

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No. 1 of 2014

M/s B.K.Chawla Contractor, A Partnership Firm 28, Vardhman Colony Jagdalpur C.G., 494001, Represented By- Mr. Rohit Chawla, Age- 39 Yrs, S/o B.K. Chawla, R/o 28, Vardhman Colony, Jagdalpur (C.G.), 494001.

---- Petitioner

Versus

1. Bharat Sanchar Nigam Limited And Anr. S/o (A Govt. Of India Enterprise), Through- The Chief Engineer (Civil), B.S.N.L. Civil C.G. Zone, Khamardih, Shankar Nagar, Raipur C.G.
2. Bharat Sanchar Nigam Limited (A Govt. Of India Enterprise), Through- The Executive Engineer, B.S.N.L. Civil Division, Raipur C.G.

---- Respondents

Arbitration Application No. 2 of 2014

M/s B.K.Chawla Contractor, A Partnership Firm 28, Vardhman Colony Jagdalpur C.G., 494001, Represented By- Mr. Rohit Chawla, Age- 39 Yrs, S/o B.K. Chawla, R/o 28, Vardhman Colony, Jagdalpur (C.G.), 494001.

---- Petitioner

Vs

1. Bharat Sanchar Nigam Limited And Anr. S/o (A Govt. Of India Enterprise), Through- The Chief Engineer (Civil), B.S.N.L. Civil C.G. Zone, Khamardih, Shankar Nagar, Raipur C.G.
2. Bharat Sanchar Nigam Limited (A Govt. Of India Enterprise), Through- The Executive Engineer, B.S.N.L. Civil Division, Raipur C.G.

---- Respondents

And

Arbitration Application No. 3 of 2014

M/s B.K.Chawla Contractor, A Partnership Firm 28, Vardhman Colony Jagdalpur C.G., 494001, Represented By- Mr. Rohit Chawla, Age- 39 Yrs, S/o B.K. Chawla, R/o 28, Vardhman Colony, Jagdalpur (C.G.), 494001.

---- Petitioner

Vs

1. Bharat Sanchar Nigam Limited And Anr. S/o (A Govt. Of India Enterprise), Through- The Chief Engineer (Civil), B.S.N.L. Civil C.G. Zone, Khamardih, Shankar Nagar, Raipur C.G.
2. Bharat Sanchar Nigam Limited (A Govt. Of India Enterprise), Through- The Executive Engineer, B.S.N.L. Civil Division, Raipur, C.G.

---- Respondents

For Applicant(s) : Shri V.R. Rao, Senior Advocate, with Mr
Ashok Mishra, , Advocate in all the cases

For Respondents. : Shri Ashok Verma & Shri R.M. Solapurkar,
Advocates in all the cases.

HON'BLE SHRI JUSTICE GOUTAM BHADURI

JUDGMENT/ORDER ON BOARD

20/07/2015

1. This order will govern the disposal of three applications filed u/s 11(6) of the Arbitration Conciliation Act 1996. As the question of law and facts involved in these cases are one and the same, they are being decided together by this common judgment/order.
2. Arbitration Application No.1/2014 for appointment of arbitrator has been filed invoking clause 25 of Arbitration Agreement which arose out of a contract executed between the applicant and respondent on 10.02.2009 for the work of construction of road and running contract for 40M (4 legged) light weight narrow base tower foundation and chain link fencing at 16 different sites in Kanker district under Jagdalpur SSA. The contract value of work was Rs.76,61,392 at 94.27% above the estimated cost of Rs.39,43,699. The time allowed for execution of work was 3 months to be reckoned after 10th day of issue of the work order dated 10.02.2009. The time extension was granted upto 25.12.2009 by the competent authority by Letter dated 25.12.2009 vide Annexure A-1.
3. Likewise, Arbitration Application No. 2/2014 for appointment of arbitrator arose out of contract executed in between petitioner and the respondents on 15.11.2008 for the work of setting up and managing infrastructure sites for provision of mobile services in specified Rural and Remote areas (Part-A) civil

works for 12 sites under Kanker District in Chhattisgarh State in cluster No.15 (wind speed 160 kmph). The contract value of work was Rs.86,12,628. The time allowed for execution of work was 04 months to be reckoned after 10th day of issue of the work order dated 15.11.2008. The time extension was granted upto 21.10.2009 by the Chief Engineer (C) BSNL, Civil, C.G. Zone, Raipur vide letter dated 30.03.2012. The actual date of completion was 21.10.2009.

4. Lastly, Arbitration Application No.3/14 arose out of a contract executed in between petitioner and the respondents on 26.10.2009 for the construction work of administrative building (G+3) at CTX compound Fafadih, Raipur (building portion including internal water supply and sanitary installation, under ground sump, pump house, cement concrete road, septic tank and soak pit. The contract value of work was Rs.1,59,25,774.64 which is 74.90% above the estimated cost of Rs.91,05,395/-. The time allowed for execution of work was 16 months to be reckoned after 10th day of issue of the work order dated 26.10.2009. The time extension was granted upto 11.07.2011 by the Chief Engineer (c) BSNL, Civil C.G. Zone, Raipur vide letter dt. 25.11.2011. Actual date of completion was 11.7.2011.
5. The execution of contract works and their value are not in dispute between the parties. In all 3 cases, the grievance of the applicant is that despite completion of works, the non-applicants failed to make payment of work done by the applicant. So, by letters dated 5th July 2013 & 07th July 2013 for different rate contracts the amount was demanded for the work done with further interest on the unpaid amount. Admittedly, the said demands were not liquidated by the respondent BSNL.

