

(2011) 07 JH CK 0262
In the Jharkhand High Court
Case No : C.R. No. 52 of 2010

Rail India Technical and Economic Service Ltd., New Delhi
and Others

APPELLANT

Vs

Vijeta Constructions Ltd., Ranchi and Others

RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:

Arbitration Act, 1940 — Section 8, 8(1), 8(2)

Citation : (2011) 4 JCR 394

Hon'ble Judges : Prashant Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prashant Kumar, J.—This Civil Revision is directed against the judgment dated 18.09.2010 passed by Subordinate Judge, 1st Dhanbad in Miscellaneous Case No. 22 of 1996, whereby he allowed the petition of opposite party and directed both the parties for suggesting names of their respective arbitrators, so that the Court can appoint them as arbitrator as per sub-section (2) of Section 8 of the Arbitration Act. 1940.

2. It appears that opposite party No. 1 had entered into an agreement with petitioner for execution of following work:

Earthwork in Railway formation in embankment with mechanical compaction in filling/cutting including blanketing, turfing and boulder pitching etc. and construction of retaining wall near Khanudih Railway Station for Madhuban Washery Siding, Madhuban, Bihar, Section-III (From Km 2/425 to Km 2/940).

3. It is relevant to mention here that the said agreement stipulates that if there is any dispute between the parties for construction of operation of the contract or the respective rights and liabilities of the parties, the said dispute or differences be referred for arbitration. Clause 63 (4)(b) of the said agreement, deals with the provision for appointment of arbitrator which runs as follows:

(4) (b) For the purpose of appointing two arbitrators as referred to in sub-clause (a)(ii) above, the RITES will send a panel of more than three names of RITES Officers of one or more departments of the RITES to the contractor, who will be asked to suggest to the General Manager one name out of the list for appointment as the contractor's nominee. The General Manager, while so appointing the contractor's nominee, will also appoint a second arbitrator as the RITES nominee either from the panel or from outside the panel, ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department. Before entering upon the reference the two Arbitrators shall nominate an umpire who shall be a RITES Officer to whom the case will be referred to in the event of any difference between the two Arbitrators. Officers of the joint General Manager grade of the Accounts Department of the RITES shall be considered as of equal status to the officers in the General Manager grade of other departments of RITES for the purpose of appointment as arbitrators.

4. It further appears that after execution of agreement/contract, the opposite party (contractor) brought vehicle, machinery, staff technical persons and workers at the site so that the agreement entered between the parties be completed within the stipulated period. But in spite of that petitioners not handed over the site for starting work, though two years from the date of agreement had lapsed. It is stated that opposite party (contractor) had suffered huge pecuniary, loss, therefore he claimed damages from petitioner. It is stated that the claim of the opposite party No. 1 was rejected by the petitioner on 28.10.1993, thereafter opposite party No. 1 sent a letter to the petitioner for referring the dispute to arbitrator and further requested petitioner for sending the list of three persons so that he would suggest the name of one, for appointment as arbitrator, as his nominee. It further appears that petitioner had not given any heed to the aforesaid request of opposite party No. 1 (contractor). Therefore opposite party No. 1 filed an application on 25.6.1996 for invoking the power of Court vested u/s 8(2) of the Arbitration Act, 1940. It appears that petitioner filed "rejoinder and contested aforesaid application.

5. It is stated by the petitioner that there is no dispute which could be referred to arbitrator. It is further stated that though there is delay in handing over the site to the opposite party contractor, but same was due to unavoidable circumstances. It is stated that as per Clause 19 of the agreement, no compensation is payable for any delay in acquisition of land. Accordingly, it is stated that the claim of the opposite party No. 1 (contractor) is not maintainable. Hence, the same cannot be referred to arbitrator. It is stated that it is also mentioned in General Condition of the Contract at Clause 63 (1) that if the difference between the parties come within the purview of "accepted matters", the difference cannot be referred to arbitrator. It is further stated that petitioner called opposite party No. 1 (contractor) for negotiation, but opposite party No. 1 (contractor) reiterated his claim vide letters dated 16.1.1996 and 19.4.1996 and requested petitioner for referring the dispute to the arbitrator and further demanded panel of names of arbitrator. It is stated that the petitioner sent panel

of names of arbitrator to the opposite party No. 1 (contractor) vide letter dated 1.7.1996, but in spite of that the present application filed. Accordingly, it is submitted that the application of the opposite party No. 1 (contractor) is liable to be rejected.

6. It appears that the Court below considered rival contention of the parties and concluded that since petitioner received notice for appointment of arbitrator but did not appoint arbitrator within 15 days, therefore as per Section 8(2) of the Arbitration Act, 1940, the Court can appoint arbitrator. Accordingly, the learned Court below allowed the application of opposite party No. 1 by the impugned order. Against that present revision filed.

