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Court : Delhi

Decided On : Nov-01-2007

Reported in : 2007(4)ARBLR470(Delhi); 2007(99)DRJ610

Judge : Aruna Suresh, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 3, 11 and 11(6); Evidence Act - Sections 114; General Clauses Act - Sections 27

Appeal No. : Arb. A. No. 219/2002

Appellant : Kuljit Singh and Co.

Respondent : Engineering Projets (India) Ltd.

Advocate for Def. : C.M. Chopra, Sr. Adv. and ; Rajni Sharma, Adv.

Advocate for Pet/Ap. : Ravi Varma,; Atul Sharma,; Nilanka Chaudhary and;

Disposition : Application dismissed

Judgement :

Aruna Suresh, J.

1. Petitioner Kuljit Singh & Co. has filed present application under Section 11 of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as 'Act') for appointment of an Arbitrator as according to it, respondent failed to appoint

Arbitrator in terms of the arbitration agreement contained in the contract dated 6.5.1996.

2. Briefly narrated the case of the petitioner is that it is carrying on business under the name and style of Kuljit Singh & Co. The State of Punjab had awarded M/s Triveni Structural Limited (TSL) a contract for the work of 'concreting behind gate control and juncture reach including transition zone pen stock liners and plug of tunnels P1 and P2 in the Ranjit Sagar Dam (RSD) Project. M/s. Triveni Structural Limited awarded civil works of the said contract to Engineering Projects (India) Ltd., the respondent herein. After inviting tenders for work of concreting behind gate Control and junction reach including transition zone of tunnels P1 and P2 of Ranjit Sagar Dam at Shahpurkhandi near Pathankot, Punjab, respondent awarded this work to the petitioner vide letter No. DL1/CON/TEC/226/66 dated 6.5.1996 for a sum of Rs. 2,40,60,000/-. As required petitioner issued a performance bank guarantee of Rs. 24,06,000/- and an indemnity bond of Rs. 3 crores in favor of respondent against Steel which was to be issued free of costs by the Ranjit Sagar Project authorities. Petitioner's work was limited to placement of reinforcement and concrete which was supplied by RSD which was under the domain of the State of Punjab. This placement was to be under the supervision and direction of the RSD authorities.

3. Petitioner could not start work in time as according to it, respondent failed to make site available and the work could not be completed in the stipulated time and the completion period was extended from time to time. Petitioner completed all its work by end of November, 1998 but was asked to do some extra work which was not within the scope of work assigned to it. Respondent was informed vide letters dated 30.11.1998 and 31.12.1998 by the petitioner that the entire work had been completed and requested for releasing the bank guarantee, indemnity bond and other dues.

4. The contract between the parties contains an arbitration clause and the respondent is the appointing authority of the arbitrator while invoking the arbitration agreement. Since a dispute arose inter se the parties within the meaning of arbitration agreement, petitioner wrote a letter dated 4.6.2002 calling

upon the respondent to appoint an independent arbitrator to settle the claims regarding its final bill and returning of its indemnity bond. Since the respondent failed to appoint arbitrator in terms of the contract, the present application has been filed for appointment of an arbitrator to adjudicate the disputes inter se the parties.

5. This application has been contested by the respondent. Respondent has refuted all the claims of the petitioner as raised in the application. It also denied having received any communication dated 4.6.2002 to appoint an arbitrator to enter into reference and decide the disputes inter se the parties. But on receipt of copy of the said notice/letter with the process of the Court, respondent had already took steps under Clause 53 of the Contract and appointed Mr. A. Sarkar, Engineer working with the respondent Sole Arbitrator. The said arbitrator has entered into reference and is seized of the matter and thereforee present application is infructuous and is not maintainable.

