

(2004) 03 OHC CK 0017

In the Orissa High Court

Case No : Writ Petition (C) No. 2271 of 2004

Union of India (UOI) and Others

APPELLANT

Vs

Dhanurdhar Champatiray

RESPONDENT

Date of Decision : 17-03-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2004) 3 ARBLR 30 : (2004) 98 CLT 125 : (2004) 1 OLR 597

Hon'ble Judges : M.M. Das, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : Standing Counsel, Central Government, for the Appellant; S.K. Sanganeira, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.—The Opp. Party executed a construction work for the petitioners. Some disputes arose between the petitioners and the Opp. Party arising out of the said work. Clause 25 of the agreement between the parties provided for reference of the disputes to the sole arbitrator or the person appointed by the Chief Engineer-in-charge of the work at the time of dispute or if there be no Chief Engineer, the administrative head of the said work at the time of such appointment. On 26.3.2003, the Chief Engineer-in-charge received a written request dated 21.3.2003 from the Opp. Party for appointment of the arbitrator. When no arbitrator was appointed by the Chief Engineer-in-charge, the Opp. Party filed an application u/s 11 of the Arbitration and Conciliation Act, 1996 in ARBP No. 21 of 2003 before the Chief Justice of the High Court, praying for appointment of an arbitrator. The said prayer was opposed by the petitioners before the Chief Justice stating that in the meanwhile an arbitrator had been appointed on 2.7.2003. By order dated 21.1.2004 the Chief Justice relying on the decision of the Supreme Court in Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, held that since appointment of the arbitrator was made by the Chief Engineer-in-charge after the application u/s 11 of the Arbitration and Conciliation

Act, 1996 was filed, such appointment was without jurisdiction. Having so held, the Chief Justice passed orders appointing Shri Gobind Das, a Senior Advocate, as an Arbitrator, by the said order dated 21.1.2004. Aggrieved by the said order dated 21.1.2004, the petitioner has filed this writ petition under Article 226 of the Constitution praying for appropriate relief.

2. Mrs. Agarwal, learned Standing Counsel for the petitioners submitted that since the procedure for appointment of the Arbitrator had been agreed to by the parties in Clause 25 of the agreement, the Arbitrator could only be appointed as per the said procedure and merely because there was delay in making the appointment as per the said procedure, the Chief Justice could not have, in the impugned order held that the appointment of the Arbitrator by the Chief Engineer-in-charge in accordance with Clause 25 of the agreement was without jurisdiction. She further submitted that in the decision of the Supreme Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* (supra) on which reliance was placed by the Chief Justice in the impugned order, the Supreme Court has held in paragraph - 23 that when the parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure and the Court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. She further pointed out that in the said paragraph - 23 of the decision, the Supreme Court held that when the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.

3. Mr. Sanganerla, learned counsel for the Opp. Party, on the other hand, submitted that in the said decision of the Supreme Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* (supra), the Supreme Court has specifically held that where the parties have agreed to an appointment procedure for appointing arbitrator and one party demands on the other party to appoint an arbitrator and the said party does not make the appointment even after expiry of 30 days and an application u/s 11 for appointment of an Arbitrator is filed, the right of the party to appoint the Arbitrator ceases. He submitted that in the present case since the Chief Engineer-in-charge did not appoint the arbitrator in accordance with the agreed procedure in Clause 25 of the agreement even after expiry of 30 days and the Opp. Party filed an application u/s 11, the right of the petitioners to appoint the arbitrator ceased on filing of such application.

4. We find force in the aforesaid submission of Mr. Sanganerla. Sub-section (2) of Section 11 of the Arbitration and Conciliation Act, 1996 provides that subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) of Section 11 of the said Act further provides that where under an appointment procedure is agreed upon by the parties and a party fails to act as required under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. In *Datar Switchgears Ltd. v.*

Tata Finance Ltd. and Anr. (supra) the Supreme Court after analysing the provisions of Section 11 of the said Act, held :

"So far as cases failing u/s 11(6) are concerned - such as the one before us- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed u/s 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the Opp. Party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court u/s 11, that would be sufficient. In other words, in cases arising u/s 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application u/s 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases."

It would be clear from the language used by the Supreme Court in the judgment quoted above that where parties have agreed to a procedure to appoint the arbitrator and the party who is to make such appointment fails to act as required under the procedure, within 30 days, the right of the party to appoint the arbitrator as per the agreed procedure for appointment does not cease on expiry of 30 days but even in such a case, the appointment of an arbitrator as per the agreed procedure has to be made before the other party files an application u/s 11 seeking appointment of an arbitrator.

5. In this case, on expiry of 30 days period from the date of receipt of the request of the Opp. Party for appointment of an arbitrator, the Chief Engineer-in-charge could still appoint the arbitrator as per the agreed procedure but after expiry of the 30 days period, once the Opp. Party filed an application for appointment of an arbitrator u/s 11 of the Act, the Chief Engineer-in-charge could not appoint the arbitrator. Admittedly the period of 30 days from the date of receipt of the request of the Opp. Party on 26.3.2003, expired on 26.4.2003. The application for appointment of an arbitrator u/s 11 of the Act was filed, before the Chief Justice on 30.4.2003. On 30.4.2003 the Chief Engineer-in-charge had not appointed an arbitrator under Clause 25 of the agreement. Instead he appointed the arbitrator on 2.7.2003. The Chief Justice, therefore, was right in coming to the conclusion in the impugned order dated 21.1.2004 that the appointment of the arbitrator was without jurisdiction.

6. For the aforesaid reasons, we are not inclined to interfere with the impugned order dated 21.1.2004 of the Chief Justice in ARBP No. 21 of 2003 and we accordingly dismiss the writ petition.

M.M. DAS, J.

7. I agree.