

Amar Constructions Vs. Central Public Works Department

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Court : Delhi

Decided On : Sep-29-2006

Reported in : 134(2006)DLT584; 2007(98)DRJ584

Judge : Reva Khetrapal, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11, 11(6) and 11(8); [Indian Partnership Act, 1932](#)

Appeal No. : Arb.P. No. 138/2006

Appellant : Amar Constructions

Respondent : Central Public Works Department

Advocate for Def. : Maneesha Dhir, Adv.

Advocate for Pet/Ap. : S.S. Sastry, Adv

Judgement :

Reva Khetrapal, J.

1. This is a petition under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#) read with Clause (ii) of the Scheme for Appointment of Arbitrators, notified vide No. 16/Rules dated 02.02.1996.

2. The petitioner's case is as follows.

3. The petitioner is a partnership firm duly registered under the [Indian Partnership Act, 1932](#). By agreement No. 48/EE/DAD/2001-02 vide its letter dated 21.12.2001, the petitioner was awarded the work of construction of ARC Directorate Complex at Palam, New Delhi (SH: Construction of Living Accommodation for Junior Officers) by the Delhi Aviation Division, CPWD, R.K. Puram, New Delhi. The time for completion as stipulated in the agreement was 10 months. Owing to various reasons attributable to the respondent the works awarded to the petitioner could not be completed within the stipulated period of 10 months and from time to time extension was granted by the respondent for the aforesaid purpose. On 12th June, 2003, the petitioner successfully completed the work awarded to it, as per the specifications, and raised its final bill on 24th June, 2003, which inter alias included payments against the extra and substituted work performed by it at the site. No notice of liquidated damages had been issued by the respondent on the said date.

4. By its letters dated 14th July, 2003 and 3rd March, 2004, the petitioner requested the respondent to take over the building and the site since the work had been completed and also since the petitioner was being forced to deploy its watch and ward staff at the cost of the respondent. On 16th August, 2003, the petitioner by its letter addressed to the Executive Engineer, DAD, CPWD, R.K. Puram, New Delhi sought release of the outstanding payments due and payable by the respondent in respect of the works completed by it under the agreement. The respondent vide its letter dated 28th October, 2003 raised certain alleged defects in the works executed by the petitioner. The said allegations of the respondent were refuted by the petitioner vide its letter dated 3rd November, 2003 and it was categorically pointed out that the said notice was not issued in accordance with law. The respondent vide its letter dated 30th April, 2004 while admitting the overdue of the completion of the work awarded under the agreement, maintained that the mandatory maintenance period under the agreement was not over. The petitioner responded by its letter dated 7th June, 2004 and 17th July, 2004, refuting that there was any such mandatory maintenance period and calling upon the respondent to release the outstanding balance payment, which was long overdue.

5. Thereafter, the respondent after a period of about one year prepared the final bill without considering the payments against the extra and substituted works/ executed by the petitioner, and losses and damages claimed by the petitioner vide its final bill submitted on 24th June, 2003. The petitioner by its letter dated 9th August, 2004 raised objections to the final bill prepared by the respondent without taking into account the extras, losses and damages etc., claimed by it in its final bill. This was followed by letter dated 19th September, 2004 whereby the petitioner confirmed having handed over the building to the respondent on 18th September, 2004.

6. On 5th January, 2005, the petitioner issued a reminder to the Executive Engineer of the respondent seeking release of the various outstanding payments as per its final bill, and having failed to receive any response from the respondent was forced to issue notices dated 21st January, 2005 and 7th February, 2005 in terms of Dispute Resolution Procedure as laid down in Clause 25 of the Conditions of Contract. No response to the said notice was received by the petitioner within the stipulated period.

