

Vinay Agrawal Vs. the General Manager, East Coast Railway

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SooperKanoon Citation : sooperkanoon.com/533005

Court : Orissa

Decided On : Apr-04-2008

Reported in : 2008(4)ARBLR256(Orissa); (2008)106CALLT169(NULL)

Judge : A.K. Ganguly, C.J.

Appellant : Vinay Agrawal

Respondent : The General Manager, East Coast Railway

Judgement :

A.K. Ganguly, C.J.

1. This application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act') for appointment of an Arbitrator has been filed on 31.1.2007.

2. The material facts of the case are:

The Petitioner was awarded a contract by the Opposite Party bearing agreement No. 08/CAO/CPM/KJR/94 dated 12.12.1994 for execution of earth work in formation in Section between Km 41.00 and 58.00 in connection with construction of B.G. Line from Banspani and Daitari (Km-147) Section VI. The original value of the contract work was Rs. 1,79,87,150.00. The original value was revised and enhanced from time to time. The sixth enhancement amounting to Rs. 4,47,54,638/- was made by the Opposite Party and the work was executed and

completed in all respects by the Petitioner before 31.12.2002. But since the Petitioner instead of receiving the final payment in respect of the final bill has received lesser amount and the final bill has not yet been prepared by the Opposite Party, disputes and differences arose between them.

3. It is not in dispute that there is an arbitration clause between the parties. The Arbitration clause has been quoted in the petition. Admittedly, in this case, the claim is more than Rs. 5 lakhs. As such, the Arbitration Tribunal shall consist of a panel of three Arbitrators as per Clause 64(3)(a)(ii) of the General Condition of the contract. The said clause is set out below:

Clause 64(3)(a)(ii). Two Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) for all claims of Rs. 5,00,000 (Rupees five lakhs) and above and for all claims irrespective of the amount of value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not.

In the event of the two Arbitrators being divided in their opinions the matter under disputes will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

4. Admittedly, in the present case, there was a demand for appointment of Arbitrator by the Petitioner. First the demand was made by a notice dated 12.12.2006. In the said notice, in the penultimate paragraph the following recitals have been made.

If you fail to appoint an arbitrator within 30 days from receipt of this notice, we will have no other option than to approach the Court for appointing an Arbitrator under the provisions of Arbitrator and Conciliation Act, 1996.

5. Admittedly, the said notice was received by the Opposite Party on~22.12.2006. This appears from the receipt which has been annexed as Annexure-3. Since no Arbitrator was appointed, this petition under Section 11 of the said Act was filed in Court on 31.1.2007. Thereafter, the General Manager sent a panel of four names

and requested the Petitioner to nominate two names within thirty days. The said notice was received by the Petitioner on 2.3.2007. But since the Petitioner has already come before this Court and filed a petition, the Petitioner did not send any name. On the other hand, the Petitioner on 10.3.2007 informed the General Manager that since he has already approached this Hon'ble Court for appointment of an Arbitrator and the matter is subjudice, he requested the General Manager not to appoint any Arbitrator out of the panel sent by the General Manager. Despite the said request, the General Manager appointed the arbitrators by its letter dated 5.4.2007.

6. Now the question is whether the General Manager in the facts and circumstances of the case, can make the appointment of Arbitrator. Admittedly in this case, the appointment of Arbitrator is governed by the provision of Section 11(6) of the said Act.

7. Learned Counsel for the Opposite Party submitted that since this case is covered by Section 11(6) of the said Act, the requirement of appointing an Arbitrator within thirty days, which is there under Section 11(4) and 11(5) of the said Act is not attracted. Therefore, the General Manager has acted rightly by sending a panel of four names may be thirty days after receiving the Petitioner's request and asking the Petitioner to nominate at least two persons. Since the Petitioner failed to nominate, the General Manager appointed the panel of arbitrators and in that view of the matter, this petition under Section 11 of the Act is not maintainable.

8. Both the Counsel have relied upon certain Judgments which now the Court proposes to consider.

Time schedule in the matter of appointment of arbitrator was considered by the Supreme Court In Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr., reported in : (2000)8SCC151 . In that case also, time limit was not mentioned in the arbitration clause. In that decision, Learned Judges of the Supreme Court held that even if the appointment is made after thirty days from the date of receipt of the request for such appointment the appointment is valid provided, the Court has not been moved seeking the appointment. In other words, Learned Judges held in

paragraph 19, at page 158 of the report that the right to make appointment does not cease after the expiry of thirty days from the date of demand. Such right is not automatically forfeited. But if after expiry of thirty days an application is made before the Court seeking appointment of Arbitrator, only then the right of the Opposite Party to appoint 'ceases'.

9. In the instant case, the Petitioner has made an application seeking appointment of an Arbitrator before this Court on 31.1.2007. Still then, the General Manager has not sent any panel of names and did not take any steps under the arbitration procedure between the-parties. That being the position and in view of the ratio in Datar Switchgear case, the right of the General Manager 'ceases'.

