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Ashok Coal Depot Vs. South Eastern Coal Fields Ltd.

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Court : Madhya Pradesh

Decided On : Apr-20-1999

Reported in : 1999(2)MPLJ594

Judge : S.C. Pandey, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11(6)

Appeal No. : M.C.C. No. 510 of 1998

Appellant : Ashok Coal Depot

Respondent : South Eastern Coal Fields Ltd.

Advocate for Def. : P. Jaiswal, Adv.

Advocate for Pet/Ap. : Kishore Shrivastava, Adv.

Disposition : Petition allowed

Judgement :

ORDER

S.C. Pandey, J.

1. This is an application under Section 11 of the [Arbitration and Conciliation Act, 1996](#) (henceforth 'the Act') for appointment of an arbitrator by me as a person designated by Hon'ble the Chief Justice, High Court of Madhya Pradesh, Jabalpur,

under the 'scheme for appointment of arbitrator or arbitrators by the Chief Justice of Madhya Pradesh, 1996'. It is not in dispute that the amount claimed by the applicant is more than Rs. 25 Lakhs and, therefore, I am authorised to deal with the matter.

2. Shortly stated, the facts of this case are that the applicant entered into a work contract of transporting the coal as per Annexure A-1, the tender, dated 23-11-1993. The applicant entered into an agreement with the non-applicant, marked as Annexure A-2, dated 23-3-1994 after accepting the tender. That agreement contains Clause 36 which is an arbitration clause. The arbitration clause is widely worded and it provides for referring of disputes arising out of or relating to the contract etc. to a sole arbitrator who is required to be appointed by the Chairman-cum-Managing Director of the non-applicant or any other person who is authorised by the Board to appoint such arbitrator. The wordings of Clause 36 show that all kinds of disputes that relate to the contract between the parties could be referred to a sole arbitrator even after completion of the work under the contract. It is apparent from the arbitration clause itself that the arbitrator is to be appointed by a named authority in the agreement, be it a Chairman-cum-Managing Director or a person authorised by the Board. Therefore, it is apparent that sub-section

(2) of Section 11, which is subject to sub-section

(6) of that section comes into operation. This section gives liberty to the parties to agree on a procedure for appointing an arbitrator or arbitrators. When the parties agree to a procedure for appointment of an arbitrator or arbitrators then automatically sub-sections (3),

(4) and

(5) of Section 11 of the Act would not be attracted because these sub-sections deal with the case or cases where no procedure for appointment of an arbitrator or arbitrators is fixed by the parties themselves. Sub-section

(6) of Section 11 of the Act operates where despite agreement of procedure for appointment of an arbitrator or arbitrators between the parties, one of the parties

fails to act as required under that procedure. Under these circumstances, subsection

(6) provides that other party may request the Chief Justice or any person or institution designated by him to take the necessary measures unless there be an alternative procedure under the agreement for securing the appointment of an arbitrator. The applicant and the non-applicant do not say that there is such an alternative procedure in this case under the agreement entered into by the parties.

3. The applicant, however, asserts that by virtue of Section 11 of the Act the Chief Justice or the person or institution designated by him has the full power in case, it is held that the Chairman-cum-Managing Director of the non-applicant had failed to appoint an arbitrator at the request of the applicant. The learned counsel for the applicant drew my attention to the notice, Annexure A-14, dated 29-8-1996 demanding the designated authority - the Chairman-cum-Managing Director of South Eastern Coalfields Ltd. to appoint an arbitrator. This notice makes a claim of about Rs. 60 Lakhs as detailed in paragraph 15 thereof, and also there is a request in this notice on behalf of the applicant, that as per clause 36 of the agreement dated 23-3-1994, an arbitrator be appointed. When the Chairman-cum-Managing Director of the non-applicant did not act, the applicant filed this application under Section 11 of the Act.

4. It appears from the reply of the non-applicant that instead of appointing a sole arbitrator as demanded by the applicant, the non-applicant failed to appoint an arbitrator apparently without considering the notice of the applicant along with the entire agreement, Annexure A-2 as well as Annexure A-I for coming to the just conclusion if the applicant has made out a case for appointment of an arbitrator. No order was passed by the Chairman-cum- Managing Director of the non-applicant. On the other hand, the notice was handed over to a counsel Shri O. P. Agrawal who sent a reply to the notice denying most of the allegations made by the applicant on merits and he stated that there was no case which could go to arbitration. The reply to the notice appears to be on the instructions received by Shri O. P. Agrawal, Advocate from the Chairman-cum-Managing Director of South Eastern Coalfields Ltd. It appears that the Chairman-cum-Managing Director has

