
(2009) 07 RAJ CK 0036
In the Rajasthan High Court

Daya Engineering Works (Sleepers) Ltd.	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision : 28-07-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(8)(a)

Citation : (2010) 2 RLW 1809

Hon'ble Judges : P.C. Tatia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Tatia, J.—Heard learned Counsel for the parties.

2. The applicant-company registered under the Companies Act and having its registered office at 187, AP Colony, Gaya (Bihar) submitted its offer in response to the notice inviting tender issued by the respondents which is tender No. CS-156/05. The tender was issued in the month of Jan., 2005. The petitioner's offer was accepted by the respondents for manufacture and supply of PMC Sleepers against the said tender and a formal contract was executed between the parties and copy of which has been placed on record as Annex. 2 which is dated 12th Dec., 2005. As per the petitioner there was a term in the contract that respondents shall supply the cement for manufacturing of PMC Sleepers and as per the petitioner, the respondent failed to discharge their duties and did not supply the cement for manufacturing of the PMC Sleepers. According to the petitioner it was a condition precedent for supply of manufactured PMC Sleepers as the Sleepers could have been manufactured only if the petitioner would have been supplied with the cement by the respondents. Because of that difficulty according to the petitioner, the petitioner could not proceed with the speed with which it could have proceeded if the respondents would have supplied the cement to the petitioner. There was correspondence between the parties, but according to petitioner, the respondent ultimately sent a letter dated 25th Oct., 1997 whereby they opted the clause of 30% enhancement in supply of PMC

Sleepers as per agreement and according to the petitioner that enhancement clause was opted just 3 months before the conclusion of the contract term.

3. Be it as it may be, the detail facts are not necessary, but due to dispute between the parties, the petitioner vide letter dated 6th Dec, 2008 called upon the respondents that they have already made several request with respect to above disputes but nothing has been done by the respondents and now the petitioner is intended to invoke the arbitration clause No. 2900 of the general conditions of the contract. The petitioner requested that this letter may be treated as request to the General Manager-respondent No. 3 to appoint sole arbitrator. Copy of the said request letter is placed on record as Annex. 9. The petitioner when found no positive response from the respondents then the petitioner has approached this Court for appointment of the arbitrator with the ground that respondents failed to appoint the arbitrator within 30 days from the date of receipt of the letter requesting appointment of the arbitrator.

4. This arbitration application has been submitted on 7.8.2008. This Court ordered to issue notice to the respondents on 12.8.2008. Notice of the petition was served upon the respondents somewhere in the month of January, 2009 then time was sought by the respondents for filing reply and today reply has been filed.

5. Learned Counsel appearing for the respondents submitted that as per terms of the contract, the General Manager of the respondent was authorized to appoint the arbitrator and he has already nominated Sh, V.S. Meena, Sr. DFM, Jaipur as arbitrator for resolving the dispute between the parties. The respondents have placed on record the copy of the order dated 11th Sept., 2008 by which Sh. V.S. Meena referred above, was appointed as arbitrator.

6. Learned Counsel for the petitioner vehemently submitted that in view of the judgment of the Hon"ble Apex Court delivered in the case of Datar Switchears Ltd. v. Tata Finance Ltd and Anr. reported in 2000 AIR SCW 3925 if one party fails to appoint arbitrator within a period of 30 days of demand then that party loses his right to appoint arbitrator. However, the party who is under obligation to appoint arbitrator could have got additional period and that may be till the first party files an application u/s 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of the arbitrator. Learned Counsel for the petitioner also relied upon the judgment of this Court delivered in the case of KMC Constructions Ltd. v. State of Rajasthan and Ors. reported in 2006 (3) WLC 566 wherein it has been held when no arbitral tribunal appointed by non-applicants prior to moving court u/s 11(6) of the Act of 1996; then right of non-applicant to appoint arbitrator nominee comes to an end. In that situation this Court appointed the arbitrator and not allowed the respondents to appoint the arbitrator after initiation of the proceedings.