10. Reference in this case connection has also been made to the Judgment of the Supreme Court in the case of Union of India and Anr. v. M.P. Gupta, reported in (2004) 10 SCC 504. That was not a case under Section 11 of the said Act, but was a case under the old Act. In that context, Learned Judges of the found that in the facts of that case, a Learned Single Judge of the High Court appointed Justice P.K. Bahri as the sole arbitrator ex parte on an application filed under Section 20 of the Arbitration Act, 1940. Aggrieved by the said ex parte order, the Appellant moved the Hon'ble Division Bench of the High Court which dismissed the Appellant's plea. Against the said order, Hon'ble Supreme Court was moved. Hon'ble Supreme Court looking at the relevant arbitration clause between the parties, set aside the appointment made by the Learned Single Judge merely on the ground that the arbitration clause had different terms.

11. In my view the ratio of the said Judgment is not strictly attracted to the present case, since the present case is governed by totally different statutory provisions.

12. Reliance was placed on the Judgment of the Supreme Court in the case of Punj Lloyd Ltd. v. Petronet MHB Ltd., reported in (2006) 2 SCC 638. In that case, the arbitration clause did not contain any time limit. After thirty days notice was given, the Opposite Party failed to act and the High Court was moved for appointing an arbitrator. In that circumstances, the Court held, reiterating the ratio in the Datar, that Opposite Party has lost the right. In fact, paragraph-19 of Datar Switchgear has been set out by the Learned Judges in Punj Lloyd Ltd. case.

The attention of this Court was also drawn to the decision of the Supreme Court in the case of Union of India and Anr. v. V.S. Engineering (P) Ltd., reported in : AIR 2007 SC285 . In that case, on the contractor's application, arbitrator was appointed by the Railways under Clause-64 of the General Conditions of the Contract. Before the Arbitrator, the contractor submitted its claim. Subsequently, the contractor filed a petition under Section 11 of the Act. Then the High Court appointed Mr. Justice Y.V. Narayana as the arbitrator. In the background of those facts, the Hon'ble Supreme Court by following the decision in M.P. Gupta held that the High Court cannot appoint an Arbitrator. In fact, the fact situation in that case was totally different.

13. Reliance was placed on the decision of the Supreme Court in the case of ACE Pipeline contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd., reported in : AIR 2007 SC1764 . In that case also, the facts were that on 21.7.2005 request was made by the Appellant for appointment of an Arbitrator. The notice dated 21.7.2005 was received by the Director (Marketing) on 26.7.2005 and a request was made to the Appellant to supply copy of the arbitration agreement and other corresponding documents as he was not aware of the procedure for appointment of the arbitrator. The Director (Marketing) received reply to the communication dated 12.8.2005 on 16.8.2005 which was received in the office on 17.8.2005. After receiving the communication and all the materials on 17.8.2005, the appointing authority appointed Shri P.S. Bhargava as arbitrator on 22.8.2005 and a communication was sent to the Appellant through courier which was received by him on 26.8.2005. It was also pointed out after receipt of the reply to the communication dated 12.8.2005 on 16.8.2005, on 19.8.2005, 20.8.2005 and 21.8.2005 office remained closed on account of Raksha Bandhan and weekly holidays. The Director (Marketing) sent reply on 22.8.2005 appointing Shri P.S. Bhargava as arbitrator. It was also pointed out that the whole action was done with urgency and thereNwas no delay on the part of the administration.

14. On 22.8.2005 the petition was filed before the High Court. On those fact's, the appointment of arbitrator made by the Respondent was sustained. But in the instant case, the petition was made before the High Court on 31.3.2007 and the General Manager sent a panel of names only on 21.3.2007, which was

substantially after the High Court was moved.

Reliance was also placed on the Judgment of the Supreme Court in the case of Union of India v. Bharat Battery ., reported in (2007)7 SCC 684. In that case, the initial notice was sent for appointment of an Arbitrator on 7.6.2005 and notice was received by the Opposite Party on 9.6.2005. Thereafter, second notice was served on 2.1.2006 which was received by the Opposite Party on 30.3.2006. Then the High Court being approached, the High Court appointed the Arbitrator on 26.5.2006. In facts of that case, the Supreme Court held that since the High Court was moved and an arbitrator has been appointed, the Appellants are estopped from appointing an arbitrator under Clause 24 of the agreement. Therefore, the principle of Datar Switchgear was affirmed.

15. In the facts of the case which have been discussed hereinabove, this Court is of the opinion that in this case, the Opposite Party have lost' their right to appoint an arbitrator as the High Court was moved much prior to any order being passed by the Opposite Parties under the arbitration clause. It is for the High Court to appoint an Arbitrator.

16. This Court therefore appoints Mr. Justice B.N. Patnaik a former Judge of the Orissa High Court the sole Arbitrator in this case to decide the disputes between the parties. The Arbitrator will immediately enter upon the reference within a period of four weeks from the date of service of this order upon him and thereafter he will take up all steps to decide the disputes between the parties and pass an award within a period of six months from the date of entering upon the reference. The question of remuneration of the Arbitrator and other costs and fees are left to be decided by the Arbitrator.

17. The ARBP is accordingly disposed of.