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Court : Delhi

Decided On : Oct-14-2004

Reported in : 2005(1)ARBLR90(Delhi)

Judge : Mukul Mudgal, J.

Acts : Arbitration and Conciliation Act, 1996 - Sections 11, 11(4), 11(5) and 11(6)

Appeal No. : Arb. P. 101/2004

Appellant : Khub Chand Tyagi

Respondent : Djb

Advocate for Def. : Sushant Kumar, Proxy Counsel for ; Arvind Nayyar, Adv.

Advocate for Pet/Ap. : Vivekanand, Adv

Disposition : Petition allowed

Judgement :

Mukul Mudgal, J.

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the `Act') for appointment of an independent arbitrator.

2. The parties to this petition entered into an Agreement dated 15th November, 2000 for replacement of old water line in Karol Bagh, New Delhi. The petitioner is a partnership concern of Engineers and Contractors and the respondents are the Delhi Jal Board and its functionaries. Clause 25 of the Agreement between the parties providing for settlement of disputes by way of arbitration reads as follows:-

'Clause 25:

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality or workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works of execution or failure to execute the same whether arising during progress of the work or after completion or abandonment thereof shall be referred to the sole Arbitration of CEO, Delhi Jal Board or any person nominated by the CEO on his behalf. The award of the Arbitrator shall be final conclusive and binding on all parties to this contract.

Any letter, notice or other communications dispatched to the contractor relating either arbitration proceeding or otherwise whether through the post or through a representative on the address last notified to the Board by the contractor shall be deemed to have been received by the contractor although returned with remarks, refused, undelivered where about not not known or words to that effect or for any other reasons whatsoever.

It is further agreed that the award as and when made for an amount exceeding Rs. 10,000/- by the arbitrator shall be speaking.

It is further provided by agreement that the party desiring to invoke arbitration clause shall distinctly specify the disputes sought to be determined by arbitration. Only dispute or disputes out of such disputes shall be referred to the arbitration as any be determined by the CEO or his nominee as arising out of and relating to the contractor.'

3. It is not in dispute that upon disputes arising between the parties and in accordance with the above clause, the petitioner had called upon the respondent No. 3 to appoint an arbitrator by addressing a communication to the Chief Executive Officer, Delhi Jal Board as provided in the aforesaid clause 25 on 22nd December, 2002 by a letter admittedly received by the said respondent. There was no response from the respondent No. 3. On 21st April, 2004, the petitioner approached this Court under sub-section (6) of Section 11 of the Act. In reply to the arbitration petition, Mr. Sushant Kumar for Mr. Nayyar appears on behalf of the respondents sought further time to file the reply. The reply has not been filed in spite of the opportunity having been given. The position of law in respect of the delayed response to a request for appointment of an arbitrator is to be found in the judgment of the Supreme Court in Datar Switchgears Ltd. v. Tata Finance Ltd. & Another reported as JT 2000 (2) 226 wherein the relevant para 19 reads as follows:-

'19. So far as cases falling under Section 11(11) are concerned-such as the one before us-no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, thereforee, 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. We do not, thereforee, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an Arbitrator under Section 11(6) is forfeited.'

4. A learned Single Judge of this Court in B.W.L. Ltd. v. M.T.N.L. 2000 IV AD 165 crystallized the position of law in relation to the delayed response to the request

for appointment of an arbitrator as under:-

'It has now become common place for persons who have retained this power of appointment of an Arbitrator, not to act at all or to act with such obduracy as to render an Arbitration clause totally meaningless. The vehemence with which the present petition was opposed, often caused me to forget that it was only the appointment of an Arbitrator to adjudicate upon the claims raised by both parties and not the disposal of objections, that was in debate. After hearing lengthy arguments it would be an abdication of judicial duty if the Respondents were still permitted to make an appointment of the Arbitrator. The State is expected to act without arbitrariness and with fairness and in furtherance of the well-being of its citizens. It is also expected to know the law, especially as laid down by the Supreme Court. It cannot be excused if its action tantamount to emasculating the laws-i.e. of expeditious disposal of disputes through arbitration.'

5. This position of the law laid down by this Court and the Hon'ble Supreme Court as extracted above is categorical. thereforee once the party moves the Court under Section 11(6) of the Act, the right of the opposite party to appoint an arbitrator as per the arbitration agreement ceases. The above position of law squarely applies to the present case. The respondent's right to appoint an arbitrator was extinguished on 21st April, 2004, the date when the petitioner approached this Court under Section 11(6) of the Act.

6. Accordingly, the petition is allowed and Mr. Justice G.T. Nanawati, a former Judge of Supreme Court, 3 Tuglak Lane, New Delhi (Tel. 23017384) is appointed as an Arbitrator to adjudicate upon the disputes between the parties sought to be raised in this petition. The Arbitrator to fix his fees in consultation with the parties. Both the counsel pray that the arbitrator be directed to deliver the award within six months. The Arbitrator to give his award, not later than 6 months from the date of entering upon reference. Parties to appear before the arbitrator on 17th November, 2004 at 4.30 pm along with statement of claims/counter-claim.

7. This petition stands allowed and disposed of accordingly in the above terms.

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