issue, and the parties shall discuss the matter and shall endeavour to reach an amicable settlement. In case parties fail to reach an amicable solution within sixty (60) days after the date of the said notice, the matter shall be referred to an arbitration in accordance with Clause 22 hereof.

*22. ARBITRATION*

22.1. Any dispute which could not be resolved between the parties in accordance with clause 21 hereof shall be settled exclusively by arbitration conducted in accordance with the Rules of Concilation and Arbitration of the International Chamber of Commerce. Each arbitral tribunal shall consist of three arbitrators. The Contractor and the sub-contractor shall each appoint one arbitrator and the two arbitrators thus appointed shall jointly agree upon the third arbitrator to act as chairman. If such agreement cannot be reached within thirty (30) days from the date of appointment of the later member, the third arbitrator shall be appointed by the International Chamber of Commerce. The said Chairman shall not be the same nationality of either party to the

A sub-contract.

22.2. The arbitration shall be conducted in India

22.3. The language to be used on all written documents provided in each arbitration shall be English.

B 22.4. The decision of the arbitral tribunal shall be considered final and binding upon both parties and shall not be subject to any appeal whatsoever.

22.5. The cost and expenses of arbitration shall be borne by the party based on the award of the arbitral tribunal.

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22.6. Performance of the sub-contract work shall continue during the arbitration proceedings notwithstanding the existence of any dispute, controversy or question."

4. When the named arbitrators failed to nominate a presiding arbitrator, D the petitioner approached the International Chamber of Commerce (for short ICC) with a request that the presiding arbitrator may be nominated by the ICC. There was some correspondence between the ICC and the parties and ultimately the ICC informed the petitioner that the ICC had decided not to appoint a Chairman of the arbitral tribunal pursuant to the rules of ICC as E appointing authority. It was in that context that the petitioner approached this Court with this application under Section 11 of the Arbitration and Conciliation Act.

5. Learned counsel for the petitioner submitted that going by the arbitration agreement the petitioner and the respondent have nominated their F arbitrators but the nominee arbitrators had failed to appoint a presiding arbitrator in terms thereof and in that context, as per the agreement, the petitioner had approached the ICC for nominating a presiding arbitrator but the ICC had refused the request without assigning any reason. In that context it was submitted that the jurisdiction of the Chief Justice of India — being an international arbitration — under the Act was attracted and it was just and G necessary to appoint a presiding arbitrator in terms of Section 11 of the Act. This argument is controverted by the respondent, in addition to pleading on the merits that there was no subsisting claim for the petitioner and that the arbitration is barred by limitation, by contending that the petitioner had not complied with the procedure set down by the ICC before calling upon ICC H to name the presiding arbitrator and in that context the jurisdiction of the

Chief Justice of India under Section 11 of the Act is not attracted. It was also contended that there were four sub-contracts and a single application for the appointment of a presiding arbitrator in respect of the disputes relating to four different contracts was not maintainable. It was for the petitioner to have agreed to follow the ICC Rules and to comply with those rules so as to get an arbitrator appointed by the ICC in terms of their Rules and the petitioner having failed to do so, the application filed by the petitioner had only to be rejected. The arbitration agreement clearly provides that disputes between the parties are to be settled exclusively by an arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. It is hence submitted that the petitioner not having adhered to the said Rules, ICC was not justified in refusing to act.

6. It is true that there is a clause that the arbitration is to be conducted in terms of the Conciliation and Arbitration Rules of ICC. But it also provides that the arbitral tribunal shall consist of three arbitrators. The contractor and the sub-contractor had to each appoint one arbitrator and the two arbitrators thus appointed, should jointly agree upon the third arbitrator as Chairman. If such agreement be not reached within the time provided, the third arbitrator shall be appointed by the ICC. The Chairman was not to be of the same nationality of either party to the sub-contract. The arbitration agreement has to be read as a whole to know its purport.

