

(2011) 04 AHC CK 0477

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 8259 of 2003

National Thermal Power Corporation Ltd.

APPELLANT

Vs

District Judge, Gautam Buddha Nagar and Another

RESPONDENT

Date of Decision : 25-04-2011

Acts Referred:

Arbitration Act, 1940 — Section 14(3), 20

Arbitration and Conciliation Act, 1996 — Section 21, 85

Citation : (2011) 7 ADJ 775

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : K.M. Misra and H.R. Misra, for the Appellant; A.K. Bajpai, D.C. Mathur, U.N. Sharma and V.N. Sharma, C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri K.M. Mishra, learned counsel for the petitioner, Sri D.C. Mathur, learned counsel for respondent No. 2 and perused the record. The writ petition is directed against the order dated 8.1.2003 (Annexure-2 to the writ petition) whereby the District Judge, Gautambudh Nagar in Original Suit No. 12 of 1998 filed u/s 20 of Arbitration Act, 1940 (hereinafter referred to as the "Old Act") has appointed Sri Sushant Sen Gupta, General Manager Scope (Retd.), D-632 C.R. Part, New Delhi-19 as sole Arbitrator directing him to hold arbitration proceeding and give award within six months and the order dated 5.2.2003 (Annexure-3 to the writ petition) which is a consequential letter issued pursuant to the said order.

2. Learned counsel for the petitioner contended that the first notice for appointment of Arbitrator was given by respondent No. 3 on 27.1.1996 though the new Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") has already commenced on 25.1.1996 and, therefore, the appointment of Arbitrator under Old Act was impermissible and the order of District Judge impugned in this writ petition is without jurisdiction. He submitted that u/s 85 of

Act, 1996 only those proceedings where arbitration has already commenced are protected and rest would be covered by New Act. He further stated that proceedings of arbitration would be commenced when the notice was given by one of the parties for appointment of Arbitrator and for this purpose reliance is placed on Apex Court's decision in Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd., .

3. Per contra, learned counsel appearing for respondent No. 2 stated that as a matter of fact arbitration commenced when first notice for appointment of Arbitrator was given by respondent No. 2 on 30.6.1995 which followed by subsequent notices dated 30.8.1995 and then on 27.1.1996. He drew my attention to para 4 of his petition (Annexure-1 to the writ petition) filed for appointment of Arbitrator in the Court showing that arbitration clause was invoked by respondent No, 2 on 30.8.1995 and it followed by letter dated 27.1.1996 as stated in para 5 of the said petition.

4. I have heard learned counsel for the parties and perused the record.

5. It appears that a work contract was awarded to respondent No. 2 pursuant where to an agreement was executed between the parties on 14.8.1992 which contain the clause for referring dispute for arbitration in para 56 which reads as under:

56. Arbitration:

56.1 Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other questions, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of National Thermal Power Corporation Ltd., and if the General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director, National Thermal Power Corporation Ltd., willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of National Thermal Power Corporation Ltd., and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer, vacation of office or inability to act, Chairman and Managing Director, National Thermal Power Corporation Ltd., shall appoint another person to act as arbitrator in accordance with the terms of the Contract. It is also a term of this Contract that no person other than a person appointed by C.M.D., N.T.P.C. Ltd., as aforesaid should act as

arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

Subject as aforesaid the provision of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The work under the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the Contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing. The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final, conclusive and binding on all parties to this contract.

The cost of arbitration shall be borne by the parties to the dispute, as may be decided by the arbitrator(s).

In the event of disputes or differences arising between one public sector enterprise and a Govt. Department or between two public sector enterprises the above stipulations shall not apply, the provisions of B.P.E. office memorandum No. 15/9/86-BPE (FIN) dated 1st January 1976 or its amendments for arbitration shall be applicable.

6. The respondent No. 2 raised certain bills which were not paid and, therefore, sent letters dated 22.6.1995 and 31.7.1995 addressed to General Manager, National Thermal Power Corporation Ltd., National Capital Power Project, Vidyut Nagar, District Ghaziabad titled as "Application for Appointment of Arbitrator for Settlement of Disputes" requesting to commence arbitration proceeding himself being sole Arbitrator to decide the dispute under Clause 56 of the agreement.

