j\207IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.5939 OF 2007
STATE OF WEST BENGAL & APPELLANT
Vs.
SARKAR & SARKAR & RESPONDENT

O R D E R
JAGDISH SINGH KHEHAR, CJI.
1. The question, that arises for consideration, truly emerges from two orders passed by the High Court at Calcutta (hereinafter referred to as the High Court), dated 24.5.2002, and 26.9.2002. The order dated 24.5.2002 is reproduced below :
THE COURT : The Learned Counsel appearing for the respondent submitted that the State of West Bengal may be granted liberty to prefer counterclaim , if any, before the Learned Arbitrator. Mr. Dutta, the Learned Counsel appearing for the petitioner very fairly submitted that it will always be open to the respondent to prefer its counterclaim, if any, before the Learned Arbitrator and there cannot be any possible objection to this from his client. Accordingly, there is no reason why the matter should not be placed before the Honble the Chief Justice for appointment of an Arbitrator.
Let the matter be placed before His Lordship for nominating a fit and proper person to act as the Arbitrator as prayed for.
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2. Likewise, the order dated 26.9.2002, is extracted below :
The Court : In exercise of power under Section 11 of the Arbitration & Conciliation Act, 1996 I appoint Justice S.S. Ganguly (Retd.) as Arbitrator to decide the disputes arising in the matter and I fix the remuneration a sum of Rs.5000/- per sitting. The Arbitrator shall give the award within four months from the date of filing of the claims and counter claims. The remuneration of the Clerk and Stenographer shall be decided by the Arbitrator in the meeting with the parties.
Let a copy of the order be communicated to the Arbitrator concerned by the Registrar, O.S.
All parties including the Arbitrator and Registrar, O.S. are to act on a Xeroxed Signed Copy of this dictated order on the usual undertaking.
3. A collective perusal of the aforesaid orders, leads to the clear and unambiguous conclusion, that Justice (Retired) S.S. Ganguly, came to be appointed as an arbitrator, by the High Court, in exercise of its powers under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act). Additionally, it emerges, from the above orders, that learned counsel appearing for the State of West Bengal sought liberty from the High Court, to raise a counter-claim, before the arbitrator. In furtherance of the said prayer, learned counsel for the respondent-Sarkar & Sarkar accepted before the High Court, that it would be open to the State of West Bengal to prefer a counter-claim.
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4. Consequent upon the appointment of the above arbitrator, the State of West Bengal raised a challenge

(against the appointment of an arbitrator by the High Court under Section 11 of the Arbitration Act) during the course of the arbitral proceedings, under Section 16 of the Arbitration Act, that the dispute raised by the respondent was not arbitrable. The arbitrator accepted the aforesaid prayer and held by an order dated 15.1.2004, that the arbitrator had no jurisdiction to entertain the dispute raised by the respondent-Sarkar & Sarkar, for arbitration.

5. It is essential for us to extract herein clause 12 of the contractual agreement between the parties. The same is reproduced hereinbelow :

> Clause 12 the Engineer-in-charge shall have power to make any alteration in, omissions from, additions to or substitutions for, the original specifications : drawings, designs and instructions, that may appear to him to be necessary or advisable during the progress of the work and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge and such alterations, omissions additions or substitutions shall not invalidate the contract but shall be deemed to have formed as work included in the original tender & any altered, additional or substituted work which the contractors may be directed to do in the manner above specified as part of the work shall be carried but by the contractor on the same conditions in all respects on which he agreed to do the main work and at the same rates, if any, may be specified in the tender for the main work. The time for the completion of the

> work shall be extended in the proportion that the altered additional or substituted work bears to the original contract work and the certificate of the Engineer-in-charge shall be conclusive as to such proportion. And if the altered additional or substituted work includes any class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the Schedule of rates of the Presidency Circle which was in force at the time of the acceptance of the contract minus/plus the percentage which the total tendered amount bears to the estimated cost of the entire work put to tender and if the altered, additional or substituted work is not entered in the said schedule of rates payment thereof shall be made by the Engineer-in-charge by determining the rates on analysis worked out from (a) the basic rates of materials and labour provided in the current schedule of rates or (b) the current market rates of materials and labour when even basic rates for the work are not available in the schedule. In case when such rates are determined on analysis by the Engineer-in-charge under (a) above, the stipulated percentage above or below schedule of rates as provided in the contract shall also apply and in case of rates worked out on analysis under (b) above regarding rates determined on analysis for any altered, additional or substituted work under this clause the decision of Superintending Engineer of Circle, shall be final and binding.

6. The order passed by the arbitrator on 15.1.2004, was assailed by the respondent-Sarkar & Sarkar, under Section 37 of the Arbitration Act, before the High Court by preferring A.P.O.No.108/2004. The High Court accepted the appeal and set aside the order passed by the arbitrator dated 15.1.2004. The High Court arrived at the conclusion, that clause 12 (extracted above) was indeed a clause
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providing for settlement of disputes between the parties, arising out of their contractual obligation, by way of arbitration.

7. To assail the order passed by the High Court, the State of West Bengal, has preferred the instant civil appeal.

8. It was the vehement contention of the learned counsel for the appellant based on a series of judgments rendered by this Court, that clause 12 (extracted above) was not an arbitral clause, and that, the arbitrator as well as the High Court, had erred in determining the same.

