
(2003) 12 PAT CK 0062
In the Patna High Court
Case No : Request Case No. 10 of 2003

N.B. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-12-2003

Acts Referred:

Citation : (2003) 12 PAT CK 0062

Judgement

R.S. Garg, J.—Heard learned counsel for the parties.

2. The petitioner in accordance with Clause 63 of the agreement made an application to the other side for referring the matter to the arbitrator. As the matter was not referred to the arbitrator the petitioner has come to this Court u/s 11 of the Arbitration and Conciliation Act, 1996. On notice to the other side they have appeared and filed their counter inter alia submitting that in accordance with Clause 63 of the agreement the petitioner/contractor can make an application to the respondents after 90 days of his presenting final claim on disputed matters that the matter be referred to arbitrator and as the petitioner has not done so Clause 63 would not become operational. It is also contended by them that vide Annexure-A letter dated 8-3-2000 the petitioner has given a certificate in favour of the respondents that after completion of the work he has no other claim outstanding against the respondents, therefore, also the matter now cannot be referred to the arbitrator.

3. Learned counsel for the petitioner submits that the question that the petitioner's claims are barred by limitation or because of submission of the certificate would also be questions to be considered by the arbitrator himself. According to him the arbitrator will decide into the entitlement of the parties.

4. After hearing the parties I am of the considered opinion that the question that whether the petitioner's claim has become time-barred or his application for referring the matter to the arbitration is contrary to Clause 63 would be questions to be considered by the arbitrator. What would be the effect of the no-dues certificate on completion of the work again will have to be taken into

consideration by the arbitrator himself. The matter will have to be referred to the arbitrator.

5. When this Court required the parties to give an agreed name of the arbitrator to be appointed by the Court, learned counsel for the respondents referring to Clause 63 of the agreement especially Sub-clause (3) submitted that in case of a dispute if the matter is to be referred to the arbitrator then the matter is to be referred to two arbitrators who shall be Gazetted Railway Officers. According to him for the purposes of appointing two arbitrators as referred to in Sub-clause (a) (ii) the Railway has to send panel of more than three names of Gazetted Railway Officers of one or more Department of the Railway to the contractor who will be asked to suggest the name to the General Manager. One to be nominated as contractor's nominee and while the General Manager appointing the contractor's nominee would appoint second arbitrator either from the list or from outside the list and thereafter two arbitrators shall nominate the Umpire who shall be Gazetted Railway Officer. According to him as the arbitration clause itself provides for appointment of the arbitrator either by selection or by his office the petitioner is not entitled to select one name unless proposed by the Department. In support of his contention he has referred to judgment of the Supreme Court in the matter of M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, On the other hand learned counsel for the petitioner placing his strong reliance upon the judgment of the Supreme Court in the matter of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, submitted that as the respondents have lost their turn to appoint an arbitrator the Court will not have to fill the vacancy and will have to appoint an arbitrator. It is also submitted by him that the judgment in the matter of M/s. Indian Drugs was under Arbitration Act of 1940, while the present dispute will have to be seen in the light of Arbitration and Conciliation Act. 1996.

6. Learned counsel for the respondents at this stage submitted that a juxtapose reading of Sections 10 and 11 of the Arbitration and Conciliation Act, 1996 would make it clear that the parties would be free to determine the number of arbitrators provided that such number shall not be even number and in a case of three arbitrators one arbitrator each is to be appointed by the party and the two arbitrators will have to appoint the third arbitrator and in case a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from another party or the two appointed arbitrators fail to agree on the third arbitrator within 30 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.

7. A bare perusal of these provisions Would make it clear that in case where the matter is to be referred to three arbitrators one to be appointed by each party then the two arbitrators would appoint the third arbitrator. In the present matter each party is entitled to appoint an arbitrator and the two arbitrators would appoint a third arbitrator but the question would be that if a party fails to appoint

an arbitrator within 30 days then the vacancy is to be filled and the arbitrator is to be appointed by the Chief Justice or any person or institution designated by him.

8. Undisputedly the respondents did not refer the matter to the arbitrator or did not send the list of three persons to the petitioner for selecting one nor did they appoint their own arbitrator under the apprehension that the petitioner's claims cannot be considered because the same were barred by limitation or he had given a no dues certificate.

9. In the matter of M/s. Indian Drugs (supra) their Lordships of the Supreme Court were considering the provisions of the old Code and while considering the same they had observed that the-matter could not be referred to the arbitration of a third party or a retired Judge of the High Court because the provisions in the arbitration clause cannot be given a go-by merely at the asking of the respondents,

10. The present matter has come up before this Court u/s 11 of the Arbitration and Conciliation Act.

11. In the matter of Datar Switchgear (supra) the Supreme Court has observed that if after the dispute is arisen a party does not appoint the arbitrator in a case of sole arbitrator then the other party would be entitled to appoint an arbitrator. Their Lordships were also of the view that in case where a party entitled to appoint an arbitrator does not appoint an arbitrator then he loses his right to appoint the arbitrator. .

12. In the present matter a fair perusal of clause 63 read with Sections 10 and 11 of the Arbitration and Conciliation Act, 1996 would make it clear that the respondents have missed the bus and the arbitrator will now have to be appointed by the Court. This Court suggested the name of Mr. Justice P.S. Sahay, a retired Judge of the High Court to the parties, the parties are agreeable to the said name.

13. With the consent of the parties Mr. Justice P. S. Sahay is appointed as the sole arbitrator.

14. Accordingly the application is allowed and the matter is referred to Mr. Justice P. S. Sahay to enter into the reference and make his award. The terms/conditions of the arbitration, the remuneration and the procedure shall be decided by the arbitrator himself obviously taking into account the terms of the agreement. The petition is disposed of.