
(2015) 07 PAT CK 0074
In the Patna High Court
Case No : Request Case No. 21 of 2006

Manish Trading Company

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-07-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 11(4), 11(5), 11(6)

Citation : (2015) 07 PAT CK 0074

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : Dudh Nath Singh, for the Appellant; Kumar Manish and (SC8),
Advocates for the Respondent

Final Decision : Dismissed

Judgement

Shivaji Pandey, J.—Heard learned counsel for the petitioner and learned counsel for the Railway.

2. In the present case, petitioner has filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of an Arbitrator.

3. It appears that the petitioner has entered into an agreement with respondent vide Central Agreement No. 41/K I R/C/W-2 dated 7.2.1990 for complete track renewal works from K.M.O.06 to 28.06 between Katihar to Purnea. He submitted the bill after completion of work but that was denied which led to dispute between the parties.

4. After giving notice for settlement of dispute, the petitioner filed a case before Sub-Judge, Katihar vide Misc. Case No. 8 of 1998 under the provisions of the Act. There objection was taken for maintainability of the case and later on Misc. Case No. 8 of 1998 was dismissed as withdrawn vide order dated 5.9.2005 with a liberty to approach the proper forum.

5. In pursuance thereof present application has been filed for appointment of Arbitrator. At the first instance this Court vide order dated 22.11.2006 held that proceeding before this Court was not maintainable and same was rejected on the ground of delay. The matter went to Hon"ble Supreme Court in Civil Appeal No. 2798 of 2014 and the Hon"ble Supreme Court vide order dated 21.2.2014 remanded back the matter before this Court for consideration for appointment of Arbitrator.

6. Learned counsel for the Railway has taken a plea that Arbitrator should be appointed in terms of General Condition of Contract, 1998 as the petitioner has never served notice in terms of Section 11 of the Act. He has relied on the judgments in the case of Union of India and another V. M.P. Gupta, reported in (2004)10 SCC 504 and Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., (2009) 11 JT 450 : (2009) 11 SCALE 672 : (2009) 8 SCC 520 : (2009) 13 SCR 510 : (2009) 9 UJ 4269 . He has also relied on the order passed in L.P.A. 1364 of 2009 which has followed the judgment of Indian Oil Corporation Limited (supra).

7. Learned counsel for the petitioner has submitted that petitioner has given notice vide notice dated 6.9.1998 for appointment of Arbitrator within 30 days, in failure he will take legal course whereupon counsel for the Railway has submitted that he has not given notice in terms of General Condition of Contract, 1998 as in the General Condition of Contract provided the manner and the period within which the notice was to be served that has been violated by the petitioner and as such the Arbitrator should be appointed in terms of General Condition of contract and the Railway offered the names of the Arbitrator in terms of order dated 9.5.2014, any Arbitrator should be appointed from the list of arbitrators.

8. Learned counsel for the petitioner is not agreeable for the appointment of arbitrator from the list supplied by the Railway administration.

9. In the present case controversy has been raised by the Railway Administration that while appointing the arbitrator, terms of agreement cannot be ignored and the arbitrator should be appointed as per the provisions of the agreement.

10. The power under Section 11(6) of the Act will come in to play in making appointment only when the person including an institution, fails to perform it's act in terms of agreement under the procedure. If there is no failure of the stipulation mentioned in the agreement for the appointment of the arbitrator the invocation of Section 11(6) of the Act will not be applicable. This proposition is very much clear from long line of judgments of Hon"ble Supreme Court. It will be relevant to rely on the judgment in the case of National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others, (2006) 4 ARBLR 1 : (2006) 12 JT 334 : (2006) 9 SCALE 564 : (2006) 10 SCC 763 : (2006) 6 SCR 586 Supp as Hon"ble Supreme Court in paragraph Nos. 29 and 32 in specific term has stated as follows: "Obviously, Section 11(6) of the Act has application only when a party had failed to act in terms of the arbitration agreement."