7. The petitioner submitted a reply dated 8.9.1995 stating that there is no dispute at all and petitioner should refer the statement of claims alongwith supporting documents for examination before Engineer In-charge so that clear point of difference of dispute could be established for referring the same to General Manager. This letter was issued by Manager, (C-WMS). In the meantime

petitioner sent another letter dated 30.8.1995 addressed to Chairman-cum-Managing Director, NTPC stating that General Manager had not entered into arbitration as a sole Arbitrator and, therefore, some other person be appointed as sole Arbitrator for deciding the dispute. The request made by petitioner in the said letter is reproduced as under:

As per the alternative provided in the contract, the Chairman and Managing Director is to appoint some other person as sole Arbitrator for deciding the disputes. Accordingly we M/s. Pee Tee Engineering Associates do hereby request the Chairman and Managing Director to kindly appoint sole Arbitrator and refer to him the disputes as per the list of disputes enclosed.

8. The aforesaid letter also appended with the schedule containing details of claims setup by respondent No. 2. Thereafter it appears that respondent No. 2 filed Suit No. 994-A of 1995 for appointment of Arbitrator in Delhi High Court in which IA No. 3025 A of 1998 was also filed seeking direction that the parties should appear in District Court at Ghaziabad and the file be sent to said Court since territorial jurisdiction would lie with District Court at Ghaziabad. Delhi High Court came to the conclusion that jurisdiction lie at Ghaziabad and petition was returned to be presented before the competent Court, i.e., District Judge, Ghaziabad. It is pursuant to this order of Delhi High Court the petition was filed before the District Judge, Ghaziabad seeking appointment of Arbitrator. In para 7 thereof it is clearly mentioned that cause of action arose on 30.8.1995 and 27.1.1996 and is still continuing.

9. From the order of District Judge it appears that despite notice having been issued petitioner-NTPC chose not to appear before the District Judge to contest the matter by filing written statement. On 8.7.2002 the District Judge passed order to proceed ex parte. Thereafter on 12.11.2002 he passed order giving one more opportunity to Chairman-cum-Managing Director to appoint sole Arbitrator or to give three names to Court so that it may appoint Arbitrator and fixed matter for 17.12.2002. The petitioner-NTPC still failed to respond and did not react in any manner. The District Judge, Gautambudh Nagar in the facts and circumstances of the case, on 8.1.2003, appointed sole Arbitrator, Sri Sushan Sen Gupta as said above. Thereafter an application was filed by petitioner for recall of the order dated 8.1.2003 but the same was rejected by District Judge on 22.1.2003 which order is not under challenge. This is how petitioner has proceeded to contest the matter before the Court below.

10. Now the sole question up for consideration before this Court whether first notice for appointment of Arbitrator in this case would be the notice dated 27.1.1996 or 30.8.1995.

11. Learned counsel for the petitioner tried to take advantage from the order of District Judge passed on 12.11.2002 wherein he has referred to respondent's No. 2 application dated 27.1.1996 only giving fifteen days time for appointment of Arbitrator and contended that since the Court below has referred to only this

notice, therefore, cause of action must have arisen only on 27.1.1996 and not to any earlier date.