6. Learned Counsel for the petitioner submitted that after an application under Section 11(6) of the Act has been filed by the petitioner when the respondent failed to appoint arbitrator after receipt of notice dated 4.6.2002, respondent had no authority to appoint Mr. A. Sarkar as an arbitrator by invoking Clause 53 of the Contract and it is for the Court to appoint an Arbitrator. The act of the respondent in appointing the arbitrator is thereforee against the provision of Section 11 of the Act. Since the petitioner has approached the Court for appointment of an arbitrator, the Court is within its rights to appoint an independent Arbitrator for adjudication of the dispute inter se the parties. It is further argued by the learned Counsel for petitioner that the notice dated 4.6.2002 was duly served upon respondent as it was sent by UPC. It is for the respondent to refute the service of notice upon it as presumption under Section 114 of the Evidence Act can be safely raised against the respondent that the notice for invoking the arbitration clause was duly served upon respondent. He has also pointed out the order of this Court dated 8.5.2006 whereby the respondent was asked to produce relevant receipt register for the relevant period to show that the said notice was not received by the respondent and the receipt register has not entry about the receipt of said notice and has argued that since respondent has failed to produce this register it has

failed to rebut the presumption that it had received the notice dated 4.6.2002. Bare denial of receipt of notice cannot be accepted in the absence of any other proof of non receipt of notice and thereforee he has submitted that the present application is maintainable and the Court may appoint an Arbitrator in accordance with Section 11 of the Act to adjudicate the disputes inter se the parties. He has referred to following judgments:

1. Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. : (2000)8SCC151 .

2. Punj Lloyd Ltd. v. Petronet MHB Ltd. 2006 (3) Scale 299.

3. Jitendra Nath Das v. Bijoy Lal Das AIR 1976 Cal 473.

4. Surajmall Shiwbhagawan v. Kalinga Iron Works : AIR1979 Ori126 .

7. Learned Counsel for respondent argued that petitioner cannot invoke Section 11(6) of the Act as he failed to give notice as required under Section 11(6) of the Act before filing the present petition. The alleged letter dated 4.6.2002 invoking the arbitration clause by petitioner was never received by respondent and this notice was received only along with the process of this Court when notice of the present petition was served upon the respondent. On receipt of the notice, respondent immediately appointed Mr. A.K. Sarkar as an arbitrator in pursuant to the arbitration clause who entered into reference. Petitioner had also joined the said reference. It is further pointed out by the learned Counsel for the respondent that since Sh. A. Sarkar died on 26.10.2004, Sh. H.N. Wahal, executive director, who at the relevant time was general manager, was appointed on 12.1.2005 as an arbitrator. thereforee, according to her, present application is not maintainable, as the petitioner could not have invoked the provisions of Section 11(6) of the Act without calling upon the respondent to appoint an arbitrator in accordance with Clause 53 of the Contract as it was for the respondent to appoint an arbitrator to adjudicate the dispute inter se the parties, the petition is liable to be rejected.

8. Maintainability of the present petition has been challenged on the principle that notice as required under Section 11 of the Act was not delivered/served upon the respondent. The power exercised by the Court while considering an application

under Section 11(6) of the Act are judicial in nature and not administrative one.

9. In *SBP & Co. v. Patel Engineering Ltd. and Anr.* (2005) 8 SCC 618. It was observed:

First of all, the power is conferred not on an administrative authority, but on a judicial authority, the highest judicial authority in the State or in the country. No doubt, such authorities also perform administrative functions. An appointment of an Arbitral Tribunal in terms of Section 11 of the Act, is based on a power derived from a statute and the statute itself prescribes the conditions that should exist for the exercise of that power. In the process of exercise of that power, obviously the parties would have the right of being heard and when the existence of the conditions for the exercise of the power are found on accepting or overruling the contentions of one of the parties it necessarily amounts to an order, judicial in nature, having finality subject to any available judicial challenge as envisaged by the Act or any other statute or the Constitution.

10. Whenever a Court is approached with an application under Section 11 of the Act, it has to decide its own jurisdiction in the sense that the party making the application has approached the right High Court. The Court will have to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request to it is a party to such an agreement. The Court can also decide the question whether the claim was a dead one or a long time barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. Further the Court has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Court can take into consideration the affidavits of the parties or any other evidence made available on the record. The Judge, therefore, exercises its judicial authorities while considering an application under Section 11(6) of the Act. therefore, this Court has the power to adjudicate on the maintainability of the petition when receipt of notice under Section 11 of the Act is denied.

11. Section 3 of the Act reads as follows:

3. Receipt of written communications.--(1) Unless otherwise agreed by the parties,-

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in Clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) ...

(3) ...

