

. * IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 19th May, 2016
Judgment Pronounced on: 23 May, 2016

+ Arb. P. No.174/2016

ORISSA CONCRETE AND ALLIED INDUSTRIES LTD.

..... Petitioner

Through Mr.Rajiv Nayar, Sr. Adv. with
Mr.Gurmehar Singh Sistani and
Mr.Dhiraj Sachdev, Adv.

versus

UNION OF INDIA & ANR.

..... Respondents

Through Mr.R.V. Sinha, Adv.with Mr.A.S.
Singh, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act').
2. The main contention of the petitioner is that as per the agreement in question, respondents were to appoint the Arbitrator. The petitioner duly sent the notice dated 5th February, 2016 for invoking the arbitration clause and requested the respondents to appoint an independent Arbitrator as per the provisions of the Act. However, despite notice dated 5th February, 2016 being duly served by the petitioner upon the respondents, no Arbitrator has been appointed by the respondents.

3. Brief facts of the case are that the respondents on 18th October, 2013 invited tenders for Manufacture and Supply of Pre-stressed Mono-block Concrete Line Sleepers (pre-tensioned type) for Broad Gauge against Tender No. CS-166 of 2013 and the petitioner Company had submitted its tender.

4. The offer of the petitioner Company was accepted on 28th September, 2013 and the work was awarded to the petitioner Company vide letter dated 18th October, 2013 by respondent No.1.

5. The original delivery period for completing the supply against the subject contract was two years and 30 days and the total number of sleepers to be supplied were 1,40,750 @Rs. 1589/-. The total value of the contract was Rs.22,36,51,750/-.

6. As per the petitioner on 14th October, 2014, the officials of CBI visited the manufacturing unit of the petitioner at Kapa. The officials of CBI tested one sleeper and the same was passed. Thereafter, CBI officials carried out the testing of 15 sleepers on 22nd December, 2014. The respondents wrote to the petitioner on 7th January, 2015 that 15 sleepers supplied by the petitioner were tested and out of the same 11 sleepers allegedly failed, though the batches were tested and passed by the respondents at the manufacturing unit of the petitioner before dispatch to consignees. The respondents carried out the testing activity in the month of March and April, 2015 for the sleepers manufactured by the petitioner. The respondents sent a letter dated 14th July, 2015 wherein it was stated that the sleepers which were tested on 22nd December, 2014 and based upon the said results as well as results of further tests, the sleepers of the petitioner company manufactured prior to 22nd December, 2014 were treated as rejected.

7. The respondents thereafter issued a letter dated 8th October, 2015 and terminated the contract of the petitioner and also imposed liquidated damage equivalent to 5% of the updated cost of undelivered/ cancelled sleepers(1,23,825 sleepers) as on 7th October, 2015 in terms of clause 12 of the contract.

8. The provisional amount against liquidated damage was mentioned as Rs.1,16,21,015. The respondents also directed recovery of Rs.11,14,82,852/- against about 62189 allegedly rejected sleepers. The respondent also issued directions in the said letter for forfeiture of full security deposit of Rs.20,00,000/-.

9. The petitioner on 6th October, 2015 filed a petition being OMP (I) No.615 of 2015 under Section 9 of the Act for interim measures against the respondents pursuant to letter dated 8th October, 2015. The petitioner was protected on the basis of statement made by the counsel for the respondents.

10. The petitioner sent a letter dated 5th February, 2016 for invoking the arbitration clause requesting the respondents to appoint an independent arbitrator for adjudicating the disputes between the parties. The respondents did not appoint the Arbitrator within thirty days on receipt of notice. The copy of the petition was served upon the counsel for the respondents on 17th March, 2016 and another copy was served on 18th March, 2016 by hand. The present petition was filed on 18th March, 2016. The petition and the supporting affidavit are dated 10th March, 2016.

11. It was submitted by the respondents that the request of the petitioner for appointment of Arbitrator was received by the competent authority and the General Manager, South Central Railway appointed

Sh. Sanjay B. Nagbhidkar, as the Arbitrator on 18th March, 2016 in terms of the agreement which was further communicated to the party vide letter dated 18th March, 2016. Therefore, the petitioner has got no cause of action to file the present petition and there is no reason or justification for this Court to appoint the Arbitrator. The aforesaid appointment of Arbitrator was made by the competent authority before notice of present petition. Even the copy of the petition was not received before appointment.

12. The Agreement (SCC) has an arbitration clause i.e. clause 2900 which has been reproduced here as under:

"Clause 2900 Arbitration

(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the Special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by the Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organisation in respect of contracts entered into by the other Organisation under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the

arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.

(d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.

(e) Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.

(f) Subject as aforesaid, the Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

(g) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.

(h) In this clause the authority to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to their functions or otherwise."

13. The petitioner sent a letter dated 5th February, 2016 for invoking the arbitration clause requesting the respondents to appoint an independent Arbitrator for adjudicating the disputes between the parties. Despite the service of the said notice, respondents have failed to appoint the Arbitrator. The receipt of notice from the petitioner was not denied by the respondents. The present petition was filed on 18th March, 2016. On the same day, General Manager of South East Central Railway appointed Sh.Sanjay B. Nagbhidkar, CE/CON/II/SECR Bilaspur as sole Arbitrator for adjudicating the claims and disputes. It

is not denied by the respondents that the sole Arbitrator is a serving employee of Railways. It is also admitted position that when the appointment was made, the petition under Section 11 of the Act was already prepared on 10th March, 2016 and the advance copy of the petition was served on 17th March, 2016. Another copy was served on 18th March, 2016 to the counsel for the respondents.