failed to understand the nature of his powers and his duties under Clause 36 of the arbitration agreement. He could not have acted in a partisan manner by giving reply to notice for appointment of an arbitrator. He may be the Chairman-cum-Managing Director of South Eastern Coalfields Ltd. but at the same time, he, being a designated authority to appoint an arbitrator, was required to shed his garb of the Chairman-cum-Managing Director of South Eastern Coalfields Ltd. for the time being, and consider the case of the applicant objectively for appointment of an arbitrator. The Chairman-cum-Managing Director was required to rise above the level of his post as an interested party in the South Eastern Coalfields Ltd. because the agreement conferred upon him a job different from what he was ordinarily required to do as a Chairman-cum- Managing Director of South Eastern Coalfields Ltd., that is to say, act impartially as an umpire for appointment of an arbitrator. Not only the Chairman-cum-Managing Director did not apply his mind but he chose to give reply to the notice of the applicant denying the allegations made in it in most frivolous manner. In my opinion, therefore, I can exercise the powers conferred upon me under sub-section (6) of Section 11 of the Act because the Chairman-cum-Managing Director of the non-applicant has failed to act as required under the procedure fixed by the parties, for appointment of an arbitrator.

5. Now, the only question that remains to be seen is what action can be taken by me under the aforesaid sub-section (6) of Section 11 of the Act. The wordings of sub-section (6) say that 'if a party fails to act as required under the procedure or there is breach of clause (b) or (c), (which is not to be considered in this case,) 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.' It may be said that this agreement does not provide for any other procedure for securing appointment of an arbitrator. Therefore, the only way left to me is to take the 'necessary measures', interpreted by a learned single Judge of this Court in the case of M/s Subhash Projects and Marketing Ltd. v. South Eastern Coalfields Limited, reported in AIR 1998 MP 276. The conclusion of the learned single Judge in that case has been summed up by the learned single Judge in paragraph 9 of his order as follows at page 279 :-

'9. As has been noticed above, under sub-section (6) where the agreement lays down a procedure for appointment of arbitrator referable to sub-section (1), the Chief Justice has merely to take necessary measures for enforcing the procedure laid down in the agreement for arbitration. Under sub-section (6), the Chief Justice or his designate has not to make any appointment but to enforce or compel the party to make the appointment in accordance with the agreed procedure.'

It is clear from the above quotation that the learned single Judge has taken the view that the Chief Justice or his designate cannot make an appointment but can only enforce or compel the party to make the appointment in accordance with the agreed procedure.

6. It has been contended on behalf of the applicant that since the concerned authority has not appointed a sole arbitrator, the only way remains is to direct the Chairman-cum-Managing Director of the non-applicant to appoint a sole arbitrator. On the other hand, the learned counsel for the non-applicant contends that language of section 1(6) of the Act does not warrant the conclusion recorded by the single Judge in the aforesaid case. It has been contended that in view of the authority in the aforesaid case with respect to sub-section (6) of Section 11 of the Act, there was no occasion to lay down the law because the ultimate conclusion of the Court was that the arbitrator had already been appointed as per sub-section (2) of Section 11 of the Act and the petition could have been disposed of accordingly. However, even if assuming that these observations are obiter, they are entitled to great respect, and there is no reason to take a different view from the view taken by the learned Single Judge, in this case. I am of the view that since it appears to me that no order has been passed by the Chairman-cum-Managing Director of South Eastern Coalfields Limited, the non-applicant, regarding the appointment of an arbitrator, I can make a direction to consider the entire case again and apply his mind to the facts of the case for coming to a just conclusion if the case is covered by clause 36 of the agreement, Annexure A-3, dated 23-3-1994. In my opinion, this is the 'necessary measure' within the meaning of Section 11(6) of the Act, that is required to be taken in this case. On this conclusion, I do not want to enter into controversy raised by the learned counsel for the non-applicant.

7. Accordingly, this petition is hereby allowed. It is directed that the Chairman-cum-Managing Director of South Eastern Coalfields, Limited, Bilaspur, the non-applicant shall consider along with the notice of the applicant, all the materials which the applicant may file in order to show that the dispute is covered by clause 36 of the agreement, Annexure A-2, dated 23-3-1994. It would not be out of place to mention here that in case, the Chairman-cum-Managing Director deems it necessary, he may hear also the applicant and its counsel. The Chairman-cum-Managing Director shall pass an appropriate order in connection with the appointment of a sole arbitrator, in accordance with law, after reaching to a conclusion if clause 36 of the agreement aforesaid is attracted for the purpose, within a period of three months from the date on which a copy of this order is presented before him.

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