

(2011) 11 CAL CK 0029
In the Calcutta High Court
Case No : A.P. No. 607 of 2011

United Unemployed Engineers Co-operative Society Ltd.	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 11(6), 11(8)

Citation : AIR 2012 Cal 41 : (2012) 2 CHN 651

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Amitava Ghosh, for the Appellant; Moinak Bose, for the Respondent

Judgement

Sanjib Banerjee, J.—There is no dispute between the parties as to the existence of the arbitration agreement. The respondents also say that there are live disputes covered by the arbitration agreement that can go to a reference. The appropriate arbitration agreement appears at page 13 of the respondents' affidavit. Clause 25 contemplates that the chief engineer of the relevant department would be the appointing authority and it would be open to the chief engineer to either take up the reference himself or nominate any other person to be the arbitrator. There is an exception carved out by way of a subsequent rule that amended the arbitration clause contained in the general conditions: for the arbitration agreement to be effective, the estimated cost of the work or the amount tendered, whichever is less, should exceed Rs. 1 crore.

2. There appears to be little dispute, particularly upon reading the work order dated May 4, 2009, that the arbitration agreement would be applicable. The estimated amount put to tender for the work was in excess of Rs. 1.99 crore, the tendered value of the work was in excess of Rs. 1.93 crore.

3. The only point that has been urged on behalf of the respondents is that since the chief engineer is given the choice under the arbitration clause to take up the reference or nominate another, notwithstanding the fact that a period of more

than 30 days had elapsed from the date of receipt of the request for the appointment of the arbitrator by the relevant chief engineer and the institution of the present request u/s 11 of the Arbitration and Conciliation Act, 1996, the Court should direct the chief engineer to take up the reference or nominate another as arbitrator. Such submission does not appeal.

4. It has now come to be judicially recognized that notwithstanding Section 11(6) of the 1996 Act, unlike sub-section (4) of the same Section, not providing a time limit, the reasonable period of 30 days which is referred to in Section 11(4) should also be applied in a case covered by Section 11(6) of the Act. That would imply that a party to an arbitration agreement would have the right to make a request u/s 11 of the 1996 Act to the Chief Justice or his designate if the appointing authority recognized by the agreement fails to constitute the arbitral tribunal for a period in excess of 30 days from the date of receipt of a notice in such regard.

5. There is no dispute that the notice in this case was issued on December 15, 2010 which the relevant chief engineer received shortly thereafter. The petition was instituted some time in June, 2011, well after the expiry of a period of 30 days from the date of receipt of the notice by the chief engineer. The question of affording the chief engineer another opportunity would have arisen if the agreement between the parties had been worded otherwise.

6. Section 11(8) of the 1996 Act requires the Chief Justice or his designate to have regard to two aspects of the matter upon a request for the constitution of the arbitral tribunal being received : the qualifications as to the arbitrator or the arbitral tribunal as may have been agreed between the parties; and, the independence and impartiality of the tribunal. The clause in the present case permits the relevant chief engineer to take up the reference or appoint another and there is no indication in the agreement that the nominee of the chief engineer would be required to possess any qualification. It follows that it would be open to the relevant chief engineer to appoint any person irrespective of his qualifications, whether in the line of the business or in position. It is possible that in certain cases though a valid request has been carried u/s 11 of the 1996 Act, it may appear that the appointing authority did not get due opportunity to exercise the authority to appoint and, in such cases, the Chief Justice or his designate may permit the appointing authority to exercise such authority if no case of mala fides is made out. But once it appears that the appointing authority slept over the matter and failed to discharge an obligation that was cast on such person by the agreement between the parties, it would be, in a sense, the betrayal of the confidence of the parties in the appointing authority to make the appointment in accordance with the agreement. In such a case, the Chief Justice or his designate can scarcely be expected to allow the appointing authority a further chance to make the appointment according to his wish, particularly when the arbitration agreement is silent as to the qualifications of the nominee of the appointing authority.

In such circumstances, AP No. 607 of 2011 is directed to be placed before the Hon"ble the Chief Justice for constituting an arbitral tribunal to adjudicate upon the disputes between the parties covered by Clause 25 of the general conditions governing the parties.

There will be no order as to costs. Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.