

(2009) 12 OHC CK 0012

In the Orissa High Court

Case No : Civil Appeal No's. 8230 of 2009 (Arising out of SLP (C) No. 8218 of 2007)

Bharat Sanchar Nigam Ltd. and Another

APPELLANT

Vs

Dhanurdhar Champatiray

RESPONDENT

Date of Decision : 11-12-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)

Citation : (2010) 1 ILR (Ori) 431

Hon'ble Judges : Tarun Chatterjee, J;Aftab Alam, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Tarun Chatterjee, J.—Leave granted.

2. These appeals by special leave have been filed against the orders dated 5th of January 2005 in A.R.B.P. Nos. 11, 12, 17, 18 and 28 of 2005 passed by the High Court of Orissa whereby the High Court had appointed Sh. Bibhudhendra Mishra, a Senior Advocate of the Orissa High Court as the sole arbitrator on the application of the Respondent filed u/s 11(6) of the Arbitration and Conciliation Act 1996 (hereinafter referred to as "the Act"). Since the parties and the subject matter of the dispute are the same, we have clubbed all these appeals and the same are being decided analogously by this common judgment to avoid any confusion.

3. The relevant facts leading to the filing of these appeals as emerging from the records may be briefly stated as follows:

The parties herein entered into a contract pursuant to distinct notices inviting tender by BSNL (in short "the Appellant") for the work of construction of 4 Nos. of Type-II, 2 Nos. Type-III and 1 No. of Type-IV Staff Quarters at Bhanjanagar of vertical extension to combined building at Aska of 3 Nos. of Type III, 3 Nos. of Type II and 4 K type T.E. building at Jankia and of vertical extension to 8 Nos. of

Type II and 6 Nos. of Type IV staff quarters at CTTC compound Vanivihar, Bhubaneswar.

4. The said contract contained an arbitration Clause in terms whereof the Chief Engineer, Telecommunication/ Postal Department in charge of the work at the time of dispute, or if there be no Chief Engineer, the Administrative Head of the said Telecommunication/ Postal Department was to be appointed as a sole arbitrator. The said provision envisaged that in terms thereof no person other than the one appointed by such Chief Engineer or Administrative Head of the Telecommunication/ Postal as aforesaid should act as arbitrator to decide the disputes referred to him.

5. The Respondent, by letters, requested the Chief Engineer (Civil) for appointment of an arbitrator to adjudicate the disputes between the parties in terms of Clause 25 of the respective agreements. According to the Respondent, letters were received by the Chief Engineer of the Appellant No. 1 on different dates. The Appellants having failed to respond to the letters of Respondent requiring them to appoint an arbitrator and to appoint an arbitrator in response to such letters within the stipulated period in accordance with Clause 25 of the respective Agreements, the Respondent was constrained to file petitions u/s 11(6) of the Act for appointment of an Arbitrator. However, according to the case made out by the Appellants, on 9th of March, 2005, Chief Engineer (Civil), BSNL had already appointed Sri Gurbaux Singh, Principal Chief Engineer (Arbitration) BSNL vide, its office letter No. 69- 41(05)/CE(c)/BBSR/205. By the impugned order, the High Court allowed application u/s 11(6) of the Act, and appointed one Sri Bibhudhendra Mishra in place of departmental nominee Sri. Gurbaux Singh who was appointed by Chief Engineer (Civil) BSNL of Appellant No. 1.

6. Feeling aggrieved by the said order of the High Court, the Appellant has filed these special leave petitions which on grant of leave, were heard in the presence of learned Counsel for the parties.

7. Before we consider the arguments raised by the learned Counsel for the parties before us, it would be necessary to refer to Section 11 of the Act, which reads as under:

Section 11. Appointment of arbitrators, (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) and (4), omitted because these are not necessary for our purpose

(5) Failing any agreement referred to in Sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, - (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by Sub-section (4) or Sub-section (5) or Sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to - (a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator....

