
(2014) 11 AP CK 0122

In the Andhra Pradesh High Court

Case No : Arbitration Application No. 148 of 2014

Inland Road Transport (P) Limited

APPELLANT

Vs

Bharat Heavy Electrical Limited

RESPONDENT

Date of Decision : 28-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 4

Citation : (2014) 11 AP CK 0122

Hon'ble Judges : Kalyan Jyoti Sengupta, C.J

Bench : Single Bench

Judgement

Kalyan Jyoti Sengupta, C.J.—This application has been filed for appointment of an arbitrator by me under sub-section (3) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "the Act").

2. A counter-affidavit has been filed. Affidavit in reply has been filed and in fact, it is not necessary.

3. It is the case of the applicant that in spite of notice being served on the respondent on 07.07.2014 for appointment of an arbitrator in terms of the arbitration agreement, the appointment has not been made within the period of 30 days as mentioned in Section 11 of the Act. The appointment has been made after filing of the present application i.e. on 26.09.2014. This fact is borne out by the records and it cannot be disputed. Indeed, it is not disputed.

4. In the counter-affidavit, there has been no dispute with regard to the validity, legality and existence of the arbitration agreement. The only objection raised is that firstly, the notice for appointment of arbitrator containing the alleged demand for payment of the claim was issued on 07.07.2014. However, the applicant thereafter, issued a subsequent letter through his learned lawyer on 28.08.2014 by way of a clarification. The respondent acted upon on the basis of this clarificatory notice dated 28.08.2014. If 30 days" time as mentioned in the Act is reckoned, appointment has been made within the time as stipulated by the

law, rather, this application has been filed without waiting for 30 days time to expire, as it was filed on 25.09.2014.

5. Mr. Ravi, learned counsel for the applicant says that the clarificatory notice dated 28.08.2014 is nothing to do with the demand for appointment of arbitrator. This notice was issued demanding a modified claim.

6. On the other hand, learned counsel for the respondent says that the clarificatory notice dated 28.08.2014 has to be read with the initial notice dated 07.07.2014 as demand of claim is made in relation to the arbitration. This notice cannot be read in isolation of the notice dated 07.07.2014.

7. He submits that the applicant having accepted the terms of the agreement with regard to the choice of the person, now departing from the same, another claim has been made, and according to him, such claim cannot be tagged with this matter.

8. I have heard and examined the materials. Before I dilate the contentions, I set out the arbitration agreement hereunder.

"All disputes arising in connection with the contract shall be settled by mutual consultation. If no such agreement is reached between the parties, the dispute shall be settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the rules made thereunder. The dispute shall be referred for arbitration to an arbitrator to be appointed by the Head of the Unit, (BHEL). The award of the arbitrator shall be final and binding on both the Parties. The venue of the Arbitration shall be at BHEL, Hyderabad or at such place as the Arbitrator may direct. The Award to be given by the Arbitrator shall be a speaking award. All questions, disputes, differences arising under, out of or in connection with this contract shall be to the exclusive jurisdiction of Courts at Sangareddy, Medak District."

9. It appears that the arbitrator has to be appointed by the respondent unquestionably. But, in spite of notice of demand, the respondent did not act and sat on the matter. Naturally law will come to save the claimant/applicant from the evil result of the inaction of the respondent. Clause (a) of Sub-section (6) of Section 11 of the Act provides as follows:

"a party fails to act as required under that procedure."

10. It clearly says that if the person, who is in a position to act in terms of the arbitration agreement with regard to the appointment, failed to act within the time, then, such person or authority loses its right as conferred by the parties to the agreement for no person can fix up any time contrary to the provision of law is the mandate of the Indian Contract Act.

11. It has been well settled that once the thirty days" time expired from the date of receipt of the notice, demand of the appointment of the arbitrator expires. The learned Chief Justice or the authority as mentioned in Section 4 of the Act has to

act. But, the question is, whether the appointment has been made factually and legally. Such appointment is valid or not is also the question. Learned counsel for the respondent says that if the clarificatory notice is reckoned, appointment of arbitrator made by his client on 25.09.2014 is within 30 days. Therefore, the application is premature.

12. In this context, I have examined the clarificatory notice in juxtaposition, the notice of appointment on 07.07.2014 and I find that the clarificatory notice is nothing to do with the demand of appointment of the arbitrator. It merely relates to the claim of the matter. At the most, this letter may be used as evidence with regard to the correctness and genuineness of the claim. There is no mention that appointment of the arbitrator, if not appointed, has to be made, and it is not a continuation of the earlier subject. Moreover, this clarificatory notice was issued even after expiry of 30 days from the date of notice of the appointment on 07.07.2014. Therefore, this clarificatory notice has no bearing if it is treated as first notice. I fail to understand why the respondent would think that a clarificatory notice would be coming after 30 days, and such a conjecture and surmise is unheard of and absurd. I therefore hold that the respondent has failed to appoint the arbitrator within the time as statute declared. Under these circumstances, I have to exercise the power under Section 11(6) of the Act.

13. Accordingly, I appoint Sri N.R.L. Nageswara Rao, a retired Judge of this Court, sole arbitrator, to adjudicate the dispute between the parties. The learned Arbitrator shall fix his own remuneration upon deliberation and consultation with the parties. He will also estimate the cost and expenses for the secretarial assistance and other incidental expenditure of the arbitration proceedings. The parties will bear the expenses of the arbitration proceedings in equal share. I desire that the learned Arbitrator shall complete the arbitration proceedings by making and publishing an award within a period of five months from the date of entering upon the reference.

14. The Arbitration Application is accordingly disposed of.