

(2013) 03 SC CK 0062

In the Supreme Court Of India

Case No : Civil Appeal No. 2673 of 2013 (Arising out of S.L.P. (C) No. 24686 of 2007)

Deep Trading Company

APPELLANT

Vs

Indian Oil Corporation and Others

RESPONDENT

Date of Decision : 22-03-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(1), 11(2), 11(3), 11(4)

Citation : (2013) 4 AD 281 : AIR 2013 SC 1479 : (2013) AIRSCW 1891 : (2013) 98 ALR 722 : (2013) 2 ARBLR 105 : (2013) 3 AWC 2984 : (2013) 2 BLJ 513 : (2013) 114 CLA 18 : (2013) 177 CompCas 475 : (2013) 2 CompLJ 271 : (2013) 2 CTC 888 : (2013) 8 JT 159 : (2013) 3 LW 3

Hon'ble Judges : R.M. Lodha, J; Madan B. Lokur, J; Jasti Chelameswar, J

Bench : Full Bench

Advocate : Amit Sharma, for the Appellant; Abhinav Vashishta Priya Puri, Sagar Singhal and Anuj Malhotra, for the Respondent

Final Decision : dismissed

Judgement

R.M. Lodha, J.—Leave granted.

2. The questions that arise for consideration in this appeal, by special leave are, whether Respondent No. 1 has forfeited its right to appoint the arbitrator having not done so after the demand was made and till the Appellant had moved the court u/s 11(6) and, if the answer is in the affirmative, whether the appointment of the arbitrator by Respondent No. 1 in the course of the proceedings u/s 11(6) is of any legal consequence and the Chief Justice of the High Court ought to have exercised the jurisdiction and appointed an arbitrator?

3. The above questions arise from these facts: On 01.11.1998, an agreement for kerosene/LDO dealership was entered into between the first Respondent - Indian Oil Corporation (for short, "the Corporation") and the Appellant - Deep Trading Company (for short, "the dealer") for the retail sales supply of kerosene and light diesel oil in the area specified in the schedule. In the course of dealership

agreement allegedly some violations were committed by the dealer. Following the show cause notice dated 04.03.2004, the Corporation on 12.03.2004 suspended the sales and supplies of all the products to the dealer with immediate effect.

4. Aggrieved by the action of the Corporation, the dealer filed a petition u/s 9 of the Arbitration and Conciliation Act, 1996 (for short, "1996 Act") before the District Judge, Etawah seeking an order of injunction against the Corporation from stopping the supply of Kerosene/LDO. On 25.03.2004, the District Judge, Etawah passed a restraint order against the Corporation.

5. The Corporation challenged the order of the District Judge, Etawah dated 25.03.2004 before the Allahabad High Court and also prayed for an interim relief. On 12.07.2004, the Allahabad High Court refused to grant any interim relief to the Corporation.

6. On 09.08.2004, the dealer made a demand to the Corporation by a written notice to refer the disputes between the parties to the arbitrator under the terms of the agreement. In the demand notice, it was also stated by the dealer that if the Corporation fails to appoint the arbitrator, the dealer may be constrained to approach the court u/s 11 of the 1996 Act.

7. It appears that the Corporation challenged the order of the Allahabad High Court in the SLP before this Court but that was dismissed on 06.12.2004 being an interlocutory order.

8. On or about 06.12.2004, the dealer moved the Chief Justice of the Allahabad High Court u/s 11(6) for the appointment of an arbitrator as the Corporation had failed to act under the agreement. While the said proceedings were pending, on 28.12.2004, the Corporation appointed Shri B. Parihar, Senior Manager, (LPG Engineering) of its U.P. State Office as the sole arbitrator.

9. When the above application came up for consideration, the Chief Justice found no reason to appoint the arbitrator, as sought by the dealer, since the arbitrator had already been appointed by the Corporation. The brief order dated 06.12.2007, by which the dealer's application u/s 11(6) was dismissed by the Chief Justice of the Allahabad High Court, reads as under:

1. Heard Mr. Siddharth Singh, in support of this application and Mr. Prakash Padia, Learned Counsel appearing for the Respondents.