12. Thus, it is clear that written communication sent by one party to the other party can be deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address and in case the addressee party is not available at any of the business or habitual residence then such written communication is deemed to have been received if it is sent at the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

13. There is no prescribed procedure for service of notice through the Court under the Act. Provisions of this Section are procedural in nature and apply to all the notices that are required to be served otherwise than through the Court. The object to serve such a notice is to bring to the knowledge of a party the intention to act upon the arbitration agreement by the person or the party which is seeking to refer the matter. If a notice is duly sent to the person's address and there is evidence to that effect, it must be treated as good and proper notice.

14. In the present case the letter dated 4.6.2002 invoking the arbitration clause was sent by UPC a method which was not being followed by the petitioner for communication between him and the respondent. There are various communications placed on the record by the petitioner. Communications dated 31.12.1998, 15.1.2002, 9.3.2002 and copies of letter dated 11.10.1999 addressed to various persons like Mr. P. Shankar and Principle Secretary to Govt. of Pb. etc. were sent by the petitioner to the respondent by way of registered AD cover. Whereas communications dated 26.3.1999, 7.9.1999, 30.9.1999, 30.7.2001 and 12.2.2002 were all sent by the petitioner to the respondent by courier service.

15. None of these communications placed on record were sent by the petitioner to the respondent or any of its official under postal certificate. The impugned letter dated 4.6.2002 is stated to have been sent and delivered to the respondent under postal certificate. There is no proof placed on record to indicate that this letter calling upon the respondent to appoint an arbitrator by invoking the arbitration clause was ever delivered to the respondent. Photocopy of the postal certificate has been placed on record. The manner in which the petitioner had been corresponding with the respondent and the method adopted for delivery of the letters suggest that petitioner used to ensure that the letters sent by him were duly delivered to the respondent. There is a departure to this procedure when the impugned letter dated 4.6.2002 was sent under UPC. Admittedly, this letter was not sent by registered AD cover or even by courier service. Under these circumstances, it is difficult to believe that statutory requirement of delivery of letter calling upon the respondent to appoint arbitrator was duly delivered and requirement of Section 3 of the Act were met with. Petitioner has not explained why there was change in adopting the procedure while sending the letter dated 4.6.2002. Intriguingly, petitioner did not place on record a copy of this letter along with the petition. Similarly, he has not placed on record any document to indicate that the envelope under UPC was delivered to the post office containing the communication in question and was delivered to the addressee only.

16. In National Highways Authority of India and Anr. v. Bumihiway DDB Ltd. (JV) and Ors. : (2006)10SCC763 it was held that Court under Section 11(6) of the Act has jurisdiction to make appointment only when the person including an institution

fails to perform any function entrusted to it under that procedure.

17. This Court in *Varun Associates v. Army Welfare Housing Organisation* : 2005(83)DRJ500 in similar circumstances when petitioner sought appointment of an arbitrator alleging that it had sent a letter to the respondent for appointment of an arbitrator held that petitioner had failed to satisfy that the said notice was served upon the respondent as petitioner failed to file on record the acknowledgment of notice which is stated to have been sent through courier and therefore petitioner under the circumstances could not take advantage of reference of provisions of Section 11 of the Act so as to disable other side from exercising its right to appoint an arbitrator. The petition was accordingly dismissed.

18. In the present case, the respondent disputes the very receipt of the letter dated 4.6.2002 which is the foundation of the present petition filed by the petitioner/contractor. It is default of one party to act which gives right to the other party to invoke the provisions of Section 11 of the Act for appointment of an arbitrator. The default is a fact which must be shown to have existed to the satisfaction of the Court by the petitioner who approached this Court. Receipt of notice is an acknowledgment in writing of having received the letter. In the present case, receipt in other words the delivery of the letter was to be proved by the petitioner which it has failed.

19. Learned Counsel for the petitioner has referred to Section 114 of the Evidence Act which raises a presumption of service of notice upon the addressee if sent through a proper and approved mode of service. However, this presumption is rebuttable.

20. In *Jitendra Nath Das v. Bijoy Lal Das* (supra) it was observed that although the presumption under Section 27 of the General Clauses Act does not apply to a case of a letter sent under certificate of posting, the presumption under Section 114 of the Evidence Act would apply in such a case. However, the Court is at liberty to see if such presumption has been rebutted in view of the evidence on record and facts and circumstances of the case.

