

Varun Associates Vs. Army Welfare Housing Organisation

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Court : Delhi

Decided On : Jul-28-2005

Reported in : 2005(3)ARBLR39(Delhi); 2005(83)DRJ500

Judge : Swatanter Kumar, J.

Acts : [Societies Registration Act, 1860](#); [Arbitration and Conciliation Act, 1996](#) - Sections 11, 11(2), 11(3), 11(4), 11(5) and 11(6)

Appeal No. : ARB. P. No. 222/2004

Appellant : Varun Associates

Respondent : Army Welfare Housing Organisation

Advocate for Def. : A.K. Tiwari, Adv.

Advocate for Pet/Ap. : B.D. Sharma, Adv

Judgement :

Swatanter Kumar, J.

1. The Army Welfare Housing Organisation is a society registered with the Registrar of Societies, Delhi under the Societies Registration Act 21 of 1860 with its head office located at South Hutments, Kashmir House, Rajaji Marg, New Delhi. The object of the society is chiefly to promote and provide dwelling units to

the servicing, retired army personnel and their widows all over India on 'No profit No Loss Basis'. In normal course of its business the Society invited tenders for the execution of the work under the name and style of External Electricals Works for Army Welfare Housing Organisation at Sector 68, Mohali on 24th January, 2003. The Petitioner M/s Varun Associates, a partner firm having its registered office at A-37 (basement) Nirman Vihar, Delhi submitted its tender for that work which was accepted by the Society. The acceptance of the tender was communicated by the Society to the Contractor. The date of commencement of the work was 12th March, 2003 and completion thereto was 11th July, 2003. The parties have entered into the contract.

2. According to the Respondent Society, before this Court in the present Petition, the Contractor Petitioner herein had not completed the work within time despite the grant of extension of time for completion of work on 9th October, 2003 and then up to 29th February, 2004. Even the work was stopped on 25th February, 2004 and according to the Branch Manager there were large number of defects and certain items of work were yet to be executed by the Petitioner at the site. Finally the work was got completed and defects were removed through another agency and on 3rd November, 2004 notices/summons, without any petition, were received by the Society from the High Court. The paper book was not furnished to the Society. The Society was not aware of the contents of the Petition and on 10th November, 2004 the Society engaged its Counsel, inspected the Court record and came to know that Petitioner was praying for appointment of independent Arbitrator and that allegedly a letter dated 29th April, 2004 was written to the Society. Despite the fact that no such letter was received, the Society vide its letter dated 18th November, 2004 appointed Shri Satish Chander, Joint D.G. (Contracts), Directorate of Contract Management, Engineer in Chief Branch, Army Headquarters, Kashmir House, New Delhi as the sole Arbitrator to adjudicate the claims raised by the Petitioner Contractor in terms of the Arbitration Clause. It is also submitted on behalf of the Society that the said Society vide its letter dated 22nd November, 2004 has entered upon reference and has notified the parties to file their respective claims and or their counter claims. As such they pray for dismissal of the Petition.

3. On the other hand, according to the Petitioner Contractor the dispute has arisen between the parties when the Contractor had raised claims against the Society which were liable to be referred to arbitration, in terms of Clause 133, 134 and 135 of the Contract between the parties, to the Arbitrator. Vide its letter dated 29th April, 2004 the Contractor claims to have written to the Society at its correct address, that the dispute and differences referred to in the list annexed to the said letter should be referred to the Arbitrator. This letter at Pg. 64 of the documents was sent by courier and was received by the Respondent immediately thereafter. As such the respondent Society ought to have appointed the Arbitrator on or before 29th August, 2004. They having failed to do so, the Petitioner is entitled to pray before the Court for appointment of Arbitrator in accordance with the provisions of Section 11(6) of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as the Act).

4. From the above narrated facts it is clear that the controversy in the present case falls within a very narrow compass. Where the Contractor invokes the default clause under Section 11(6) of the Act there the Society disputes the very receipt of the letter dated 29th July, 2004 which is the very foundation of the present Petition filed by the Contractor. Neither the facts relevant for the purposes of determination of the present Petition are hardly in dispute nor the proposition of law that if a party defaults to act in terms of provisions of Section 11 of the Act and appoint an Arbitrator as per the procedure prescribed under the Arbitration Agreement within the stipulated time, the other party has a right to pray before the Court for appointment of a independent Arbitrator.

5. In the present case if the version of the Respondent Society whether they did not receive the letter dated 29th July, 2004 is disbelieved the consequences as contemplated in law would necessarily follow and if the Petitioner's version with regard to receipt of the said letter is disbelieved the Petition has to be dismissed.