9. Learned counsel for the respondent-Sarkar & Sarkar contested the claim of the appellant. It was submitted, that the appellant could not be permitted even to raise the instant plea, so as to assail the order passed, either by the arbitrator (on 15.1.2004), or by the High Court (on 16.5.2006). The instant submission of the learned counsel for the respondent, was premised on the judgment rendered by this Court in SBP & Co. Vs. Patel Engineering Ltd. , (2005) 8 SCC 618. Our pointed attention was drawn to the conclusions drawn by the Constitution Bench in the above judgment, in paragraph 20. Paragraph 20 is reproduced below :

> 20. Section 16 is said to be the recognition of the principle of Kompetenz-Kompetenz. The fact that the Arbitral Tribunal has the
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> competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In Konkan Rly. what is considered is only the fact that under Section 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order under Section 11(6) of the Act, was not considered.

Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

(emphasis is ours)

10. It was the submission of the learned counsel for the respondent, that proceedings could not have been

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entertained by the arbitrator under Section 16 of Arbitration Act, in the present controversy, because by the orders of the High Court dated 24.5.2002 and 26.9.2002 (extracted above), the appointment of the arbitrator was made, in exercise of the powers vested in the High Court, under Section 11 of the Arbitration Act. The factual position depicted hereinabove, as also, the orders referred to hereinabove, leave no room for doubt, that Justice (Retired) S.S. Ganguly, was actually appointed as an arbitrator by the High Court, in exercise of the powers vested in the High Court, under Section 11 of the Arbitration Act. That being the position, learned counsel for the respondent is fully justified in her submission, that the said order could not be tested by the arbitrator while considering the claim raised by the appellant-State of West Bengal under Section 16 of the Arbitration Act. Thus viewed, irrespective of whether Clause 12 extracted hereinabove, postulated the adjudication of dispute between the parties through an arbitrator, it is now not open to the appellant before this Court to raise a challenge to the order passed by the High Court appointing an Arbitrator.

11. There is another reason for us not to accept the prayer made before us, on behalf of the appellant-State of West Bengal, for raising a challenge to the order dated 15.1.2004, passed by the arbitrator, and order dated

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16.5.2006 passed by the High Court, and that is, that order dated 26.9.2002 passed by the High Court (extracted above) leaves no room for doubt, that the appellant before this Court, factually requested the High Court to grant liberty to it, to prefer a counter-claim before the arbitrator. In other words, the appellants prayer to the High Court (on 24.5.2002) was, to permit it to raise its own dispute, by granting liberty to it to prefer a counter-claim before the arbitrator. Such being the position, the appellant cannot now wriggle out of the aforesaid voluntary acceptance, to have the matter adjudicated before the arbitrator. In any case, even Section 7(4)(c) of the Arbitration Act, in such factual circumstances, would lead to the same conclusion. Therefore, in the facts and circumstances of this case, there is also no dispute about the fact, that as against the claim raised by the respondent-Sarkar & Sarkar before the arbitrator, the appellant-State of West Bengal, had indeed raised a counter-claim. And having done so, it must be deemed to have submitted before the arbitrator,a request to adjudicate its claims as well. When both parties, had approached the arbitrator, and submitted themselves to the arbitrators jurisdiction, independent of all other factual and legal considerations, the arbitrability of the disputes was clearly made out under Section 7(4)(c) of the

Arbitration Act.

12. For the reasons recorded hereinabove, we find no justification whatsoever, to interfere in the conclusions drawn by the High Court. The civil appeal is accordingly dismissed. The conclusions rendered by the High Court, are however being sustained for different reasons and not for the reason, that clause 12 of the contractual agreement between the parties was or was not a clause postulating arbitration as a mode of settlement of the disputes arising between the parties.

13. The Registry of this Court is directed to dispatch a copy of this order to the arbitrator - Justice (Retired) S.S. Ganguly, for further necessary action.

.....CJI.
[JAGDISH SINGH KHEHAR]
.....J.
[Dr. D.Y. CHANDRACHUD]
.....J.
[SANJAY KISHAN KAUL]
New Delhi;
19 th
April, 2017.

ITEM NO.103 COURT NO.1 SECTION XVI

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

Civil Appeal No(s).5939/2007

STATE OF WEST BENGAL Appellant(s)

VERSUS

SARKAR & SARKAR Respondent(s)

Date : 19/04/2017 This appeal was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Appellant(s) Mr. Kalyan Banerjee,Sr.Adv.
Mr. Chanchal Kumar Ganguli,Adv.
Mr. Saurav Gupta,Adv.

For Respondent(s) Ms. Shipra Ghose,Adv.

UPON hearing the counsel the Court made the following

O R D E R

The civil appeal is dismissed in terms of the signed order, with a direction to t he Registry of this Court to dispatch a copy of this order to the arbitrator - Justice (Retired) S.S. Ganguly, for further necessary action.

Pending application, if any, shall stand disposed of.

(Sarita Purohit) (Renuka Sadana)
Court Master Assistant Registrar

(Signed order is placed on the file)