11. The next question would arise if the party has not acted in terms of the agreement the person aggrieved will give notice to other side and if within 30 days no response is received but before filing of the application under Section 11(6) of the Arbitration Act not thereafter, will have an authority to appoint arbitrator. In nutshell the other side has to give response till filing of the application under Section 11(6) of the Act which is clear from the judgment in the case of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, (2000) 2 JT 226 Supp : (2000) 7 SCALE 204 : (2000) 8 SCC 151 : (2001) 1 UJ 349 : (2000) AIRSCW 3925 : (2000) 7 Supreme 145 where in paragraph 19 the Court has interpreted the provisions and its working of Section 11 of the Act relating to the appointment of the arbitrator where the Hon"ble Supreme Court has held that if one party demands from 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 under Section 11 of the Act that would be sufficient. It will be relevant to quote paragraph 19 of the aforesaid judgment:

"19. So far as cases falling under Section 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 under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so 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 under Section 11, that 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 filed application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited "

12. This principle has been reiterated in the case of the Punj Lloyd Ltd. V. Petronet MHB Ltd., reported in (2006) SCC 638 where Hon"ble Supreme Court in paragraph No. 5 in concurrence has quoted paragraph 19 of the judgment. It is not necessary to repeat the same paragraph.

13. In the same volume Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited, AIR 2006 SC 963 : (2006) 1 ARBLR 286 : (2006) 2 CompLJ 417 : (2006) 2 JT 89 : (2006) 2 SCALE 53 : (2006) 2 SCC 628 : (2006) 1 SCR 933 : (2006) AIRSCW 664 : (2006) 2 Supreme 10 in the case of Shin Satellite Public Co. Ltd.

v. Jain Studios Ltd. in paragraph the Hon"ble Supreme Court has said if there is failure on the part of the respondent in making appointment of arbitrator in accordance with the agreement, the prayer cannot be allowed. It will be relevant to quote paragraph 30 of the aforesaid judgment:

"30. Finally, it was submitted by the respondent that if this Court is not upholding the objection of the respondent and is inclined to grant the prayer of the petitioner, sometime may be granted to the respondent to make an appointment of an arbitrator. It was not done earlier because according to the respondent, clause 23 was not enforceable. The learned counsel for the petitioner objects to such a prayer. According to him a letter/notice was issued and in spite of request by the petitioner, the respondent had failed to exercise his right to appoint an arbitrator. At this belated stage, now, the respondent cannot be permitted to take advantage of its own default. In my opinion, since there is failure on the part of the respondent in making appointment of an arbitrator in accordance with the agreement, the prayer cannot be granted."

14. In the case of Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd., AIR 2006 SC 2422 : (2006) 2 ARBLR 435 : (2006) 11 JT 198 : (2006) 6 SCALE 295 : (2006) 5 SCC 275 : (2006) 2 SCR 954 Supp : (2006) AIRSCW 3114 : (2006) 4 Supreme 534 the question arose whether the respondent has lost its right to appoint its nominee to the Arbitral Tribunal in view of its failure to comply with the demand of the petitioner to appoint the arbitrator that the respondent not appointed an arbitrator within 30 days from the date of receipt of notice dated 30.8.2005. A plea was taken that they were under bona fide impression that there was no clause of arbitration but the Hon"ble Supreme Court has appointed its Arbitral Tribunal. It will be relevant to quote paragraph Nos. 11 and 12 of the aforesaid judgment:

"11. The next question is whether the respondent has lost its right to appoint its nominee to the Arbitral Tribunal in view of its failure to comply with the demand of the petitioner to appoint the arbitrator within 30 days from the date of receipt of notice dated 30.8.2005. It is apparent that the respondent did not appoint an arbitrator as it was under a bona fide impression that there cannot be an arbitration. Further, without prejudice to its contentions, it has nominated its arbitrator.

