

Jayant Kumar Agarwal and ors. Vs. Dr. K. Subba Reddy and anr.

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SooperKanoon Citation : sooperkanoon.com/535801

Court : Orissa

Decided On : Apr-04-2008

Reported in : AIR2008Ori161; 2008(4)ARBLR563(Orissa)

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

Appellant : Jayant Kumar Agarwal and ors.

Respondent : Dr. K. Subba Reddy and anr.

Judgement :

ORDER

A.K. Ganguly, C.J.

1. Heard learned Counsel for the parties.
2. This application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter called the 'said Act') was filed on 10-12-2007 before this Court, On such petition being filed, this Court issued the notice on 14-12-2007 to the opposite parties. Pursuant to such notice, learned Counsel appeared on behalf of the opposite parties and made submissions.
3. The case, in the present petition is that the parties have entered into a share-purchase agreement for effecting sale of 50 lakhs equity shares of Rs. 10/- each in the company named M/s. Samleshwari Ferrometals Pvt. Ltd. and also the shares to be allotted on the pending applications in respect of the said Company. It was

also stated that in terms of the agreement, the opposite parties are required to pay advance of Rs. 2 crores by 30-11-2006 and to pay the entire balance amount by 31-3-2007.

4. However, disputes and differences arose between the parties. There is an agreement between the parties which is at Annexure-1. In the said agreement, there is an arbitration clause. It is under Clause 14 of the agreement. The said Clause is as follows:

Clause 14. Any dispute between the parties to this agreement in regard to the interpretation of this agreement or any other agreements supplementary to this agreement and of any matter arising out of this agreement or any supplementary agreement shall be referred to arbitration under the provisions of the Indian Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996) to two arbitrators, each party nominating one arbitrator who shall be entitled to appoint a third arbitrator under the Act. The venue of the arbitration proceedings shall be Sambalpur only. The language of the arbitration shall be English.

The Parties agree that the award of the arbitrator(s) shall be final and binding upon the Parties and that none of the Parties shall be entitled to commence or maintain any action in a Court of law upon any matter in dispute arising from or in relation to this Agreement, except from the enforcement of an arbitral award passed pursuant to this Clause.

5. In terms of the said Arbitration Clause, the petitioners' lawyer wrote a letter to the opposite party No. 1 on 11-10-2007 by registered post with A/D for appointment of an arbitrator on their behalf. In the said letter, it has been made clear that the petitioners appointed their arbitrator. The exact recitals are set out below:

That as per Clause 14 of the Share Purchase Agreement, there is an arbitration clause for any dispute. You have approached the Company Law Board as a minority share holder, but after 31-3-2007, your holding of shares is in dispute, which can only be adjudicated by arbitration. Further, you have also raised disputes over the clauses of the Share Transfer Agreement, and dispute resolution

can only be resolved by arbitration under the Arbitration and Conciliation Act, 1996 in an Arbitration Tribunal. My client has now appointed and intimates you the name of Mr. Madhab Ch. Panda, Senior Advocate, Sambalpur, At P.O. Jharapara, Dist. : Sambalpur-768001 (Orissa) as one of the arbitrator as per clause 14 of the Share Purchase Agreement, Page 14. You are requested to appoint an arbitrator to the Arbitration Tribunal and fulfil your obligation under Section 11 of the Arbitration and Conciliation Act, 1996, so that the arbitration proceedings can proceed.

6. It is not in dispute that the said letter was received by the opposite parties well before filing of the case before this Court on 10-12-2007. That fact has not been disputed before me. The case of the petitioner is that as the opposite parties have not nominated their arbitrator this petition under Section 11 of the Act was filed.

7. The first response to this petition by the opposite parties was by way of filing a preliminary counter affidavit. In that the opposite parties enclosed a letter dated 18-2-2008. In that letter, receipt of the petitioners' letter dated 11-10-2007 has been acknowledged and in that letter they nominated Mr. Himadri Mohapatra, Former Principal Secretary to Government of Orissa, Law Department, Bhubaneswar as their arbitrator. A further stand taken in the said letter is that the petitioners may approach the Hon'ble Chief Justice of Orissa High Court for appointment of an Umpire.

8. The learned Counsel for the petitioner submitted that the stand taken in the said letter is not within the contract made between the parties.

9. After the matter was heard on 28-3-2008, it was posted for further hearing on 4-4-2008. In between another affidavit has been filed by the opposite party on 3-4-2008, a copy of which has been served on the other side.

