

HON'BLE THE ACTING CHIEF JUSTICE DILIP B. BHOSALE

ARBITRATION APPLICATION No. 71 of 2013

DATED:14.10.2015

Between:

M/s. Nautical Lines Private Limited.

... Applicant

And

The Central Warehousing Corporation.

...

Respondent

...

Respondent

HON'BLE THE ACTING CHIEF JUSTICE DILIP B. BHOSALE

ARBITRATION APPLICATION No. 71 of 2013

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PC:

Heard learned counsel for the parties.

The applicant-Company has filed the instant application under Section 11 (4) and (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking appointment of an Arbitrator on behalf of the respondent-Central Warehousing Corporation to adjudicate the claims and disputes between them.

The applicant is a Company incorporated under the provisions of the Companies Act and engaged in the business of handling and transporting goods, containers etc., by land, air and sea. They are also in the business of forwarding and transporting since 2008. The respondent, after inviting tenders for handling and transport of ISO Containers and allied services at their container freight station situated at Kukatpally, Hyderabad, appointed the applicant as regular handling and transport contractor. Agreement

was also executed between them for a period of five years with effect from 15.11.2011.

According to the applicant, the respondent misinterpreted Clause XII (h) in respect of taxes, levies, fees, charges payable to the Government and local authorities by the applicant and withheld an amount of Rs.14,71,471/- and informed the applicant that they are liable to pay an amount of Rs.18,00,000/- towards service tax payable for the period from November, 2011 till January 2013. The applicant, under protest, paid an amount of Rs.1,16,329/-.

In this backdrop and having placed reliance upon Clause XXII in the tender document, which relates to the duties and responsibilities of the contractor, the applicant stated that it is not liable to pay service tax. I am not entering into other details since these are not necessary to decide the instant application.

The relevant arbitration clause XX, as provided in the general terms and conditions of the tender, reads thus:

XX ARBITRATION

(i) All disputes and differences arising out of or in any way touching or concerning this contract, whatsoever (except as to any matter contained in part I to XII, XXI & XXII the decision of which is expressly provided for the contract) shall be referred to the sole arbitration of the person appointed by the Managing Director, Central Warehousing Corporation. There will be no objection to any such appointment on the ground that the person so appointed is an employee of the Corporation that he had to deal with the matters to which the contract relates and that in the course of his duties as employee of the Corporation had expressed views on all or any of the matter in dispute or difference. The award of such arbitrator shall be final and binding on the parties to the

contract. It is a term of this contract that in the event of such arbitrator to whom the matter is originally referred being transferred or vacating his office being unable to act or resigning for any reason, the Managing Director, Central Warehousing Corporation, at the time of such transfer, vacation of officers inability to act or resigning, shall appoint another person to act as arbitrator in accordance with the terms of this contract.

Such person shall be entitled to proceed with the reference from the stage at which his predecessor left it. It is also a term of this contract that a person other than a person appointed by the Managing Director, Central Warehousing Corporation as aforesaid should act as Arbitrator and if for any reason that is not possible, the matter is not to be referred to Arbitration at all.

(ii) The Arbitrator shall give reasons for the award. Provided further that any demand for arbitration in respect of any claim(s) of the contractor or of the Corporation under the contract shall be in writing and made within one year from the date of termination (expiry of the period) of the contract and where the provision is not complied with, the claims of the contractor shall be deemed to have been waived and absolutely barred and the Corporation shall be discharged and released of the liabilities under the contract. It is further provided that the arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award.

(iii) The venue of the arbitration shall be Hyderabad or such place as may be fixed by the sole arbitrator in his sole discretion.

(iv) The arbitration proceedings in respect of dispute shall / commence on the date on which the Arbitration call upon the parties to file their claim and defence statement.

(v) Work under the contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.

(vi) The costs of arbitration shall be borne by the parties as per the decision of the Arbitrator.

(vii) The Arbitrator shall give separate award in respect of each dispute or differences referred to him and shall give reasons for his decision.

(viii) Subject as aforesaid, Arbitration & Conciliation Act, 1996 shall apply to the arbitration proceedings under this clause.

EXPLANATION

For the purpose of this clause, the expression “Managing Director” shall include any officer for the time being performing the duties of the Managing Director of the Central Warehousing Corporation, New Delhi.”

The applicant accordingly issued notice, dated 27.12.2012, calling upon the respondent to appoint an Arbitrator in terms of Clause XX of the general terms and conditions of the tender. The notice was served on the respondent personally and it was received by them on the same day. The respondent did not respond to the notice issued by the applicant and hence, the applicant filed the instant arbitration application under Section 11 of the Act on 10.06.2013. According to the applicant, it was permitted to serve notice by registered post and accordingly notice was served on the respondent on 18.06.2013. Immediately on the next date i.e. 19.06.2013, they appointed an Arbitrator.

In the backdrop of these facts, learned counsel for the applicant placed heavy reliance upon the judgment of the Supreme Court in **Datar Switchgears Ltd Vs. Tata Finance Ltd and another**^[1] to contend that once the application under Section 11 of the Act is filed, the respondent forfeit their right to make an appointment of an Arbitrator.