7. It is submitted by Sri V. Shivnath, learned counsel for the petitioner that Section 8 of the Arbitration Act has no application in this case because as per agreement, the arbitrator cannot be appointed by the consent of both parties. Accordingly, it is submitted that impugned judgment of the learned Court below is without jurisdiction. It is further submitted that it is admitted case of the parties that the work had not started because the land was not handed over to petitioner by opposite party No. 2 (BCCL). Under the said circumstance, as per Clause 19 of the agreement, petitioner cannot claim compensation for delay. It is submitted that the claim of the petitioner came within the purview of "accepted matters", thus as per General Condition of Contract 63(1) the dispute cannot be referred to arbitrator. Thus it is submitted that impugned order cannot be sustained.

8. Sri Rahul Gupta, learned counsel for opposite party No. 1, submitted that in the instant case General Manager of RITES got power under the agreement to appoint arbitrator, thus it will be presumed that he agreed to act on behalf of both parties for the purpose of appointment of arbitrator. Accordingly, it is submitted that if he fails to act as per the terms of agreement, the Court can appoint arbitrator according to the provision of Section 8(2) of Arbitration Act 1940. Thus, it is submitted no interference required by this Court.

9. Having heard the submission, I have gone through the record of the case. As noticed above, mode of appointment of arbitrator mentioned in sub clause 4(b) of Clause 63 of General Terms of the Contract. According to the said provision, the General Manager of RITES (petitioner) will send a panel of more than three names of RITES Officers to the Contractor asking him to suggest one name, out of the list, for appointment as contractor's nominee. Thereafter the General manager while appointing the contractor's nominee also appoint a second arbitrator as RITES nominee. Thus, as per sub-clause 4(b) of Clause 63 of General Condition of Contract, the authority of appointment of arbitrator is in the General Manager of RITES.

10. It has been held by their Lordship of Supreme Court in *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, that where the power to appoint arbitrator had been given to the administrative head of principal and when he

failed to do so within the stipulated period of 15 days after receiving notice, the contractor has got a right to avail remedy u/s 8 of the Arbitration Act.

11. Hon"ble Patna High Court in Central Coal Field Limited, Darbhanga House, Ranchi through its Chairman-cum-Managing Director and others v. Bhardwaj Construction Company, Hazaribagh and another, reported in 1994 (1) PLJR 532 has held that in view of stipulation that Managing Director of the Company will appoint arbitrator, it will be presumed that the Managing Director had agreed to act on behalf of both the parties for the purpose of nomination of an arbitrator and thus he will be treated as a party to the agreement for the purpose of Section 8(1) (a) of the Act thus if he fails to act or concur in accordance with Arbitration Clause for appointment of an arbitrator as per the request made by the aggrieved party then Court can definitely exercise its jurisdiction u/s 8(2) of the Arbitration Act.

12. Thus in view of aforesaid two decisions, contention of Sri V. Shivnath that Section 8 of the Arbitration Act, 1940 has no application, cannot be accepted. In the instant case, the General Manager of RITES has been given power to appoint arbitrator. Thus he has to follow the procedure for appointment of arbitrator within 15 days from the date of receipt of notice. If he fails to do so, opposite party No. 1 (contractor) has right to approach the Court for appointment of arbitrator as per Section 8(2) of the Arbitration Act 1940.

13. In the instant case, it is manifestly clear that opposite party No. 1 gave notice to the General Manager of RITES (petitioner) for referring the difference/dispute between the parties to the arbitrator and requested him to provide panel of names of more than three officers, so that he can choose his nominee. Thus, it is incumbent upon the General Manager of RITES to provide the names of nominee and then appoint arbitrator within fifteen days from the date of receipt of notice.

14. In the instant case, it appears to be admitted that even after expiry of 15 days from the date of receipt of notice, the General Manager (RITES) had not provided panel of names of more than three persons of RITES to the opposite party No. 1 (contractor). Thus, the contractor assumed right u/s 8(2) of the Arbitration Act 1940 to approach the Court of competent jurisdiction for appointment of arbitrator. Under the said circumstance I find that the learned Court below had jurisdiction u/s 8(2) of the Arbitration Act, 1940 to appoint arbitrator.

15. So far the other points raised by the petitioner that the dispute between the parties cannot be referred to arbitrator, I find that the learned Court below had rightly held that the decisions on the said points are within the domain of arbitrator. I find no illegality in the aforesaid finding of learned Court below, which require any interference.

16. I find no merit in this revision, the same is accordingly dismissed.