Thereafter, by separate different letters dated 14.08.2013 applications were filed before the Chief Engineer, BSNL, Bhopal, M.P., which were replied by the Chief Engineer, BSNL, Bhopal on 03.09.2013. The petitioner/applicant, therefore, asked the name of the authorities who will decide the claim of the applicants. Subsequently, in terms of Clause 25(3) of the Agreement, an application was filed in respect of 3 contracts before the Executive Engineer (Civil) BSNL on 02.10.2013 to commence the process of conciliation. Since conciliation proceedings did not start, as such, the applicant filed applications before the Chief Engineer, BSNL (Civil) C.G. Zone Khamardih on 30th November 2013 in respect of 3 contracts and made request to constitute the Arbitral Tribunal comprising of sole arbitrator within the statutory period.

6. In response to such requisition for appointment of Arbitrator, the Chief Engineer, BSNL by letter dated 12.12.2013 asked the applicant to raise such demand in the form of enclosed proforma. The applicant in response to the demand to ask for appointment of arbitrator in proforma contended that since the contract does not mandate any format to make demand for arbitration, the Tribunal may kindly be constituted. Subsequently, again request was made by the petitioner for appointment of arbitrator contending that no proforma is required to make demand for appointment of arbitrator and necessary information was already furnished, therefore arbitrator may be appointed. However, no arbitrator was appointed. Thereafter the petitioner filed these petitions invoking clause 25 of Arbitration Agreement and hence the request for appointment of arbitrator came into being.

7. Learned Senior Counsel Shri V.R. Rao assisted by Mr. Ashok Mishra would submit that arbitration agreement do not prescribe any format to be supplied. He would submit that if the contents of sub-clauses (V) & (VII) of Clause 25 of the Agreement are read together, it provides that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each dispute along with the notice for appointment of arbitrator. It is further contended that in the instant case, despite invoking the arbitration clause for appointment of arbitrator by letter dated 30.11.2013, the respondents failed to appoint any arbitrator. The petitioners have filed the petition before this Court on 02.01.2014. Consequently, the right to appoint the arbitrator of the respondent ceased. If the proforma was mandatory then in such case, the respondents even otherwise could not have appointed the arbitrator as has been done by respondents on 10.01.2014 after filing of these petitions. He would further submit that reading of the entire agreement, it would go to show that the entire facts were in know of the respondents, therefore, the proforma though was not a part of the contract was directory and not mandatory. He, therefore, submits that deliberately wrong submission was also made by the respondents about the receipt of arbitration clause which also stood clarified that the application was received prior to the appointment of the arbitrator on 10.01.2014. Therefore, in this case, the respondents have ceased their right to appoint the arbitrator and the sole arbitrator may be appointed by the Court.
8. Per contra, Shri Ashok Verma & Shri R.M. Solapurkar appearing on behalf of the respondents would submit that after the arbitration clause was invoked by Letter dated 30th November

2013, respondent No.1 by a letter dated 12.12.2013 sent the proforma for notice for appointment of Arbitrator but the petitioner did not comply with it and did not send back such proforma. It is contended that deliberately the applicant did not fill the proforma and failed to send it back as per the terms of clause 25 of the agreement. It is further submitted that after the letter dated 17.12.2013 (Annexure R-3) sent by the applicant was received, the respondents replied it by letter dated 30th December 2013 (Annexure R-4) and requested them to fill the application in prescribed form to fill the notice with proforma so that necessary compliance may be made but eventually it failed to do so. Consequently, the respondent by letter dated 10.01.2014 appointed the arbitrator. It is further contended that though the application for appointment of arbitrator was presented on 02.01.14 before this Court, however, by letter dated 05.1.2014 (Annexure R-5) in the communication made, the said filing of application was suppressed by the applicants. Therefore, the appointment of sole arbitrator by the respondent is well merited.

9. I have heard learned counsel for the parties and have also perused the documents on record.
10. The correspondence made inter-se between the parties on various dates are not in dispute. The relevant part to decide the lis travels over contract between the parties which contained an Arbitration Clause. Clause 25 of the agreement provides for settlement of disputes and arbitration. Sub-clauses (v) & (vi) of Clause 25 are relevant here for adjudication of the issue which read as under:

Clause 25.- Except where otherwise provided in the

contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before 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 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) xxx

(ii) xxx

(iii) xxx

(iv) xxx

(v) When conciliation proceedings have become infructuous or have been terminated the party. Which initiated the Conciliation shall, within a period of 30 days of termination thereof shall give a notice, in the form prescribed by the BSNL, to the Chief Engineer, Bharat Sanchar Nigam Limited in-charge of the work or if there be no Chief Engineer. To the Administrative Head of the Bharat Sanchar Nigam Limited for appointment of an arbitrator to adjudicate the notified claims failing which the claims of the contractor shall be deemed to have been considered absolutely barred and waived.