12. I have considered the submission very carefully but find no substance therein. It is no doubt true that in the order dated 12.11.2002 the District Judge has referred only application dated 17.1.1996 but from the petition it is evident and a perusal of letter dated 30.8.1995 leaves no doubt in the mind of Court that it was an application submitted by respondent No. 2 to Chairman-cum-Managing Director to appoint Arbitrator in terms of contract since the General Manager has not entered into reference and appears to be unwilling and unable to act as sole Arbitrator in the matter pursuant to letters dated 22.6.1995/31.7.1995 sent to him. The second notice dated 17.1.1996, copy whereof has been placed on record as Annexure-SA-a to the supplementary affidavit shows that it was in reference to letter dated 8.9.1995 given by Manager (WMS) reiterating claim of respondent No. 2 as mentioned in his letters dated 22.6.1995/31.7.1995 and 30.8.1995 and this letter only clarifies that dispute already exist and in case the NTPC will not pay dues within 15 days the respondent No. 2 have no alternative but to seek payment by legal course. In strict sense this letter by itself does not require the competent authority to appoint Arbitrator under the terms of contract as contained in para 56 but only a notice to Manager who sent letter dated 8.9.1995 disputing that there exist no dispute. It appears that understanding of Manager, NTPC with regard to existence of dispute was that a claim if set by party "A" and is denied by party "B" by specific letter only then a dispute will come to exist and not otherwise. This understanding is wholly fallacious and misconceived. When respondent No. 2 raised certain claims and they were not paid within time despite demand, this non payment of dues by petitioner necessarily result in creating a dispute. This is fortified from the fact that respondent No. 2 sent letters dated 22.6.1995 and 31.7.1995 requesting the General Manager to arbitrate the dispute as sole Arbitrator which letter was not replied by General Manager itself and on the contrary Manager (WMS) of NTPC tried to delay the matter by stating that there is no dispute. As per terms of contract the respondent No. 2 rightly sent letter dated 30.8.1995 having waited for almost one month and more for reply from the General Manager and realising that the General Manager himself is not willing to proceed as sole Arbitrator.

13. In the above facts, circumstances and discussion I have no manner of doubt that first letter sent by respondent No. 2 seeking appointment of Arbitrator is of 30.8.1995 whereby he requested Chairman-cum-Manager Director to appoint sole Arbitrator. If the letter dated 22.6.1995 and 31.7.1995 is not treated to be a letter for appointing Arbitrator though apparently it also constitute a letter for commencement of arbitration proceeding since in terms of agreement parties should have requested the General Manager himself to act as Arbitrator, therefore, even this letter could have been treated as a first notice for appointment of Arbitrator and the arbitration proceeding would have commenced therefrom also but since respondent No. 2 has sought to rely on his letter dated 30.8.1995 in his petition (Annexure-1 to the writ petition) as first date, I have no

reason to doubt the correctness thereof. The mere fact that District Judge in his order dated 12.11.2002 has referred to only one of the letter, i.e., dated 27.1.1996, that would not make any difference since necessary facts are already on record and were never disputed by petitioner-NTPC by filing written statement in the Court below.

14. The decision cited by learned counsel for petitioner in Milkfood Limited v. GMC Ice Cream (supra) referring to Section 14(3) of 1940 Act clearly shows that arbitration proceeding shall commence as soon as the notice is given requesting for Arbitrator. Once proceeding have commenced, the subsequent letters or any reminder would not give a fresh cause of action or would not amount to a fresh commencement of arbitration proceeding. In para 46 of the judgment Hon"ble S.B. Sinha, J. stating majority opinion has said:

46. A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons was charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedures required therefor. If the provisions of the 1940 Act apply, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common-parlance meaning given to the expression "commencement of an arbitration" which, admittedly, for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regards the procedure under the one Act other required to be followed. It is only in that limited sense the expression "commencement of an arbitration" qua "a notice of arbitration" assumes significance.

15. In my view, the aforesaid law squarely fortify the view I have taken in this case and, therefore, this judgment instead of helping the petitioner, helps the respondent No. 3.

16. The writ petition, therefore, is thoroughly misconceived.

17. It is really strange that a public sector undertaking itself having provided a forum for settlement of dispute outside the Court of Law but has not adhered to such procedure and has kept this matter lingering for last almost one and half decade keeping alive the dispute between two parties burdening Court of Law with an avoidable litigation. If the petitioner would have acted in more careful and prudent manner this unwarranted litigation could have been avoided. The attitude of inaction and laxity on the part of petitioner cannot be appreciated and

has to be condemned. In my view, it is a fit case which deserves to be dismissed with exemplary costs.

18. The writ petition is accordingly dismissed with costs quantified to Rs. 25,000/- which shall be paid by petitioner to respondent No. 2 within two months from the date of production of a certified copy of this order. Interim order, if any, stands vacated.