8. A plain reading of Section 11(5) of the Act would show that if one party demands appointment of an arbitrator and the other party does not appoint any Arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the Appellant makes an appointment even after thirty days of demand but the first party has not moved the Court u/s 11, that action on the part of the Appellant would be sufficient. In other words, in cases arising u/s 11(6), if the Respondent has not made an appointment within thirty days of demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files the application u/s 11 seeking appointment of an arbitrator before the High Court. It is only then the right of the Respondent ceases. In this connection, a three-Judge Bench decision of this Court in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638, may be referred to. In this case, this Court considered the applicability of Section 11(6) of the Act and after considering the scope and object of the Act held that once notice period of thirty days has expired and the party has moved the Hon. Chief Justice of the High Court u/s 11(6) of the Act, the other party loses his right to appoint an arbitrator on the basis of arbitral agreement. While taking this view, this Court in the *Punj Lloyd's* case (*supra*) had relied on the judgment referred in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*, wherein in paragraph 19 at page 158 this Court observed as follows:

So far as cases falling u/s 11(6) are concerned, such as the one before us no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed u/s 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an Arbitrator and the opposite party do not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment

even after 30 days of the demand, but before the first party has moved the Court u/s 11, which would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application u/s 11 seeking appointment of an Arbitrator. Only then the right of the opposite party ceases.

9. Similarly in the case of *Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited*, , this Court went to observe that:

But in Sub-section (6), where, the procedure has already been agreed upon by the parties, as in the present case, and in that event, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may in that event, request the Chief Justice or a person or an institution designated by him to make necessary measures, unless the agreement on the appointment procedure provides other means for appointment of arbitrator. Therefore, so far as the period of thirty days is concerned, it is not mentioned in Sub-section (6). The period of limitation is only provided under Sub-sections (4) & (5) of Section 11. As such, as per the statute, the period of limitation of thirty days can not be invoked under Sub-section (6) of Section 11 of the Act.

10. On a perusal of the above quoted observations of this Court made in *Ace Pipeline Contracts Private Limited (supra)*, the reasons advanced in the orders passed by the High Court must be found to be a correct interpretation of the aforesaid provision and so far as the period of 30 days with regard to Section 11(6) is concerned, there is no doubt at all that thirty days limitation can not be invoked as mandatory period u/s 11(6) of the Act. But a somewhat different view was expressed in a latter decision of this Court in the case of *Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd.*, . In view of the difference of opinion of the two coordinate benches of this Court, the matter was referred to a three-Judge Bench in the case of *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*,) in which the decision in *Ace Pipeline Contracts Pvt. Ltd. (supra)* was also referred to, Arijit Pasayat, J. (as His Lordship then was), heading the three-Judge Bench of this Court, after considering the scope and object of the Act particularly Section 11 of the Act, concluded the following:

A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications

required by the agreement and other considerations.

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In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of Sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.

11. In the aforesaid decision in the case of Northern Railway Administration (supra), Arijit Pasayat, J. (as His Lordship then was), found that the High Court in the said case did not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other conditions necessary to secure the appointment of an independent and impartial arbitrator. In the aforesaid decision, this Court also concluded that since the requirement of Sub-section (8) of Section 11 was not at all dealt with by the High Court in its order, the appointment of an arbitrator without dealing with Sub-Section 8 of Section 11 of the Act became vulnerable and accordingly, such appointment was set aside. Similar is the position in this case. In this case also, before appointing an arbitrator u/s 11(6) of the Act, the High court had failed to take into consideration the effect of Section 11(8) of the Act as was done in Northern Railway Administration (supra).

12. In view of the discussions made hereinabove and particularly, in view of the principles laid down by this Court in Northern Railway Administration (supra), we set aside the impugned order and remand the case back to the High Court for fresh decision of the application u/s 11(6) of the Act and while considering the application afresh, the High court is directed to take into consideration the aforesaid decision of this Court.

13. The appeals are allowed to the extent indicate above. There will be no order as to costs.