7. Accordingly, the petitioner issued another notice dated 23rd February, 2005 to the Superintending Engineer in terms of Clause 25 of the Conditions of Contract, calling upon the Superintending Engineer to give his decision on the outstanding payments as detailed in consolidated list annexed to the said notice within the stipulated 30 days period. Having received no response from the Superintending Engineer within the stipulated period of 30 days, the petitioner issued a notice dated 28th March, 2005 to the Chief Engineer in terms of Clause 25 of the Conditions of Contract, calling upon the Chief Engineer of the respondent to give his decision on the outstanding payments within the stipulated 30 days period. Yet again, the petitioner received no response from the Chief Engineer within the stipulated period of 30 days, compelling the petitioner to issue a notice dated 29th April, 2005 to the Chief Engineer in terms of Clause 25 of the Conditions of Contract seeking reference of the disputes, being the release of payments as detailed in the consolidated list (Appendix B) and appointment of an Arbitrator.

8. The arbitration clause between the parties being Clause 25 reads as under:

CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions hereinbefore mentioned and as to the quality of 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 or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

i) if the contractor considers any work demanded of him to be outside the requirement of the contracts, all disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

if the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his opinion within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of Arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

ii) Except where the decision has become final, binding and conclusive in terms of sub-para 1 above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in-charge of the work or if there be no Chief Engineer, the administrative head of the said CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer, CPWD or the administrative head of the CPWD, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the invitation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the

total amount of the claims by any party exceeds Rs. 1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term in the contract that the arbitrator shall be deemed to have entered on the reference on the date he issued notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the party. The cost of the reference and the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such cost or any part thereof shall be paid and fix or settle the amount of cost to be so paid.

9. The petitioner submits that despite having received the notice for appointment of an Arbitrator, in terms of the above clause, the Chief Engineer has till date failed to appoint an Arbitrator to adjudicate upon the disputes that have arisen between the parties, thereby forcing the petitioner to move the present petition seeking appointment of an independent Arbitrator under the provisions of Section 11(6) of the [Arbitration and Conciliation Act, 1996](#).

10. The respondent CPWD, on issuance of notice of the filing of the petition, has filed a response opposing the petition on the ground that the stipulated date of completion of work was 30th October, 2002, but the work was actually completed on 12th June, 2003. The said delay, it is alleged, was attributable to the petitioner. It was also submitted that final bill was paid including extra items, deviations etc. as per measurements recorded in the Measurement Book and a penalty of 0.1% had been imposed on the petitioner for the delay caused in the execution of the work. Finally, it was submitted that the appointment of an Arbitrator in accordance with Clause 25 of the contract was under process and the same would be finalized shortly. It was pleaded that the petition, therefore, deserves to be dismissed.

11. From the pleadings of the parties and the documentary evidence on record, there can be no manner of doubt that disputes and differences have arisen between the parties. Clause 25 of the Agreement between the parties lays down the appointment procedure agreed upon by the parties. Pursuant to the stipulated appointment procedure and in terms of Clause 25 of the agreement, the petitioner gave notice to the Executive Engineer and thereafter to the Superintending Engineer and the Chief Engineer in terms of Clause 25 of the Conditions of Contract calling upon them to give their decision on the outstanding payments. Having received no response from any quarter within the stipulated period, the petitioner perforce issued a notice dated 29th April, 2005 to the Chief Engineer, calling upon the Chief Engineer to refer the disputes to arbitration. The Chief Engineer having failed to act in consonance with Clause 25 of the agreement, the petitioner was compelled to knock at the doors of this Court.

12. There is no denying the fact that the respondent has totally ignored all the letters/notices issued to it in terms of the Arbitration Clause, and thus, quite clearly has been indifferent to the plea of the petitioner for appointment of an arbitrator. The question, therefore, which arises for consideration in the present petition is as to whether upon the refusal of the respondent to appoint an arbitrator, in spite of the several notices issued to it in terms of the arbitration agreement between the parties, is this Court entitled to appoint an independent arbitrator?

