
(2013) 10 AP CK 0011
In the Andhra Pradesh High Court
Case No : A.A. No. 107 of 2013

Lead Space

APPELLANT

Vs

Senior Divisional Commercial Manager and Another

RESPONDENT

Date of Decision : 25-10-2013

Acts Referred:

Citation : (2014) 1 ALD 234 : (2014) 2 ALT 4

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

Bench : Single Bench

Advocate : P. Raja Sripathi Rao, for the Appellant; C.V. Vineetha Reddy for the Respondent Nos. 1 and 2, for the Respondent

Judgement

Kalyan Jyoti Sengupta, C.J.—This application has been filed u/s 11(5) and (6) of the Arbitration and Conciliation Act, 1996 for appointment of arbitrators. In this matter there is no dispute that the parties are governed by the contractual agreement and there is no dispute that the dispute between the parties has to be resolved by the mechanism of arbitration. Arbitration agreement is undisputed and the relevant clauses are set out hereunder:

1. If any dispute or difference of any kind whatsoever arises between the parties hereto in connection with or arising out of this agreement parties hereto shall promptly and in good faith negotiate with a view to its amicable resolution and settlement.
2. In the event no amicable resolution and settlement is reached within a period of 90 days from the date of which the dispute/difference arose a demand shall be made for arbitration. The dispute/difference of either party shall be referred to the Sole Arbitrator appointed by the General Manager, South Central Railway, who shall be railway Gazetted Officer within 60 days from the date of receipt of request/demand.
3. The Gazetted Officer to be appointed as arbitrator, however, will not be one of those who had an opportunity to deal with the matter to which the contract

relates.

2. The applicant before me by letter dated 12.3.2013 demanded the Senior Divisional Commercial Manager, Secunderabad Division, South Central Railway, for appointment of arbitrator in terms of the aforesaid agreement. The aforesaid arbitration agreement stipulates that the arbitrator has to be appointed by the General Manager. Therefore, on the date of issuing letter, the applicant had no business to act contrary to the terms of the agreement nominating an outsider as an arbitrator. However, the applicant did not take any steps until it receives the notice from the official of the Railway nominating himself as the sole arbitrator in terms of the agreement. Thereafter, he approached with this application for appointment of a new person.

3. In the counter-affidavit, aforesaid factual aspect is not denied. The whole contention raised before me is whether the appointment made by the General Manager, South Central Railway, is valid or not.

4. It is argued that the appointment of arbitrator is invalid as it is contrary to the agreement by reason of the fact that within sixty days from the date of demand, no appointment of arbitrator was made and it was made later than 60 days and it could be known when the nominated arbitrator served notice. Even the appointment of arbitrator was not factually informed. Learned Counsel for the applicant says that in view of the non-appointment within time stipulated, the respondent has forfeited the right to appoint arbitrator. He further submits that the official is subordinate to the General Manager and in all probabilities he will act under the influence and dictates of the superior officer. In support of his contention, he has referred to a Single Bench judgment of the Supreme Court in *Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence*, wherein it is ruled that in case the named arbitrator is biased against the petitioner, then the Chief Justice or the designate has the power to appoint his own nominee.

5. Learned Counsel for the applicant also draws my attention to a judgment of the Supreme Court in *Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd.*, to contend the legal proposition that when the person mentioned in the arbitration agreement as an arbitrator is not likely to act independently, it is open for the parties to approach the Chief Justice with the application.

6. Learned Counsel for the respondent on the other hand says that the time fixed for appointment of the arbitrator is not mandatory rather directory and the application even for such appointment is not made within the time, right to nominate the arbitrator is not forfeited and the appointment beyond stipulated time is not an invalid one. In support of his contention he has relied on a decision of the Supreme Court in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*,

7. I have heard the contentions of both the Counsel and gone through the authorities cited before me while telescoping the factual aspect of the matter, I find it is not in dispute that the appointment of arbitrator has been made beyond

sixty days contrary to the terms of agreement. It is not disputed that the applicant approached this Court after appointment is made and did not approach immediately after expiry of sixty days. In view of this undisputed factual background, it has to be seen whether the nominated arbitrator of the General Manager should be allowed to continue as arbitrator or not.

8. The Supreme Court in *Datar Switchgear Limited's case* (supra), in Paragraph No. 19 held 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 does 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, that would be sufficient. In other words, in cases arising u/s 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. In view of the aforesaid observations, it is noticed though the appointment was made after sixty days, but the applicant did not take any steps by making application before this Court immediately after expiry of sixty days. Therefore, the observation of the Supreme Court, as above, clearly holds the field here. I am, therefore, of the view that the appointment made by the respondent beyond stipulated period cannot be ignored. The judgment of the learned Single Bench of the Supreme Court in *Denel (Proprietary) Limited's case* (supra), is not applicable, as there is no material to hold that the nominated arbitrator is biased against the applicant. It is too early to say that the conduct of the arbitrator is biased against the applicant.

10. As far as the decision rendered in *Indian Oil Corporation Limited's case* (supra), rather helps the respondent. In Paragraph No. 45 of the judgment, it is observed as follows:

If the arbitration agreement provides for arbitration by a named Arbitrator, the Courts should normally give effect to the provisions of the arbitration agreement. But as clarified by *Northern Railway Administration*, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the Arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent Arbitrator in accordance with Section 11(8) of the Act.

11. Just because the learned arbitrator nominated by the General Manager, South Central Railway, is his junior, cannot per se be presumed to be biased against the applicant as the Railway Administration is vast one and the officials of the Railways had hardly any personal interest in the matter, unless he has dealt with the subject contract previously. Here no such allegations have been made. Under the circumstances, the respondent will not be permitted to doubt the impartiality and independence of the appointed arbitrator, after all, the applicant, keeping eyes open agreed to the methodology of such appointment and in the absence of any material, the applicant should not be allowed to turn round and say otherwise. Under the circumstances, I am not inclined to appoint any arbitrator rather, I direct the arbitrator appointed by the General Manager, South Central Railway, to act independently without being influenced by any of the dictates or anything else. He should bear in mind that he is now appointed arbitrator as a Court nominee.

12. The learned Arbitrator shall complete the arbitration proceedings by passing speaking Award and publishing the same within five months from the date of communication of this order. The learned Arbitrator shall fix the date of hearing of the arbitration much earlier to 12.11.2013. The arbitration application is accordingly disposed of. No order as to costs.