21. Surajmall Shiwbhagawan v. Kalinga Iron Works (supra) case as relied upon by the petitioner is rather contrary to his submissions. It was held in the said case that where certificate of posting did not indicate whether the letter posted was an envelope, inland letter or post card and there was no direct evidence on record that the original letter was actually put in an envelope and that particular envelope was posted under certificate of posting, the Court cannot draw presumption under Section 114 of the Evidence Act that the letter was posted and received. As already pointed out above, the petitioner did not place on record the copy of the letter dated 4.6.2002 along with the present petition under Section 11(6) of the Act. thereforee, under no circumstance, presumption of posting of the impugned letter or its delivery to the respondent can be raised.

22. Learned Counsel for the petitioner has submitted that the Court, vide its order dated 8.5.2006, had asked the respondent to produce the relevant receipt register for the relevant period to show that the said notice was not received by the respondent and the respondent has failed to produce the said register which indicates that the respondent had received the said notice. It was deliberately not produced by the respondent. thereforee, a presumption has to be drawn against the respondent that it had received the notice dated 4.6.2002. These submissions are devoid of any merits. In compliance of the Court's order respondent filed an affidavit of Sh. Narender Sharma, its Deputy General Manager (legal), who has categorically stated that no such 'receipt registers' are maintained in the company nor any such notice was received by the company. The post is received at the reception and is kept in respective boxes for various divisions of the office and also CMD of the respondent. Had this communication dated 4.6.2002 been received by the respondent it would have been immediately put up before the CMD in the box marked for CMD. I have no reason to disbelieve this affidavit. Under these circumstances, no presumption under Section 114 of the Evidence Act can be raised against the respondent of having received the impugned notice and if such presumption is drawn then it has been successfully rebutted by the respondent.

23. In Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. (supra) it was observed:

As far as Section 11(6) of the [Arbitration and Conciliation Act, 1996](#) 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. Only then the right of the opposite party ceases.

It was further observed:

When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of 'freedom of contract' has been whittled down by various labour and social welfare legislation, still the Court has to respect the terms of the contract entered into by parties and endeavor to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.

24. In the present case the petitioner failed to serve upon the respondent the requisite notice calling upon it to appoint an arbitrator in terms of the arbitration agreement contained in the contract. It is not a case where the respondent admits the service of notice but appoints arbitrator only after one party has moved the Court under Section 11(6) of the Act.

25. In *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (supra), *Datar Switchgears Ltd.* (supra) has been followed.

26. Respondent received copy of the impugned letter dated 4.6.2002 along with the process of this Court and on receipt of this letter, though the respondent did not receive the copy of the petition, it immediately invoked the arbitration clause and appointed Mr. A. Sarkar as an arbitrator to adjudicate upon the dispute inter se the parties. The objection to the appointment of the arbitrator after the receipt of the Court process is without any merits as already pointed out above that respondent did not receive the letter dated 4.6.2002 and therefore petitioner had no right to come to this Court under Section 11(6) of the Act.

27. I do not find any infirmity or illegality in the appointment of Mr. A. Sarkar as an arbitrator and after his death in the appointment of Mr. H.N. Wahal, Executive Director, as an arbitrator to adjudicate upon the dispute. Respondent was within its right to appoint an arbitrator and was so done in this case.

28. In arbitration application No. 254/2004 titled as M/s. Khaildas Constructions v. M/s. Engineering Projects(I) Ltd. decided on 11.2.2004 in such circumstances this Court observed that the disputes having arisen between the parties were required to be adjudicated upon and decided through the process of arbitration. The Court was therefore pleased to direct the Chairman and Managing Director of the respondent organisation to appoint an arbitrator with further directions for the Chairman and Managing Director to consider appointing an officer who is unconnected with the project which was the subject matter of the said petition. In the present case, the petitioner did not dispute the independence of the arbitrator appointed and also the fact that he in no manner is connected with the dispute in question inter se the parties.

29. Hence, I find no merits in the present application. Same is accordingly dismissed. Interim stay granted by this Court is hereby vacated. Arbitrator is at liberty to proceed with the reference.