7. Learned Counsel for the respondent submitted that there is a condition in the arbitration clause itself that respondents shall have power to appoint the

arbitrator and before service of the notice upon the respondents of this petition, the respondents have already appointed the arbitrator vide Annex. R/1. It is also submitted that as per the provisions of law in the Arbitration and Conciliation Act, 1996 itself, the arbitrator can be appointed by the Court, but court is required to take care of the expertises which is required by the arbitrator looking to the nature of the dispute. It is submitted that in that background if the arbitrator which has been appointed by the respondent may also be appointed as arbitrator by the Court it court reaches to the conclusion that appointment of arbitrator by the respondents beyond the period of 30 days or upto the time of filing of this petition was bad in any manner.

8. I considered the submissions of learned Counsel for the parties and perused the facts of the case.

9. The relevant clause of arbitration is clause No. 2900, which is as under:

2900 Arbitration

(a) In the invent of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contacts entered into by the Zonal Railways and Production Unit; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organization in respect of contract entered into by the other Organization under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator, shall be final and binding on the parties to this contract.

(b) In the event of arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason or his award being set aside by the Court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the matter aforesaid.

(c) It is further a term of this contact that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.

(d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.

(e) Upon every and any such reference, the assessment of the cost in incidental to the reference and award respectively shall be in the discretion of the arbitrator.

(f) Subject as aforesaid, the Arbitration Act, 1940 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under the clause.

(g) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator or such other place as the arbitrator at his discretion may determine.

(h) In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.

10. Under Clause 2900 there is Clause (c) that is relevant for the purpose of deciding this issue which is reproduced again hereinbelow:

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.

11. The Clause (c) clearly provides negative covenant that no person other than the person appointed by the authority as mentioned in the Clause 2900 can act as arbitrator. It appears that parties agreed that in case of any dispute under Clause 2900 the matter may be adjudicated "only by the arbitrator appointed by the authorities of respondent." The question of bias therefore, does not arise because of the reason that the parties themselves including the petitioner signed the arbitration agreement with open eyes that the arbitrator will be appointed by the respondents.

12. Sub-section 8 of Section 11 of the Act of 1996 also very relevant which is as under:

(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.

13. As per Sub-clause (a) of Sub-section 8 of Section 11 of the Act of 1996, the Chief Justice or the person or institution designated by him, in appointing an arbitrator, is required to give due regard to any qualifications required by the arbitrator.

14. Looking to the total tenure of the clause No. 2900 and specially Sub-clause (c) of Clause 2900 it can be inferred that the parties themselves agreed that the persons should be qualified and should be found fit by the General Manager of the Railways to be appointed to adjudicate upon the dispute looking to the

nature of the work. Not only this, but under Clause (C) of the contract, the petitioner agreed to the condition that no other person can be arbitrator to decide the dispute between the contracting parties. Further more, petitioner agreed to the condition that if dispute cannot be referred to such arbitrator then there is no question of referring the matter to any other arbitrator and then petitioner by natural consequence agreed that he may avail other remedy for redressal of his grievance, obviously in general law. This term is not only a term in tarorum only, but a specific agreement between the parties of having even no arbitral settlement.

15. Apart from above, even in a case where arbitrator has not been appointed by concerned party in time and said party lost his right to appoint arbitrator and yet appointed the arbitrator then the Court in its own power and discretion can appoint the same person as arbitrator.

16. Further more, the timing in this case is very relevant. The notice for appointing arbitrator was given by the petitioner to the respondents on 6th June, 2008. The appointment of the arbitrator could have been made by the respondents within 30 days and that comes upto on 5-6th July, 2008. The petition has been submitted with promptness on 7th August, 2008 in this Court, but respondents appointed the arbitrator about 5 months before the notices were served upon the respondents. In these facts and circumstances this Court deem to proper to appoint Sh. VS Meena Sr. DFM, Jaipur as sole arbitrator by order of this Court, who may prdceed to decide the arbitral proceedings.

17. Therefore, this arbitration application is allowed and the Sh. VS Meena Sr. DFM, Jaipur is appointed as arbitrator who may fixed his fees for arbitration and also expenses, which shall be payable by both the parties equally initially and ultimately the arbitrator may decide who shall be liable and to that extend.