

Builder and Supply Vs. Union of India and ors.

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Court : Kolkata

Decided On : Aug-17-2010

Judge : I . P. Mukerji, J.

Appeal No. : A. P. No.128 of 2010

Appellant : Builder and Supply

Respondent : Union of India and ors.

Advocate for Def. : Mr. Saptarshi Roy, Adv.

Advocate for Pet/Ap. : Mr. Yatindra Nath Gupta, Adv.

Judgement :

This is a Section 11 application. The petitioner by their letter dated 27th January, 2010 had called upon the General Manager, N. F. Railway, Maligaon to appoint an Arbitrator, as disputes had allegedly arisen out of an agreement dated 12th September, 2005 between the parties. That agreement contained an arbitration clause, which is Clause 64 of the Railways General Conditions of Contract.

Since the claim is over Rs.10 lakhs, Clause 64(3)(a)(ii) applies. It says that the Railways will send a panel of more than three names of gazetted Railway officers to the contractor.

The contractor could suggest upto two names out of the said panel for appointment as the contractors nominee. The General Manager was to appoint

one out of those names suggested as the contractors nominee and appoint the balance Arbitrators, together being three in number.

While so appointing, the General Manager would also nominate the presiding Arbitrator. By their letter dated 21st April, 2010, the Railways sent a panel of names of four officers to the petitioner.

There is no dispute that after receiving such letter the petitioner is yet to select or nominate any person from that panel in terms of the said arbitration clause. It is said that these names were forwarded after filing of this application in March, 2010.

Because of alleged delay in so sending names and filing of this application by the petitioner before they were sent, the petitioner is entitled to obtain appointment of an Arbitrator from the Court.

In Clause 64(3)(a)(i) of the said conditions, it is provided that in case of claims of Rs.10 lakhs or less, the Arbitrator is to be appointed within 60 days of receipt of demand by the Railways. In Clause 64(3)(a)(ii), there is no such stipulation. It is submitted on behalf of the Railways that this absence of stipulation means that the Railways can appoint an Arbitrator within reasonable time. I notice that the machinery for appointment of an Arbitrator in the arbitration clause is that the Railways have the right to nominate the presiding Arbitrator. Further the contractor does not have the right to appoint his nominee.

He can only suggest. It is up to the Railways to select one from his suggestion. Therefore, this appointment procedure is not the procedure provided in Section 11 Sub-section 3 of the Arbitration and Conciliation Act, 1996. This procedure is under Section 11(2) read with S.11(6) of the Act. Therefore, in my opinion, the provision of 30 days does not apply to such procedure. Further, by the letter dated 21st April, 2010, the Railways were not appointing an Arbitrator, but setting the machinery in motion.

Thereafter the petitioner and the respondent have reciprocal obligations under the said conditions, before an Arbitral Tribunal is constituted. The Railways are

enjoined to take action within reasonable time as contemplated by Section 11(6).

Only if the Railways cannot take such action within reasonable time should the Court appoint an Arbitrator. In my opinion, considering Clause 64(a)(i) the action taken in April, 2010 by the Railways as stated above is within such reasonable time. In the above facts, such right was not lost, even after filing of this application. Even assuming such right was lost, I ratify such action of the Railways as such power always rests with the Court. Therefore, this application is dismissed.

However, while dismissing this application, I would observe that the petitioner should forthwith nominate or select one person from the panel so that the arbitration process can be expedited. Similarly, the Railways are also directed, in such event, to expedite the process to constitute the Arbitral Tribunal.

All parties concerned are to act on a signed photocopy of this order on the usual undertakings.

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