2. The dispute in this matter is regarding suspension of the Petitioner's agency as a kerosene dealer for sometime. The applicant applied for appointment of an arbitrator by writing a letter in March, 2004, but filed the present proceeding on 06.12.2004. An Arbitrator was appointed by the Respondents on 28.12.2004. Earlier arbitrator has been replaced by another arbitrator.

3. The contract of the applicant is continuing with the Respondents in view of an injunction granted by the Civil Court.

4. The submission of the applicant is that the Respondents ought to have moved

within thirty days from the date of a request being made. In any case arbitrator has been appointed within thirty days from the filing of the application. Mr. Siddharth Singh, says that the arbitrator conduct should have been appointed after filing of an application u/s 11 of the Arbitration and Conciliation Act.

5. In my view, there is no reason to appoint any fresh arbitrator, as sought by the applicant.

6. The application is dismissed.

10. Clause 29 of the agreement dated 01.11.1998 provides as under:

29. Any dispute or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties here to arising out or in relation to this Agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation, or of some Officer of the Corporation who may be nominated by the Director (Marketing). It is known to the parties to the Agreement that the arbitrator so appointed is a share holder and employee of the Corporation. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Director (Marketing) as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as arbitrator in accordance with the terms of the Agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Director (Marketing) or a person nominated by such Director (Marketing) of the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final conclusive and binding on all parties, to the Agreement, subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification of or reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

The award shall be made in writing within six months after entering upon the reference or within such extended time not exceeding further four months as the sole arbitrator shall by a writing under his own hands appoint.

11. Sub-sections (1), (2), (6) and (8) of Section 11 are relevant for consideration of the present matter which read as follows:

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) to (5) xxx

(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) xxx

(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.

(9) to (12) xxx

12. Sub-sections (3), (4) and (5) of Section 11 have no application in the present case as the parties have agreed on a procedure for appointing the arbitrator in Clause 29. Sub-section (2) provides that subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) makes provision for making an application to the concerned Chief Justice for appointment of an arbitrator in three circumstances, (a) a party fails to act as required under the agreed 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. If one of the three circumstances is satisfied, the Chief Justice may exercise the jurisdiction vested in him u/s 11(6) and appoint the arbitrator. In the present case, the dealer moved the Chief Justice of the Allahabad High Court u/s 11(6)(a) for an appointment of the arbitrator as the Corporation failed to act as required under Clause 29.

13. The three basic facts are not in dispute, namely, (i) on 09.08.2004, the dealer called upon the Corporation by a written notice to appoint an arbitrator in accordance with the terms of Clause 29 of the agreement; (ii) the dealer made an application u/s 11(6) for appointment of the arbitrator on 06.12.2004; and (iii) the Corporation appointed the sole arbitrator on 28.12.2004 after the application u/s 11(6) was already made by the dealer.

14. On behalf of the Appellant, Mr. K.K. Venugopal, learned senior counsel, relied heavily upon decisions of this Court, Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, and (two) Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638

and submitted that the learned Chief Justice erred in holding that there was no reason to appoint any fresh arbitrator since the arbitrator has been appointed by the Corporation.

15. Mr. Abhinav Vashishta, learned senior counsel for the Respondents, on the other hand, relied upon a decision of this Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., and submitted that while considering application u/s 11(6) for appointment of arbitrator, the Court must keep in view twin requirements of Section 11(8) and, seen thus, the view of the learned Chief Justice in the impugned order does not call for any interference.

16. In Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , a two-Judge Bench of this Court considered the scheme of Section 11, noted the distinguishing features between Section 11(5) and Section 11(6) and then considered the question whether in a case falling u/s 11(6), the opposite party cannot appoint an arbitrator after the expiry of thirty days from the date of demand. This Court held that in cases arising u/s 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but continues, but such an appointment has to be made before the first party makes application u/s 11 seeking appointment of an arbitrator. If no appointment has been made by the opposite party till application u/s 11(6) has been made, the right of the opposite party to make appointment ceases and is forfeited.

