

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment pronounced on: 27th January, 2016*

+ **ARB.P. 579/2015**

RAJESH KUMAR Petitioner

Through Mr.Ravi Shankar Garg, Adv.

versus

ARSS INFRASTRUCTURE PROJECTS LIMITED & ANR

..... Respondents

Through Mr.Anand Varma, Adv. for R-1.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the petition under Section 11 (6) of Arbitration and Conciliation Act, 1996 for appointment of Arbitrator as per clause No. 13 of the Sub-contractor agreement dated 12th April, 2013 executed between the parties.
2. The petitioner is the proprietor of M/s Shiva Construction Company engaged in the business of Construction work i.e. Road and other construction work.
3. The respondent Nos. 1 and 2 are the Companies also engaged in the business of constructions work. It is submitted that respondent No.1 and 2 used to take big construction projects under joint venture.
4. It is submitted by the petitioner that a dispute arose between the parties as the petitioner is claiming an amount of Rs.6,40,43,619/- to be recoverable from the respondents on account of due payments pertaining to the work done by the petitioner and damages and loss suffered to them by the fraudulent act of the respondents as they have cheated the petitioner.

5. In terms of Clause 13 of the Sub-contract Agreement dated 12th April, 2013, all disputes, differences and/or claims arising out of the said agreement are subject to settlement by way of arbitration, wherein the Arbitrator is to be appointed by the Chairman, ARSS Infrastructures Projects Limited.

6. The petitioner sent the letter dated 10th April, 2015 to the respondents as per clause No. 13 of Sub-contract Agreement for appointment of Arbitrator however despite receiving the said letter, till date an Arbitrator has not been appointed by the respondents. It is submitted that it is an admitted fact that the invocation letter dated 10th April, 2015 was received by the respondents.

7. It is alleged by the respondents that the Arbitrator was appointed and the petitioner was duly informed by letter dated 7th May, 2015. The case of the petitioner is that the Arbitrator appointment letter dated 7th May, 2015 was never sent by the respondent No. 1 to the petitioner, although the courier receipts dated 7th May, 2015 are fabricated and the tracking report is not available on the official website of courier company. The receipt numbers of the alleged three courier receipts i.e. K79430775, K79430776 and K7943077 are not found on the official website of the courier company. Therefore, the presumption for service cannot be drawn as the said alleged Arbitrator appointment letter dated 7th May, 2015 was never sent through registered/speed post.

8. It is denied that the petitioner has received the Arbitrator appointment letter dated 7th May, 2015, alleged to be sent by the respondent No. 1 through courier.

9. The petitioner sent the advance copy of petition to the respondents through approved courier vide receipts dated 26th

September, 2015, which were duly received by the respondents in the last week of September, 2015 which is specifically admitted by the respondent No. 1 in para No. 12 of the reply affidavit. The allegation is made by the petitioner against the respondent No.1 that after receiving the copy of the petition, they approached the Arbitrator and further the Arbitrator sent a letter dated 8th October, 2015 to all the parties concerned, thereby informed them the date for preliminary hearing was fixed as 10th November, 2015.

10. It is submitted by the petitioner that if assumed that the Arbitrator was appointed in May 2015, vide letter dated 7th May, 2015, then he could have sent the letter for preliminary hearing in the month of May or June 2015, however in the present matter admittedly the Arbitrator had sent the letter dated 8th October, 2015 for preliminary hearing only after getting the information from the respondent No. 1 that the petitioner has filed or going to file, the petition for appointment of Arbitrator before this Court. The respondent No.1 has intentionally concealed and not filed complete documents and letters sent by the Arbitrator and the petitioner and respondent No. 1. Respondent No. 1 has only filed the letter dated 8th October, 2015 and also the reply dated 2nd November 2015 which was sent by the petitioner to Arbitrator and the respondents.

11. It is also submitted that vide reply dated 2nd November, 2015, petitioner duly informed the Arbitrator, Sh. Y. Rama Rao that present arbitration petition No. 579/2015 has been filed in Court, therefore the matter is sub-judice and requested the Arbitrator not to proceed with the alleged arbitration proceeding. However despite receiving the said letter dated 2nd November, 2015, Arbitrator sent a letter 9th November, 2015, whereby informing that meeting/preliminary hearing

scheduled for 9th November, 2015 is postponed to 27th November, 2015 at Bhuvneshwar and just after 2 days of earlier letter dated 9th November, 2015, Arbitrator again sent a letter dated 11th November, 2015 wherein he stated that there is no stay order from this Court pertaining to the arbitration proceeding conducted by him.

The petitioner vide letter dated 17th November, 2015, replied to earlier letters dated 9th November, 2015 and 11th November, 2015 of Arbitrator whereby requesting the Arbitrator not to proceed with the arbitration proceeding as matter is sub-judice before this Court.

In the meanwhile, respondent No. 1 sent a letter dated 13th November, 2015 whereby informing that the venue of preliminary hearing/meeting has been arranged at conference hall, Hotel Seetal, Vani Vihar, Bhuvneshwar. The petitioner sent the reply dated 23rd November, 2015 to the respondent No. 1 whereby requesting not to proceed with the alleged arbitration proceeding as admittedly petition regarding the appointment of Arbitrator is pending before this Court.