12. Section 10 of the Act provides that the number of arbitrators shall not be "even". The arbitration clause provides that the dispute shall be referred to two arbitrators and in the event of arbitrators not agreeing then an umpire to be appointed by the arbitrators in writing before proceeding to the reference. Having regard to Section 10 of the Act, the Arbitral Tribunal shall consist of three arbitrators (one to be appointed by each of the two parties and the presiding arbitrator)."

15. In the case of National Highways Authority (supra) the Hon"ble Supreme Court has examined the provisions of Section 11 of the Act with respect to

appoint an arbitrator. In paragraph 33 the Hon"ble Supreme Court has approved the ratio laid down in the case of Dutar Switchgears Ltd. (supra). In paragraph 40 the Court has approved the principle laid down in the aforesaid case where it has been held that "this Court has repeatedly held that once a notice period of 30 days in the present case and the other party has moved the Chief Justice under Section 11(6), party having right to appoint arbitrator under arbitral agreement loses the right to do so."

16. In the case of Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., (2008) 3 ARBLR 349 : (2008) 4 CompLJ 39 : (2008) 11 SCALE 500 : (2008) 10 SCC 240 the Hon"ble Supreme Court in paragraph Nos. 11 and 12 it has been held that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. The Court has further held that it is true as contended by Mr. Desai that it 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. So emphasis has been given that while appointing the arbitrator it has to be seen the qualification and impartiality. It will be relevant to quote paragraph Nos. 11 and 12 of the aforesaid judgment:

"11. The crucial expression in sub-section (6) is " a party may request the Chief Justice or any person or institution designated by him to take the necessary measure" (underlined for emphasis). This expression has to be read along with requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

12. 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."

17. In the case of Indian Oil Corporation Limited (supra) the question arose about appointment of Officer/Manager of the Company as an arbitrator questioning the impartiality in discharging the function as an arbitrator. The Court rejected the contention that when the party has entered into an agreement providing the resolution of dispute by the arbitrator the Officer/Manager cannot act as an arbitrator in impartiality. Placing reliance on long line of judgment

mentioned in paragraph Nos. 38 and 39 where it has been held that it will be appropriate Governments/statutory authorities/public sector undertaking should reconsider their policy providing for arbitration by an employee in view of specific provisions of the new Act reiterating the need for independence and impartiality in arbitration. A general shift may in future be necessary for understanding the word "independent" as referring to someone not connected with either party. That may improve the credibility of arbitration as an alternative dispute resolution process. Another question was raised which is more important to the present dispute, in what circumstance the Chief Justice or his designate can ignore the appointment procedure provided in the agreement to appoint the arbitrator of a choice that has been discussed and has been culled out in paragraph 48 of the aforesaid judgment which is as follows:

"48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarized thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrator fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but

the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

- (i) a party failing to act as required under the agreed appointment procedure; or
 - (ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or
 - (iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.
- (vi) The Chief Justice or his designate while exercising power under sub-section 6 of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.
- (vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

18. Learned counsel for the Railway has basically relied on the judgment of the Indian Oil Corporation Limited (*supra*) and a Division Bench judgment passed in L.P.A. 1364 of 2009. It appears that before the Division Bench the judgment of Dutar Switchgears Ltd. (*supra*) and Punj Lloyed Ltd. (*supra*) were not brought to the notice. In such view of the matter the insistence of the Railway to appoint the arbitrator in terms of agreement, this Court is of the view that it is not sustainable, as they did not respond within 30 days and also before filing of the application before this Court for appointing the arbitrator. After lapse of such a long period it will not be justifiable for this Court to appoint the arbitrator in terms of Clause 62 and 63 of the agreement. The case of Indian Oil Corporation (*supra*) also makes it very clear that the right to make appointment of arbitrator to the respondent is forfeited when the respondent did not come forward with proposal of arbitrator before filing of the application.

19. In such view of the matter the contention of the Railway is not proper and accordingly the same is rejected. This Court directs both the parties to submit three names and the Court will appoint the arbitrator from their list to adjudicate the dispute as already long time has lapsed.