
(1997) 12 DEL CK 0039
In the Delhi High Court
Case No : A.A. Appeal No. 63 of 1997

M.M.T.C. Ltd.

APPELLANT

Vs

Trimurtee Fertilizers Ltd.

RESPONDENT

Date of Decision : 12-12-1997

Acts Referred:

Citation : (1998) 45 DRJ 21

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Sanat Kumar and M.K. Chatterjee, for the Appellant;

Judgement

Vijender Jain, J.

(1) It has been contended by Mr.Sanat Kumar, counsel for the applicant that the respondent failed to appoint an Arbitrator after expiry of 30 days from the receipt of the request from the applicant. Counsel for the applicant has also contended that the Arbitrator Mr. J.S. Nirody was the legal counsel of the respondent and, Therefore, he could not act as an Arbitrator. Learned counsel for the applicant has contended that in the old Arbitration Act, 1940, in terms of Section 8, sub-Section (2) which is para materia with the new Act, it lays down that if the appointment was not made within fifteen days after service of the notice by the opposite party, the Court could appoint an Arbitrator. He has emphasised that in the old Act the word occurring was "may". For proper consideration of the contention of learned counsel for the parties, it is relevant to reproduce Section 8(2) of Arbitration Act, 1940, which is as follows :

8.(2)If the appointment is not made within fifteen clear days after service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

(2) MR.KUMAR has contended that in Arbitration and Conciliation Act, 1996, Section 11 which is similar with Section 8 of the old Act, sub-Section (4) of Section 11 particularly deals with the contingencies when after receipt of request from the opposite party within thirty days, the Arbitrator is not appointed the appointment shall be made upon request of a party. Section 11(4) of Arbitration and Conciliation Act, 1996 is as follows :

11.(4)If the appointment procedure in sub-section (3) applies and -

(A)a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(B)the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(3) Learned counsel for the applicant has contended that the legislature has used the expression "may" in the old Arbitration Act but the expression used "shall" under sub-section (4) of Section 11 casts a mandatory obligation on the Court to appoint an Arbitrator in the event of failure of the party to appoint an Arbitrator within thirty days of the receipt of this notice. He has placed reliance on the judgment of the Apex Court in Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, . What has been contended before me by counsel for the applicant is when Court could supply the vacancy in view of the word "may" under the old Act of 1940 in the event of the failure of the party to appoint an arbitrator after receipt of notice of fifteen days. In view of the new Act which has incorporated word "shall", it is the Court alone which has got the jurisdiction to appoint an Arbitrator and supply the vacancy after notice of such appointment has been given and party has failed to appoint the Arbitrator within thirty days of the receipt of the notice and that is the object and purpose of the new Act.

(4) On the other hand, learned counsel appearing for the respondent Mr. Manoj Chatterjee has contended that in the Arbitration Clause between the parties there is no stipulation of the time frame in which the Arbitrator has to be appointed. Clause 23 (1) of the Contract is as follows :-

23.1In the event of any dispute/disputes arising under or out of or relating to the construction, meaning, operation or effect of this contract or breach thereof, the matters in dispute shall be referred to two arbitrators one each to be nominated by the parties contracting herein and in case of the said arbitrators not agreeing, then an umpire to be appointed by the arbitrators in writing. The decision of the arbitrators or in the event of their not agreeing of the umpire shall be final and binding on the parties to the contract.

(5) MR.CHATTERJEE has contended that the objection of learned counsel for the applicant is not correct, the arbitrator appointed by the respondent was not a legal consultant of the respondent but he was a senior business executive in a

multinational company and has never represented the respondent before the Bifurcation as alleged by the applicant. He has further stated that as a matter of fact on account of the Managing Director of the respondent company being out of station when the request dated 4.12.1996 of the applicant for appointment of arbitrator was received, the respondent has replied back vide their letter dated 11.12.1996 that as soon as the Managing Director, who was out of station, returned the nominee Arbitrator shall be appointed by the respondent. The Arbitrator was appointed on 22.1.1997. Therefore, the appointment of the Arbitrator by the respondent was legal and valid.

(6) I have heard the arguments of learned counsel for the parties at length. There is no dispute on the proposition of law that when statute provides a time frame, the Arbitrator has to be appointed during that period notwithstanding anything contrary in the contract or not mentioned in the Contract. The legislature in its wisdom has enacted 1996 Act and has used the expression "shall" in sub-section (4) of Section 11, that is to achieve the objective of having arbitration and conciliation through the forum of arbitration at the earliest possible opportunity. The idea is to safeguard the effort of one party not to scuttle contractual obligation which they have entered while entering into arbitration agreement by not appointing an Arbitrator after notice of such appointment has been served by the opposite party. Therefore, if a party fails to appoint a nominee Arbitrator, after receipt of the notice, the Court comes into play and on the request of a party aggrieved by not appointing an arbitrator within thirty days, apply to the Court, Court shall supply the vacancy.

(7) However, in this case at the first instance when the notice dated 4.12.1996 was received by the respondent from the applicant, the respondent in their letter dated 11.12.96 mentioned that they would nominate their nominee arbitrator as soon as the Managing Director who was out of station returned. Again on 15.1.1997 a telegram was sent at the address of the counsel for the applicant that respondent required fifteen days' time for appointing arbitrator because the Managing Director was still out of station. It was stated by counsel for the respondent that the Managing Director had fallen ill and, Therefore, could not come back in time. As soon as he came back, an arbitrator was appointed on 22.1.1997 and this is how the appointment of Mr. J.S. Nirody was made.

(8) In view of the fact and circumstances of the case, there was neither any delay in appointment of the Arbitrator nor any inclination on the part of the respondent not to appoint the Arbitrator within the stipulated period of thirty days. Therefore, I hold the appointment of Mr. J.S. Nirody by the respondent to be legal and valid. Hence I do not see any merit in this application. However, in the facts and circumstances of the case, no order as to costs.