

Court No. - 46

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 119 of 2023

Applicant :- M/S Sarc Construction Company

Opposite Party :- Union Of India And 2 Others

Counsel for Applicant :- Mahendra Kumar Mishra,Daya Shankar

Counsel for Opposite Party :- Ravi Ranjan

Hon'ble Ashwani Kumar Mishra,J.

This petition has been filed by the applicant under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator.

Clause 17.1 of the agreement entered into between the parties is relied upon as per which the Chief General Manager, U.P. East, Telecom Circle, Lucknow would be the sole arbitrator or anyone else who is holding the charge of such office. The named arbitrator could appoint anyone else also as an arbitrator. The arbitration clause has been invoked by the applicant on 09.05.2023. Since no arbitrator has been appointed as such the present application has been instituted before this Court on 25.07.2023.

An objection/counter affidavit has been filed by the opposite parties stating that arbitrator has been appointed by the opposite party on 27.07.2023. The arbitrator appointed is retired Senior General Manager (Development), U.P. East and as per the opposite parties the arbitrator is a retired employee of Department of Telegraph and is not the employee of BSNL with whom contract has been executed between the parties.

Learned counsel for the applicant, in reply, submits that after filing of this application the opposite parties would have no jurisdiction to appoint an arbitrator in view of the law laid down by the Supreme Court in the case of Datar Switchgears Limited vs. Tata Finance Ltd. and another, (2000) 8 SCC 151. Para 19 of the

judgment has been relied upon and is reproduced hereinafter:-

"So far as cases falling under Section 11(6) 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, therefore, 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, therefore, 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."

(Emphasis supplied)

On behalf of the opposite parties, it is then contended that the judgment in Datar Switchgears Limited (supra) would have no applicability in the facts of the present case, inasmuch as the appointment of arbitrator was approved by the competent authority on 25.07.2023, which is the date when the present application has been filed, and the mere fact that the formal order of appointment of arbitrator was issued on 27.07.2023 would not be material nor would lead to applicability of the judgment in Datar Switchgears Limited (supra) in the facts of the present case.

The contention of the opposite parties deserve rejection on two grounds. First and foremost it is the date of appointment of arbitrator which would be relevant in terms of the law laid down by the Supreme Court in Datar Switchgears Limited (supra) and not the date on which the appointment is approved in the internal records of the authority. Secondly, appointment of arbitrator by the opposite parties would otherwise be hit by section 12(5) of the Act of 1996, inasmuch as the arbitrator so appointed continued to work with the BSNL though he may have been the substantive employee of the Department of Telegraph. The spirit of section 12(5) of the Act would clearly require the dispute to be referred to an independent person and not to someone who has had strong

association with the opposite parties. Consequently, the objection raised by Sri Ravi Ranjan, learned counsel for the opposite parties is rejected.

In view of the above, necessary ingredients to invoke the jurisdiction of this Court under section 11 of the Act are shown to exist in the facts of the present case. The present application is liable to be allowed.

Let Mr. Justice Abhinava Upadhya (Former Judge), 14/4-C, Jawahar Lal Nehru Road, Prayagraj, Mob. No.9415131820 be appointed as an Arbitrator to resolve the dispute between the parties, subject to his consent in terms of Section 11(8) of the Arbitration and Conciliation Act, 1996.

Registry is directed to obtain consent of proposed arbitrator in terms of Section 11(8) of the Act within three weeks.

List thereafter.

Order Date :- 16.11.2023

Ashok Kr.