On the other hand, Mr.G.Ramachandra Rao, learned counsel for the respondent, invited my attention to the judgment of

this Court in **A.Ramakrishna Vs. Union of India and others**^[2] to contend that the respondent do not lose their right to appoint an Arbitrator merely because arbitration application under Section 11 of the Act has been filed.

The facts, as stated, are not in dispute. In view thereof, I perused the judgments relied upon by learned counsel for the parties. The Supreme Court in **Datar Switchgears**'s case (one supra) observed thus:

“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 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.”

From perusal of the observations made by the Supreme Court, it is clear, if the opposite party, such as, respondent in our

case, fails to make an appointment within 30 days of demand, the right to make appointment would not stand forfeited, but it would continue, however, the appointment should be made before a person, such as the applicant in the present case, files application under Section 11 of the Act seeking appointment of an Arbitrator. Only then, the right of opposite party ceases. In the present case, it is not in dispute that an application for appointment of an Arbitrator was filed by the applicant on 10.06.2013 and an Arbitrator was appointed by the respondent on 19.06.2013 in exercise of their right under Clause XX of the general terms and conditions of the tender.

This Court in **A.Ramakrishna's** case (two supra) while considering the questions whether a party alleged to be not cooperating with the appointment of an Arbitrator loses or forfeits his right, to agree for such appointment and whether a decision rendered by the Chief Justice or his nominee on the applications made under sub-sections (4), (5) or (6) of Section 11 is amenable to adjudication, in paragraphs 30 and 31 observed thus:

“30. Now, reverting to the first question, it may be recalled that, before approaching the Chief Justice or his nominee under Sections (4) and (5) thereof, the party has to call upon or require the other party, to agree for his proposal for appointment of Arbitrator. It is on failure of the other party to respond within 30 days, from the date of receiving such proposal that the party can approach the Chief Justice or his nominee. As observed earlier, sub-sections (4) and (5) cover cases, where the matter of appointment of Arbitrator between the parties is not covered by an agreement. Sub-Section (6) on the other hand, relates to cases, where there exists a procedure for appointment of Arbitrator. The occasion to invoke this provision arises when there is lack of unanimity in the matter of appointment of an Arbitrator, in terms of the

agreement. No time frame, as in sub-sections (4) and (5), is prescribed to enable a party to take steps under this provision.

31. Till recently, the understanding was that, with the passage of 30 days from the date of receipt of proposal made by a party for appointment of Arbitrator, the other party forfeits its right to take steps for appointment of an Arbitrator, irrespective of the provisions involved. In *Datar Switchgears Ltd. v. Tata Finance and another*, 2000(3) SCC 151, the Supreme Court held that such a contingency would arise only in cases of applications made under sub-sections 4 and 5, but not where the application is filed under sub-section 6 of Section 11 of the Act. The qualitative difference between these two categories of applications and situations was explained. It was further held that though the other party, in an application covered by sub-section (6), may not lose its right to take steps with the passage of 30 days from the date of receipt of notice, it cannot have recourse to the same, once an application is filed. The question as to whether the Chief Justice or his nominee, can approve, or accept the nomination of an Arbitrator in accordance with the terms of the agreement, though made after filing of the application, did not fall for consideration before their Lordships.”

It is true that learned Single Judge in **A.Ramakrishna’s** case (two supra), though considered the judgment of the Supreme Court in **Datar Switchgears’s** case (one supra), did not have an occasion to consider the question whether a party lose their right to appoint an Arbitrator after filing of an application under Section 11 of the Act. This question, it is apparent, did not fall for consideration of learned Single Judge in **A.Ramakrishna’s** case (two supra). Therefore, merely because a reference to **Datar Switchgears’s** case (one supra) is made in the judgment would not help the respondent to contend that the question raised in the instant application is squarely covered by the said judgment. Learned

Single Judge made reference to the judgment of the Supreme Court in **Datar Switchgears**'s case (one supra) to consider whether a party alleged to be not cooperating with the appointment of Arbitrator loses or forfeits his right to agree for such appointment.

In the circumstances, this application deserves to be allowed. At this stage, learned counsel for the applicant suggests the name of Sri N.R.L.Nageswara Rao, a retired Judge of this Court. Learned counsel for the respondent has no objection for appointment of Sri Justice N.R.L.Nageswara Rao as sole Arbitrator.

Hence, I pass the following order:

“All disputes between the parties are referred to the sole Arbitrator, Sri Justice N.R.L.Nageswara Rao.

Learned Arbitrator shall fix his remuneration upon deliberation and consultation with the parties. The costs and expenses of the secretarial assistance of the arbitration proceedings shall also be determined by the learned Arbitrator. Each party will bear the expenses of the arbitration proceedings in all respects in equal share. I desire that learned Arbitrator shall complete the arbitration proceedings by making publication of Award within a period of five months from the date of entering upon reference. Learned Arbitrator shall hold sittings as far as possible in the mediation/arbitration centre to be set up in the High Court at Hyderabad and likely to commence before or immediately after the ensuing Dussehra Vacation.”

The arbitration application is accordingly allowed.

DILIP B. BHOSALE,

ACJ

Dt:14.10.2015

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[\[1\]](#) (2000) 8 Supreme Court cases 151

[\[2\]](#) 2004 (5) ALD 762