7. It is open to the parties while entering into an arbitration agreement to provide as to how the arbitral tribunal should be constituted. It is also open to them to provide for the rules to be followed. As I read the arbitration agreement, I find that the parties had reserved unto themselves the right to nominate an arbitrator each stipulating that the two arbitrators so nominated, should agree upon the third arbitrator to act as the Chairman. In other words, the parties by their agreement have left it to the two arbitrators to appoint a third arbitrator to act as the Chairman. They have also agreed that in case of failure of the two arbitrators to appoint the third arbitrator, the third arbitrator was to be appointed by ICC. The parties had also provided that the arbitration should be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

8. It was the contention of learned senior counsel for the respondent that once the machinery contemplated by the parties failed, the petitioner could only go by way of the Rules of Conciliation and Arbitration of the International Chamber of Commerce and the petitioner not having proceeded

A in terms of the said Rules, the ICC was justified in not appointing a presiding arbitrator and in that context no cause of action has arisen for the petitioner for approaching this Court. As I read the arbitration agreement it consists of two parts. Firstly, the parties have agreed that the arbitration should be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Having agreed to that, the parties also B have agreed on the mode of creating the arbitral tribunal. This is by the parties nominating one arbitrator each and the nominated arbitrators appointing the Chairman of the tribunal or the presiding arbitrator. They have contemplated the failure of the nominee arbitrators to name the Chairman or the presiding arbitrator and they have provided the means for supplying that omission. C They have agreed that in that case, the presiding arbitrator should be got appointed by the ICC. According to me, the agreement to follow the Rules of ICC in the conduct of arbitration proceedings is different from the agreement regarding appointment of the arbitral tribunal. There is no obligation on the parties to undertake before the ICC, to have the arbitration in accordance with its procedure and Rules including even the constitution of the arbitral tribunal, D for the ICC to act to appoint the Chairman of the arbitral tribunal. In fact, except stating that it refuses to appoint a presiding arbitrator, the ICC has not given any specific reason for refusing to do so. Nor am I in agreement with the submission of learned senior counsel for the respondent that unless the parties surrender their rights of creating the arbitral tribunal to the ICC in toto E the ICC would be justified in refusing to name the presiding arbitrator. After all, the process of settlement of disputes through arbitration is a process of settlement extra cursum curiae and the parties are at liberty to choose their judge and in the case on hand, the parties have provided the manner of constituting the tribunal. Therefore, no invalidity is attached to their agreement. They had agreed to approach ICC in case the nominated arbitrators failed to F name the Chairman. One of the parties had moved ICC to supply the omission in terms of the arbitration agreement. The ICC for its own reasons has filed to act. I have, therefore, come to the conclusion that the named arbitrators have failed to nominate a presiding arbitrator in terms of the agreement and in that respect the ICC has not supplied the vacancy approached in terms of G the agreement. In that context the procedure agreed upon by the parties to constitute the arbitration tribunal has broken down justifying the approach of the petitioner to the Chief Justice of India for the appointment of a Chairman for the arbitral tribunal or the presiding arbitrator.

9. I do not see much merit in the contention of learned senior counsel H for the respondent that there should have been four separate applications for

appointment of the presiding arbitrators since four sub-contracts were involved. Even assuming that the contention has merit, I reject it as being too technical.

10. There was not much argument before me on the merits concerning non-subsistence of any further claim for the petitioner and the request being barred by limitation. The parties proceeded on the basis that those were questions for the arbitral tribunal to decide. This might have been so particularly in the context of the stand adopted by them in the High Court of Gujarat in the appeals arising from the orders of the District Court in the applications under Section 9 of the Act. These questions have to be decided by the arbitral tribunal, in the circumstances of this case.

11. As per the arbitration agreement the Chairman of the arbitral tribunal has to be of a nationality different from the nationality of the contracting parties. Learned counsel for the petitioner contended that since the arbitrator was being appointed by the Chief Justice of India or his nominee in terms of Section 11 of the Act, this restriction would not apply and I was free to appoint anyone as Chairman or the presiding arbitrator. I am not in a position to agree. In the light of my reasoning above, it is obvious that this part of the agreement between the parties must also be given effect to. Therefore, this is a case where I have to appoint a Chairman of the arbitral tribunal who is of a nationality different from the nationality of either of the parties. Suffice it to say that for the moment I hold that my jurisdiction to name a Chairman of the arbitral tribunal has rightly been invoked and that a Chairman of the arbitral tribunal has to be appointed by me.

12. To enable me to name the Chairman, I direct, the parties either to submit an agreed name with the consent of that person or in case they are not able to agree, submit two names each with the consent of the nominees, for being considered for appointment as the Chairman of the arbitral tribunal. The parties are, therefore, directed to file either a joint statement or separate statements in writing indicating the names as directed above on or before the 10th of July, 2007 and the matter will be posted for further orders on 13th July, 2007.

R.P. May be listed on 13th July 2007 for further orders.