13. It would be necessary at this juncture to extract Clause (6) of Section 11 of the [Arbitration and Conciliation Act, 1996](#) which reads as follows:

11. Appointment of arbitrators.

(1)

(2)

(3)

(4)

(5)

(6) Where, under an appointment procedure agreed upon by the parties, -

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

14. In the course of hearing, Ms. Maneesha Dhir, learned Counsel for respondent laid much stress on the fact that the disputes required to be referred for adjudication were required to be referred to the adjudication of a qualified engineer. Learned Counsel was, however, unable to point out any clause in the Arbitration Agreement requiring the appointment of an engineer as sole arbitrator. Counsel then sought to anchor her plea upon a portion of Sub-clause (2) of Clause 25 which reads as under:

i) ...

ii)

It is also a term of this contract that no person other than a person appointed by such Chief Engineer, CPWD or the administrative head of the CPWD, as aforesaid should act as Arbitrator and if for any reason that is not possible the matter shall not be referred to arbitration at all.

15. Learned Counsel for the respondent on the strength of the above sub-clause contended that the meaning of the same is manifest and, quite clearly, the arbitration clause envisages the appointment of a person who is an Engineer. I do not think that this meaning can be inferred from the sub-clause.

16. Counsel for respondent then sought to urge that the appointment of a technical person has been indicated by the provisions of Sub-section (8) of Section 11 which provides that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to (a) any qualifications required of the arbitrator by the agreement of the parties and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

17. In the instant case the agreement of the parties clearly does not provide/prescribe any qualifications for the arbitrator. No doubt, it was envisaged in the agreement that the Chief Engineer would appoint the arbitrator. The Chief Engineer having failed and neglected to appoint an Arbitrator despite the repeated pleas of the petitioner, in my considered view, Clause (6) of Section 11 of the Arbitration & Conciliation Act comes into play and the Chief Engineer must be deemed to have forfeited his right to do so. I am fortified in coming to this conclusion by the fact that the Apex Court in *Datar Switchgears Ltd. v. Tata Finance Ltd.* and Anr. 2000 (VIII) SCC 151 has interpreted Section 11(6) to mean that if in cases arising under Section 11(6), the opposite party does not appoint an arbitrator before filing of an application under Section 11 seeking appointment of an arbitrator, the right of the opposite party to do so after the filing of the petition stands forfeited.

18. The ratio of *Datar Switchgear (supra)* was affirmed by the Apex Court in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638 and *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.* : AIR 2006 SC963 . A three Judge Bench in *Punj Lloyd (supra)* held that once the party conferred with the power to appoint the arbitrator, fails to respond to the request of the aggrieved party to appoint the arbitrator, it ceases to have an authority to appoint the arbitrator after the aggrieved party approaches the court for the appointment of the arbitrator. To the same effect is the ratio of the judgment in *Shin Satellite (supra)*, wherein it was held that the respondent had lost its right to make appointment of an arbitrator once the petitioner had approached the Chief Justice under Section 11(6) for appointment of arbitrator.

19. The above has been the consistent view of the Supreme Court as well as of this Court and I am bound by the same. Continued recalcitrance and indifference on the part of public bodies, it has been repeatedly emphasised, should not lead to an impasse in the settlement of disputes between the parties. If that is countenanced, the inevitable result, to my mind, will be the break down of an important limb of the Alternate Dispute Resolution System and the eventual effacement of the Arbitration and Conciliation Act itself from the statute-book.

20. I am, however, inclined to accept the prayer of the respondent made at the conclusion of the arguments for appointment of a retired Additional District & Sessions Judge to adjudicate upon the disputes between the parties. Shri S.S. Bal, Retired Additional District & Sessions Judge is appointed as sole arbitrator to adjudicate upon the disputes/claims raised by the petitioner as detailed in the petition. The arbitrator shall fix his own fees. The parties shall appear before the said arbitrator on 16th October, 2006 or on any date and time convenient to the said arbitrator. The arbitrator will dispose of the disputes enumerated in the petition, preferably within a period of 4 months from the date of entering upon the reference.

21. The petition is disposed of accordingly, leaving the parties to bear their own costs.

22. A copy of this judgment be sent to the learned Arbitrator forthwith for necessary information and compliance.