
(2021) 03 RAJ CK 0071

In the Rajasthan High Court

Case No : Arbitration Application No. 72, 73 Of 2018

M/s V K Sood Engineers And Contractors, Sco 85, Sector 5,
Panchkula

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 10-03-2021

Acts Referred:

Arbitration & Conciliation Act, 1996 — Section 11, 11(6), 11(8)

Citation : (2021) 03 RAJ CK 0071

Hon'ble Judges : Indrajit Mahanty, J

Bench : Single Bench

Advocate : Sameer Jain, Shashank Agarwal, Daksh Pareek, Arjun Singh, Pranav Malik, S.N. Meena, P.C. Sharma

Final Decision : Allowed

Judgement

1. Heard learned counsel for the respective parties.
2. Both these arbitration applications raise common question of law and facts, therefore, they are decided by this common order. For convenience of the Court, the facts are taken from S.B. Arbitration Application No. 72/2018.
3. This arbitration application has been filed under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter to be referred as 'the Act of 1996') for appointment of an Arbitrator arising out of the contract agreement dated 26.03.2014.
4. There exists an arbitration clause No. 64 in the agreement, which reads as under:-

"In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor

may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration."

5. Learned counsel Mr. Sameer Jain, appearing for the petitioner submits that the petitioner made a request to the respondents to appoint an arbitrator under cover of its letter dated 06.11.2015 (Annexure P-4) and in spite of a delay of nearly four years since the respondents did not appoint an arbitrator, the petitioner was compelled to come and file the present application under Section 11 of the Act of 1996. Learned counsel further submits that no sooner, the petitioner approached this Court under Section 11 of the Act of 1996, the respondents-Railway in order to frustrate the application filed under Section 11 (6) of Act of 1996, proceeded to appoint an arbitrator on 04.07.2019 i.e. after a gap of nearly four years. In this respect, when this issue was brought to the notice of this Court, order dated 06.09.2019 was passed which reads as under:-

"Mr. P.C. Sharma counsel for the non-applicant- Railways seeks time to answer Mr.Sameer Jain submission that to scuttle this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act of 1996'), the respondent- Railway has now subsequent to forfeiture of its right to appoint an arbitrator in terms of the judgment of the Apex Court in the case of Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd. [(2007)7 SCC 684] proceeded to appoint one on 4.7.2019 in a wholly illegal manner.

Mr. P.C. Sharma submits that the Arbitrator appointed by the respondents during the pendency of this application under Section 11(6) of the Act of 1996 would be advised not to proceed with the arbitration till the next date i.e. 20.9.2019."

6. Learned counsel appearing for the respondent-Railway, while not disputing the assertion made by the petitioner on facts, submits that once an Arbitrator has been appointed by the Railways in terms of the arbitration agreement, though belatedly, the application under Section 11 of the Act of 1996 itself is rendered infructuous and therefore, the Court should restrain itself from exercising powers for appointing any Arbitrator.

7. Learned counsel appearing for the petitioner on the other hand, places reliance upon a recent judgment of the Hon'ble Supreme Court in the case of Perkins Eastman Architects DPS & Anr. Vs. HSCC (India) Ltd:2020 0 AIR (SC) 59 as well as the judgment in the case of North Eastern Railway & Ors. Vs. Tripple Engineering Works:(2014) 9 SCC 288 and Bharat Battery Manufacturing Co. (P) Ltd. (supra).

8. It is apparent from the judgments as referred hereinabove that while in Bharat Battery Manufacturing Co. (P) Ltd. (supra), the Hon'ble Supreme Court held that once a party files an application under Section 11 (6) of the Act of 1996, the other party extinguishes its right to appoint an arbitrator in terms of the clause

of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11 (6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.

9. Apart from the above, it is clear from the case of Perkins Eastman Architects DPS & Anr. Vs. HSCC (India) Ltd. (supra) that a person who has interest in outcome or decision of dispute must not have power to appoint an arbitrator.

10. In the present case, admittedly, the respondent, General Manager, North Western Railways, is such a person who definitely has interest in outcome or decision of dispute and consequently, it must be held that he does not have power to appoint a sole arbitrator. Even in the case of North Eastern Railway (supra), the Hon'ble Supreme Court held that where procedure and process under the Act of 1996 is rendered futile, the Court is empowered to depart from agreed terms of appointment of arbitrators, terminate mandate of arbitrators already appointed and appoint a fresh arbitrator in compliance with Sections 11 (6) & (8) of Act of 1996.

11. It would also be pertinent to note here that this Court in various similar situations has also appointed independent arbitrator in several matters. Accordingly, this Court has no hesitation in declaring the appointment of Arbitrator vide order dated 04.07.2019 by the respondent as void ab initio on account of delay and laches. Apart from that, this Court expresses no opinion on merits of the claim and accordingly directs appointment of Hon'ble Mr. Justice G.R. Moolchandani (Retd.) R/o 213, Taru Chaya Nagar, Tonk Road, Opposite M.G. Hector Car Showroom, Kidzee School Wali Gali, Jaipur, Mob. No. 9928807000, to act as an Arbitrator and to decide all issues. The arbitration fees shall be in accordance with fourth schedule of the Act of 1996.

12. The parties are at liberty to raise all such objections before the Arbitrator.

13. Registry is directed to intimate Mr. Justice G.R. Moolchandani (Retd.) of his appointment as Arbitrator and parties are at liberty to call upon reliable date for necessary directions.

14. The applications are accordingly allowed.