(vi) Except where the decisions have become final, binding and conclusive in terms of the contract all disputes arising out of the notified claims of the contractor as aforesaid and all claims of the BSNL shall be referred for adjudication through the arbitration by the Sole Arbitrator appointed by the Chief Engineer. Bharat Sanchar Nigam Limited in-charge of the work or if there be

no Chief Engineer, the Administrative Head of the Bharat Sanchar Nigam Limited. It will also be no objection to any such appointment that the Arbitrator so appointed is a BSNL Employee and that he had to deal with the matters to which the Contract relates in the course of his duties as BSNL Employee. 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 by the said Chief Engineer. 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 dispute alongwith the notice for appointment of arbitrator.

11. Perusal of the entire agreement necessarily leads to show that the agreement do not contain any such proforma which has been stated in Clause V. The Clause though contains a stipulation of format of notice prescribed by BSNL, but it do not form part of contract. It is not the case of BSNL that any format of notice for appointment of arbitrator was part of the original agreement. In the result, when format was not part of original agreement, the applicant could not be compelled to accept any format sent by BSNL. Accordingly, in the context of the issue the demand to appoint arbitrator in format prescribed by BSNL cannot be held to be mandatory in nature.
12. The arbitration clause was invoked in these cases by the petitioner by letter dated 30th November, 2013 in respect of all 3 contracts vide Annexure A-6. Reading of Annexure A-6 dated 30th November, 2011 purports that a request was made to the

respondent to appoint arbitrator by invoking the arbitration clause. The BSNL in its reply at para 9 contended that the said letter of 30th November, 2013 invoking arbitration clause was received by the respondent on 11.12.2013 which would be evident from Annexure R-1 and before expiry of 30 days, the respondents have appointed an arbitrator on 10.01.2014 vide Annexure R-6. Consequently, a defence is taken that before expiry of 30 days BSNL has already made appointment of arbitrator.

13. The petitioner had filed the rejoinder wherein the receipt of such letter was seriously disputed and along-with such document, the document obtained under the RTI from Post & Telegraph was also placed on record. The said document which was received from the Department of Indian Posts purports that the letter invoking arbitration was delivered by postal department to the office of respondents on 09.12.2013 (Annexure A-12). On the contrary, the respondents have stated that letter invoking arbitration clause was received on 11.12.2013. Consequently, the appointment was made before expiry of 30 days. On a query being made, another explanation was filed by the Officer-in-Charge wherein it was admitted on affidavit that the letter sent by the applicant was received in the office of respondent on 09.12.2013 by speed post. Therefore, in facts of the given case, it appears that BSNL rushed in matter of appointment of arbitrator on wrong premises of facts. On examination of facts, it appears that BSNL for the reasons best known to them made wrong statement of facts supported by affidavit in its initial reply. So the very defence taken by BSNL is misconceived and cannot be sustained.

14. The Supreme Court in a case law reported in ***Union Bank of India Vs. Bharat Battery Manufacturing Co. (P) Ltd (2007) 7 SCC 684*** has categorically held that once the notice period provided for under arbitration clause for appointment of arbitrator had elapsed and thereafter, an application u/s 11(6) has been filed by the party seeking appointment of the arbitrator, the other party which had power of appointment under the arbitration clause cannot resurrect the said clause. The Court in in para 12 has held as under.

“12. A three Judge Bench of this Court in *Punj Llyod Ltd. V. Petronet MHB Ltd. (2006) 2 SCC 638* the considered the applicability of Section 11(6) petition and considered the facts which are similar to the facts of the present case and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in *Datar Switch Gears Ltd. v. Tata Finance Ltd., (2004) 8 SCC 151* wherein at p. 158, para 19, the Court held as under::

“19. 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 foremer 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.”

15. Therefore, in view of the above principle, the defence which has been projected by the respondents do not find support in the facts and circumstances of the case. Further, reading of the arbitration clause do not take within its sweep any prescribed format. The agreement which has been placed before this Court do not contain such format of notice of demand, therefore, necessarily in absence of any enclosure of the agreement the format which has been placed before this Court cannot form part of the agreement so as to create a new contract between the parties. In consequence thereof, in the opinion of this Court, it is held that the requirement of format which is not a part of clause 25 of the agreement was directory in nature.
16. In the result, I am of the opinion that the applicant has made out a case for appointment of a sole arbitrator. Consequently, the appointment made by the respondents on 10.01.2014 is set aside and Mr. S.S. Shukla, Advocate, Budhapara, Raipur, is appointed as sole arbitrator to adjudicate the difference and dispute. The remuneration of Arbitrator shall be settled by the parties.
17. With the above direction/observation, the petitions stand disposed.
18. No order as to cost.

Sd/-
GOUTAM BHADURI
JUDGE