6. Section 11(4) of the Act state that if the appointment procedure in Sub-Section 3 applies and a party fails to appoint an Arbitrator within 30 days from the receipt of a request to do so from the other party, the appointment shall be made upon request by a party before the Chief Justice or any person or institution designated

by him. Under sub-section 5 of the same Section failing in Agreement referred to sub-section 2 in the Arbitration with a sole Arbitrator, if the parties fail to agree on the Arbitrator within 30 days from receipt of a request by one party from the other to so agree the appointment shall be made upon request of a party, by the Chief Justice or any person or institution designated by him. It is the default of one party to act which gives right to the other to invoke the provisions of Section 11 of the Act for appointment of an Arbitrator. The default is a fact. This fact must be shown to have existed to the satisfaction of the Court by the party which approaches the Court. The onus to establish this fact that other party has faulted to act despite the receipt of the notice is on the party which pleads this fact and wishes to take advantage of the provisions of the Section 11 of the Act. The most significant expression in the relevant provisions and which would be the basis for determining the effect of default on the part of the concerned party and from where the point of limitation of 30 days would commence would be the date on which the party called upon to appoint an Arbitrator, receives the notice. The expression 'receipt' in the Section cannot be construed as 'dispatch'. 'Receipt' normally would be an acknowledgment in writing of having received what is stated to have been sent. 7.7. Wharton's Law Lexicon 14th Edition explained the word 'receipt' as under :-

'Receipt, an acknowledgment in writing of having received a sum of money, which is prima facie but not conclusive evidence of payment'

While Cambridge International Dictionary of English, Low Price Edition explained the word 'receipt' as under :-

'Receipt is the act of receiving money or goods: We are awaiting receipt of the money. Goods will be delivered on receipt of payment (=once the money is received). I wrote to acknowledge receipt of (= to say that I had received) the cheque. He was charged with being in receipt of stolen goods (=possessing stolen goods).'

8. The expression 'receipt' has also been explained as a formal written acknowledgment that something has been received. This meaning also finds support from The New Lexicon Webster's Dictionary, Deluxe Encyclopedic Edition.

In other words the 'receipt' of notice as referred in the language of the provisions of the Arbitration Act, though not specifically referred to any Section 11(6) of the Act still would make it obligatory upon the part of the Petitioner so as to establish a party's failure to act as required under the procedures of agreement for appointment of the Arbitrator to show that notice or demand for appointment has been received by the either side and they have failed to act despite reasonable period. The period of thirty days does not find mention in 11(6) but it is a settled principle of law now that the party must act within a reasonable time and in the event it fails to act within the reasonable time, it will lose the right to appoint Arbitrator at its own as per the procedure agreed between the parties for such appointment.

9. At this stage, the judgment of the Supreme Court in the case of 'Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. JT 2000 (Supp.2) SC 226 can be usefully referred to, where their Lordships of Supreme Court held as under :-

'The respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an Arbitrator after the expiry of 30 days from the date of demand? So far as Section 11(6) is concerned, if one party demands the opposite 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 under Section 11, that would be sufficient. In other words, in cases arising under Section 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 under Section 11 seeking appointment of an Arbitrator. Only then the right of the opposite party ceases.'

10. Applying the above facts to the present case, the Petitioner has not been able to satisfactorily demonstrate before the Court that the notice dated 29th July, 2004 was served upon the Respondent. The said notice was not sent by registered

acknowledgment due so as to draw any presumption in favor of its delivery having been correctly addressed. Furthermore, the Petitioner has not even cared to file on record the acknowledgment of the said notice which is stated to have been sent through courier. It was the duty of the petitioner to file on record the acknowledgment and certificate from the courier that the said letter have been delivered at the correct address given in the letter. Having failed to discharge this preliminary onus, the Petitioner cannot take advantage of the reference of the provisions of Section 11(6) of the Act so as to disable the other side from exercising its right to appoint the Arbitrator.

11. In the reply filed the Respondents vide letter dated 16th November, 2004, the Managing Director of Army Welfare Housing Organisation (AWHO) had written to the Chairman, AWHO, Army Headquarters, New Delhi clearly stating that the notice alleged to have been issued to the Respondents by the Petitioner on 29th July, 2004 had never been received by the Respondent and it is only after receipt of the Court notice on 3rd November, 2004 that they came to know of the disputes raised by the Petitioner and within a period of 30 days from that day they had appointed an Arbitrator to adjudicate and determine the disputes between the parties. The copy of the said letter is placed on record as Annexure R-3 to the reply.

11. During the course of hearing it was stated by the learned Counsel appearing for the Respondent that the Arbitrator has been appointed and in fact the Arbitrator has already entered upon the reference.

12. Keeping in view the specific stand taken by the respondents that they did not receive the notice dated 29th July, 2004 which has not be rebutted in the rejoinder or by filing documents to refute such a stand, the court would not be in a position to accept the stand of the petitioner and invoke the provisions of Section 11(6) as prayed. The learned counsel appearing for the parties relied upon certain judgments of this court in support of their respective submissions. In view of the judgment of the Supreme Court in the case of 'Datar Switchgears Ltd. (supra), it is not necessary for this court to have a detailed discussion on that subject.

13. It is also to be noticed that the respondents within a period of 30 days from the date of the receipt of the court notice, have already appointed an Arbitrator in accordance with the terms of the agreement who has already entered upon a reference, while entertaining a petition under Section 11(6) of the Act, the court has to keep in mind the entirety of the facts and circumstances of the case before granting or declining relief under that provisions.

14. For the reasons afore-recorded, I find no merit in this petition and the same is disposed of while directing the parties to appear before the Arbitrator, who has already been appointed by the respondents in accordance with the procedure prescribed under the arbitration clause. The Arbitrator shall deal with the matter expeditiously and in accordance with law.

The parties are left to bear their own costs.

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