17. In Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638, the agreement entered into between the parties contained arbitration clause. The disputes and differences arose between the parties. Punj Lloyd (Appellant) served a notice on Petronet (Respondent) demanding appointment of an arbitrator and reference of disputes to him. Petronet failed to act. On expiry of thirty days, Punj Lloyd moved the Chief Justice of the High Court for appointment of the arbitrator u/s 11(6). Petronet had not made appointment till the date of moving the application. The designate Judge refused to appoint the arbitrator holding that the remedy available to it was to move in accordance with the agreement. Aggrieved by the said order, a writ petition was filed which was dismissed and the matter reached this Court. A three-Judge Bench of this Court referred to Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, and held that the matter was covered squarely by that judgment and the view taken by the designate Judge in dealing with the application u/s 11(6) and the Division Bench was not right. This Court restored the application u/s 11(6) before the Chief Justice of the High Court for fresh consideration and appointment of the arbitrator in accordance with Section 11(6).

18. We are in full agreement with the legal position stated by this Court in Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, which has also been followed in Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638.

19. Section 11(8) provides that Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects, (a) 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. In *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, a three-Judge Bench of this Court considered the scheme of Section 11. Insofar as Section 11(8) is concerned, this Court stated that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements mentioned therein have to be kept in view.

20. If we apply the legal position exposited by this Court in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*, to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 09.08.2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with terms of Clause 29 of the agreement but that was not done till the dealer had made application u/s 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings u/s 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice u/s 11(6). We answer the above questions accordingly.

21. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement.

22. Learned senior counsel for the Corporation, however, referred to an unreported order of this Court in *Newton Engineering and Chem. Ltd. v. Indian Oil Corporation Ltd. and Ors.* Civil Appeal No. 7587 of 2012; Decided on 18.10.2012. The arbitration clause in that case was similar to the arbitration clause in the present case. The contractor had written to the Corporation to appoint E.D. (NR) as sole arbitrator as per the agreement. But the Corporation wrote back to the contractor that office of E.D. (NR) has ceased to exist due to internal re-organisation. The Corporation offered to the contractor to substitute E.D. (NR) with Director (Marketing) to which contractor did not agree. The Corporation then appointed Director (Marketing) as arbitrator. The contractor made an application u/s 11(6)(c) read with Sections 13 and 15 of the 1996 Act for appointment of a retired Judge as a sole arbitrator. The Single Judge dismissed the petition filed by the contractor. Against that order, the SLP was filed by the contractor. This Court in paragraph 9 of the order stated as follows:

9. Having regard to the express, clear and unequivocal arbitration clause

between the parties that the disputes between them shall be referred to the sole arbitration of the ED(NR) of the Corporation and, if ED(NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED(NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. If the office of ED(NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED(NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(c), 13 and 15 of the 1996 Act have no application in light of the reasons indicated above.

23. We are afraid that what has been stated above has no application to the present fact situation. In *Newton Engineering and Chem. Ltd. v. Indian Oil Corporation Ltd. and Ors.* Civil Appeal No. 7587 of 2012; Decided on 18.10.2012, this Court was not concerned with the question of forfeiture of right of the Corporation for appointment of an arbitrator. No such argument was raised in that case. The question raised in *Newton Engineering and Chem. Ltd. v. Indian Oil Corporation Ltd. and Ors.* Civil Appeal No. 7587 of 2012; Decided on 18.10.2012 was entirely different. In the present case, the Corporation has failed to act as required under the procedure agreed upon by the parties in Clause 29 and despite the demand by the dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made u/s 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of the matter, the Chief Justice ought to have exercised his jurisdiction u/s 11(6) in the matter for appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of proceedings u/s 11(6) was of no consequence.

24. In the course of arguments before us, on behalf of the Appellant certain names of retired High Court Judges were indicated to the senior counsel for the Corporation for appointment as sole arbitrator but the Corporation did not agree to any of the names proposed by the Appellant. In the circumstances, we are left with no choice but to send the matter back to the Chief Justice of the Allahabad High Court for an appropriate order on the application made by the dealer u/s 11(6).

25. Civil Appeal is, accordingly, allowed. The impugned order is set aside. Arbitration Case No. 107 of 2004, *Deep Trading Co. v. Indian Oil Corporation and Ors.*, is restored to the file of the High Court of Judicature at Allahabad for fresh consideration by the Chief Justice or the designate Judge, as the case may be, in accordance with law and in light of the observations made above. No costs.