10. In the subsequent affidavit, the stand which has been taken is that certain proceedings were initiated before the Company Law Board, Kolkata Bench by the opposite parties under Sections 397, 398, 399, 408 and 111 of the Companies Act, 1956 against the petitioners seeking various reliefs and in the said Company Proceeding, the present petitioners have also filed their affidavit in opposition and

reply to the same has also been filed by the opposite parties. After filing of the said proceeding before the Company Law Board, opposite parties have received the notice dated 11-10-2007 sent by the petitioners. On receipt of such notice, the opposite parties thought that in view of the proceeding pending before the Company Law Board, no further step is required to be taken and the opposite parties were under the bona fide impression that the disputes by and between the parties in the Share Purchase Agreement would be solved once and for all by the Company Law Board. Thereafter, the instant petition filed under Section 11 of the said Act on 10-12-2007 was received by the opposite parties on 24-1-2008. After receiving the said petition and after taking legal advice, the opposite parties have appointed their arbitrator on 18-2-2008. Therefore, opposite parties have prayed for condoning the delay in the matter of appointment of Mr. Himadri Mohapatra, Former Principal Secretary to Government of Orissa, Law Department, Bhubaneswar on their behalf.

11. In support of the prayer for condonation of delay, learned Counsel for the opposite parties have referred to the judgment of the Supreme Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. reported in : (2000)8SCC151 .

12. Learned Counsel submitted that a proper perusal of the ratio in Datar Switchgears Ltd., would show that the concept of Limitation Act can be pressed into service in case of appointment of an Arbitrator by a party who has a right to make such appointment under the Arbitration Agreement. Learned Counsel referred to paragraphs 19, 20 and 21 at page 158 of the report in Datar Switchgears Ltd.

13. This Court on a perusal of the aforesaid paragraphs finds that in Datar Switchgears Ltd. (2000 AIR SCW 3925), the Hon'ble Judges have laid down the following propositions:

(a) Insofar as appointment under Section 11 of the Act is concerned, the party, who has a right to make appointment of Arbitrator, does not lose their right after the expiry of thirty days from the date of receipt of request by the other side to make such appointment;

(b) That right continues and is not lost by mere lapse of thirty days; and

(c) But that right ceases, after the opposite parties approach the Court with a prayer for appointment of an Arbitrator in view of the delay or failure of the other side to make such appointment.

(d) Learned Judges also held that so far as Sub-sections (4) and (5) of Section 11 is concerned, a period of thirty days has been prescribed but whether the said period is mandatory has not been decided by their Lordships.

14. It is common ground that in this case, we are not concerned with Section 11 (4) and (5) of the said Act.

15. Since we are concerned with the interpretation of Section 11(6) of the said Act, the right of a party to appoint an Arbitrator, after a request has been made by the other party and when no appointment has been made within a period of thirty days and the other party has moved the Court, I am of the view that Paragraph-19 in Datar is a clear answer that in such a situation that right of the other party ceases. This Court is of the opinion that in such a situation, the principle of Section 5 has possibly no application.

16. Learned Counsel for the petitioner has further referred to a decision of the Supreme Court in the case of *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corporation Ltd.* reported in JT 2006 (11) SC 198 : AIR 2006 SC 2422. In that case, the facts are not identical with the present case. In that case, in paragraph-11, a question arose whether the party has lost its right to appoint an Arbitrator in view of the failure to comply with the demand of the petitioner to appoint an Arbitrator within thirty days from the date of receipt of the notice. Such a question has been answered in *Datar Switchgears Ltd.* (2000 AIR SCW 3925). In *Groupe Chimique Tunisien SA* (AIR 2006 SC 2422), the Supreme Court held that the other party did not appoint an arbitrator as it was under a bona fide impression that there cannot be an arbitration. Here also, going by the affidavit which has been filed by the opposite parties, it may be a case that the opposite parties did not make appointment of an Arbitrator on their part under a bona fide impression. But there is no doubt that they have lost their right to appoint an

Arbitrator.

17. Mr. Rath, learned Counsel appearing for the petitioner submits that it is for the Chief Justice to make an appointment on behalf of the opposite parties.

18. Since the petitioner has appointed a learned lawyer of the local Bar, an appointment of a retired High Court Judge by this Court as arbitrator for the opposite parties might overawe the arbitrator appointed by the petitioner.

19. Considering this fact and the facts of the case and considering the nature of the dispute between the parties, this Court appoints Mr. Himadri Mohapatra, Former Principal Secretary to Government of Orissa, Law Department, Bhubaneswar as the Arbitrator for the second party. This Court makes it clear that this appointment is made by this Court.

20. This Court further directs that the two Arbitrators are free to appoint the third Arbitrator. Since both the parties have prayed for early hearing, this Court directs that the aforesaid two Arbitrators may appoint the third Arbitrator as early as possible, preferably within a period of four weeks from the date of service of copy of this order upon them and thereafter, the arbitration proceeding may be concluded as early as possible, preferably within a period of six months from the appointment of a third arbitrator.

The petition is thus disposed of.