12. It is the admitted position that the despite having well knowledge about the pendency of the present matter for appointment of Arbitrator before this Court, Arbitrator Sh. Y. Rama Rao held the first and preliminary hearing on 27th November, 2015 and conducted the proceedings. In the said proceeding Ld. Arbitrator specifically declared that he is the adviser of respondent companies i.e. ARSS Infrastructure Projects Ltd., a JV partner of M/s ATLANTA-ARSS JV and also ordered that there is no stay order from this Court, to not proceed with the arbitration proceeding. The arbitral tribunal decided to hear the matter which was referred for arbitration and accordingly prescribed the procedure for conducting the hearing.

Despite having the knowledge about the pendency of the present petition, Arbitrator did not wait till the decision of the present petition and also gave declaration that he is the adviser of ARSS Infrastructure Projects Ltd., a JV partner of M/s ATLANTA-ARSS JV which gave rise to justifiable doubts as to the independence or impartiality of Arbitrator. The respondents sent a letter dated 24th December, 2015 (through registered post) to the petitioner whereby informing that they have accepted the fee structure mentioned under point 13 in the arbitration proceeding hearing dated 27th November, 2015 held at Hotel Seetal, Bhubnaeswar. The alleged arbitration appointment letter dated 7th May, 2015 was sent through courier although the letter dated 24th December, 2015 was sent through Registered Post.

13. It is pertinent to mention here that as per the relevant arbitration clause in Sub-contract Agreement dated 12th April, 2013, the Court at New Delhi have the jurisdiction pertaining to the disputes arising from the said agreement. It is submitted that venue of Arbitration has not been decided or agreed in the Sub-contract agreement, however the corporate office of the respondent No. 1 is situated at New Delhi and the office of the petitioner is situated at Sonapat, Haryana (NCR).

14. It is also challenged by the petitioner that the arbitration proceeding should be conducted in New Delhi for convenience of both the parties. It is apparent that just to harass and defeat the claim of petitioner, the respondents have intentionally started the alleged arbitration proceeding in Bhubaneswar, Odisha.

15. Learned counsel for the respondent No.1 has submitted that once the Arbitrator has been appointed on 7th May, 2015 as per clause

of agreement, the present petition is not maintainable. He has also argued that before filing of present petition, the petitioner was fully aware about the said fact. Therefore, objection about the non-receipt of letter of appointment is without any substance. The petition is liable to be dismissed. He has referred the decision of ***Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr.*** (2000) 8 Supreme Court Cases 151 in support of his submission. The relevant paras of the judgment reads as under:-

“18. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?

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.”

16. Learned counsel for the respondent No.1 has not denied the fact about the existence of the arbitration clause in the agreement. He has also not denied that the dispute has arisen between the parties and the petitioner has served the notice of invocation of the arbitration clause in the month of April, 2015. His only explanation is that the Arbitrator as per the agreement has been appointed by the respondent in the month of May, 2015 and in fact the invocation letter has not been received by the petitioner. During the second week of October, 2015, the petitioner received the notice from the Arbitrator appointed by the respondents. Therefore, the petition is not maintainable.

I am unable to agree with the submissions of the learned counsel for the respondent No.1. Firstly, the appointment letter of Arbitrator dated 7th May, 2015 has not been received by the petitioner. There is no material on record to show that the service has been effected upon the petitioner. As far as the plea of the learned counsel for the respondent No.1 with regard to the second week of October, 2015 is concerned, the said submission is also without any substance, as the respondents were aware about the filing of the petition before this Court under Section 11 of the Arbitration and Conciliation Act, 1996 in the month of September, 2015 when the copy of the said petition was served upon the respondent. The said fact has not been denied by the respondent, rather the same is admitted in the reply. It appears to the Court that on receipt of the information that the petition has been filed in this Court, the Arbitrator has taken the steps to commence the proceedings. Thus, the appointment of the Arbitrator by the respondent is illegal and contrary to the provisions of the Act. Even otherwise, I would not allow the Arbitrator who has admitted in his order that he is the advisor of the respondent. The said admission

itself is contrary to the scheme of the Act. Thus, the prayer of the petition is allowed. The proceedings pending before the Arbitrator appointed by the respondent are terminated. The matter is referred to the Delhi International Arbitration Centre ('DAC') who will appoint an Arbitrator in accordance with the provisions of the Act. The Arbitrator to adjudicate the disputes arising between the parties as mentioned in the present petition, including their claims and counter-claims.

The arbitration shall take place under the aegis of DAC. The fees of the learned Arbitrator shall be in terms of the Delhi International Arbitration Centre (Administrative Cost Arbitrator's Fees) Rules.

17. The appointment of arbitrator vide letter dated 7th May, 2015 is completely illegal and without due process of law, therefore, prayer made in the present petition is allowed.

18. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

(MANMOHAN SINGH)
JUDGE

JANUARY 27, 2016