14. It is settled law that there would be a failure of procedure necessitating recourse to Section 11(6) of the Act when a party that is bound to take steps to appoint the arbitrator refuses to perform its obligation as such. The Supreme Court in **Datar Switchgears Ltd. v. Tata Finance Ltd. and Another**, (2000) 8 SCC 151 has enunciated the law in this regard in the following words:

"An application under sub-clause (6) of Section 11 can be filed when there is a failure of the procedure for appointment of Arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an Arbitrator refuses to appoint the Arbitrator or where two appointed Arbitrators fail to appoint the third Arbitrator. If the appointment of Arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of Arbitrator."

15. Once the respondent has failed to follow the procedure stipulated under Agreement, and the petitioner has thereafter approached this Court in exercise of jurisdiction under Section 11(6) of the Act, the respondent has forfeited its right to appoint an Arbitral Tribunal of its choice comprising of its serving and retired officers.

16. The law in this regard is well settled. In the case of **Deep Trading Company v. Indian Oil Corporation and Ors.**, (2013) 4

SCC 35, the Supreme Court was concerned with a similar clause in a railways contract which provided for the appointment of an employee of the corporation as the Arbitrator as being a necessary condition. It was held that even in the event of such an arbitration clause, if the corporation forfeited its right to appoint the Arbitral Tribunal, then the Court was entitled to appoint an independent and impartial Arbitrator and to give a go-bye to the terms of the arbitration clause to this extent.

The relevant findings of the Supreme Court in this regard are reproduced here as under:

"18. Section 11(8) provides that Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects, (a) 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...

19. If we apply the legal position exposited by this Court in *Datar Switchgears Ltd. v. Tata Finance Ltd.* and *Anr.* (2000) 8 SCC 151 to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 09.08.2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.

20. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for

the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement."

17. There is nothing on record as a conclusive evidence to show that the appointment was made prior to the filing of the petition as the petition is dated 10th March, 2016 so as the affidavit. There is an endorsement of service on 17th March, 2016. Thus, the appointment on behalf of the respondent is contrary to law and thus the appointment made by the respondent cannot be sustained.

18. The arbitration clause between the parties is crystal clear that disputes would be settled in accordance with the Indian Arbitration Act, 1996 "and rules there under and any statutory modification thereof for the time being in force shall be deemed to apply to the arbitration proceedings under the clause 2900 which would encompass the amendment of 2015. Yet further, the invocation of arbitration in the present case was resorted to by the petitioner in February, 2016. Section 26 of the Act (as amended in 2015) states that the amended Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Act i.e. 23rd October, 2015. The present petition was filed after the amendment of the Act. Hence, the provisions of the amended Act would apply to the present petition.

19. For the reasons stated above, I am of the view that constitution of the Arbitral Tribunal by the respondents is opposed to the parameters of Section 12 of the Act (as amended in 2015) and for this reason also the dispute relating to the illegal termination of the contract has to be referred to an independent and impartial Arbitral Tribunal.

The relevant portion of Section 12 reads as under:-

"Section 12

...(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.-The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator."

... (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator".

20. The Fifth Schedule i.e. supplementary provision read with Section 12 (1)(b) of the amended Act relating to "appointment made by any party which would give rise to justifiable doubts as to the independence or impartiality of Arbitrators" mandates that if he has relationship with the parties or counsel or the Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party, or the Arbitrator has been appointed as Arbitrator within past three years on two or more

occasions by one of the parties or in another arbitration on a related issue involving one of the parties, the same would give rise to justifiable doubts. Similarly, the Seventh Schedule read with Section 12 (5) of the amended Act mandates that there shall not be any Arbitrator's relationship with the parties or counsel who should also not be an employee, consultant, advisor or has any other past or present business relationship with a party.

21. As per the amended Act, the respondent cannot insist on an Arbitral Tribunal comprised of its serving or retired officers if the petitioner invoked the arbitration after the commencement of the Act. Therefore, the petitioner is entitled to the appointment of an independent and impartial Arbitral Tribunal in as much as the respondent has forfeited its right to appoint an Arbitral Tribunal of its choice in view of the amendment in the Act. The party is entitled to the appointment of an independent and impartial Arbitral Tribunal as per Section 11(8) of the Act (as amended in 2015), if the party would be able to cross the hurdle of Section 26 of the Amended Act.

22. Under these circumstances, the Court can exercise its power to appoint an independent and impartial Arbitral Tribunal and to give a go-bye to the terms of the arbitration clause between the parties. The present disputes are required to be adjudicated upon by an independent sole Arbitrator.

23. Thus, the suggestion of the respondent to appoint its own serving officer/employee cannot be accepted as the facts of the present case are covered under the supplementary provision of Schedules Fifth and Seventh, in order to secure the appointment of an independent and impartial arbitrator as per Section 12 of the Act (as

amended in 2015) otherwise contrary to that it would definitely give rise to justifiable doubt as to his independence and impartiality.

24. In the light of the above, the prayer made in the petition is allowed.

25. Accordingly, Justice J.D. Kapoor, former Judge of this Court (Mobile No. 9871257474/9868260000) is appointed as sole Arbitrator to adjudicate the disputes between the parties in terms of the agreement. Both parties would be entitled to file their respective claims and counter-claims with regard to subject matter of the dispute in hand.

26. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be paid as per schedule of the Amended Act.

27. The petition is accordingly disposed of.

28. No costs.

29. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator forthwith.

(MANMOHAN SINGH)
JUDGE

MAY 23, 2016