

Sr. No.314

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 8190 of 2001

Date of decision:16.01.2017

Cement Corporation of India Ltd. and others

.....Petitioners

versus

M/s Ashok Pipe Udyog, Grain Market, Charkhi Dadri

.....Respondent

Coram: Hon'ble Mr.Justice Rakesh Kumar Jain

Present: Ms. Abha Rathore, Advocate
for the petitioners.

Mr. Sudhir Mittal, Advocate
for the respondent.

Rakesh Kumar Jain, J.(Oral)

This petition is filed by Cement Corporation of India Ltd.(for short, 'CCI'). The CCI had a factory for manufacturing cement at Charkhi Dadri, District Bhiwani. One of the raw material required for the production of cement was Kankar. In order to secure the raw material, the petitioner floated a tender dated 08.05.1995 for the excavation and transportation of 56,500 MT of Kankar, from Rewasa-Bajina and Rewasa-Biran Mines to Charkhi Dadri Cement factory. In response to said tender, the respondent submitted his offer on 10.06.1995 for excavation and supply of 5000 MT of Kankar at ₹ 144/146 per MT. After negotiations, the respondent submitted a modified offer on 12.07.1995 for supplying entire contract of 52,500 MT of Kankar from Rewasa-Bajina mines at ₹ 110/115 per MT. In terms of the modified offer, the CCI issued the work order dated 27.07.1995 subject to some conditions. The conditions of the work order was accepted by the respondent. An arbitration clause, provided in the agreement, reads as

under:-

“11.0 Dispute under this contract and arbitration:

11.1 In the event of any dispute, breach or difference arising in respect of the meaning and scope of terms and conditions herein contained or in connection with any matter under this agreement(except for those matters which are to be decided as per provisions made in these terms and conditions) the same shall be referred to the sole arbitration of an officer of the Cement Corporation of India Ltd., appointed by C & MD of the Corporation. The contractor shall furnish to the corporation details of such disputes itemwise and within reasons based on contract conditions and shall also intimate amount involved in each dispute with basis for the same while invoking the Arbitration clause.

There will be no objection if the Arbitrator is an employee of the Corporation has expressed views on all or any of the matters in dispute of difference. The award of the arbitrator shall be final and binding on the parties to this contract.”

There was a dispute between the parties, therefore, respondent served a legal notice dated 19.01.1998 under Section 11 of the Arbitration and Conciliation Act of 1996(for short, 'the Act') for the appointment of the Arbitrator. The respondent made the following averments in the legal notice which reads as under:-

“19. That my client requested on 25-6-96 for referring the matter in arbitration to addresses No. 1 through Addresses No. 2. In reply of the letter my client received letter No. P & S/APU:-

98/2801 dt.5-8-1996 and the addresses to mentioned there in CCI is willing to appoint an arbitrator as per provisions of the contract and further requested to proceed the case as per terms and conditions of the contract for appointment of Arbitrator. Thereafter, my client has requested several times for the appointment of an impartial and independent person not below the rank of retired judge of High Court of Supreme Court of India Judge but no response.”

According to the aforesaid averment, at the first instance, the respondent was willing for the appointment of an Arbitrator in terms of the provisions of the contract. The said legal notice was replied by the petitioner on 24.02.1998. The relevant averments made therein are as under:-

“the CCI is willing to appoint an Arbitrator as per the provisions of the Contract. As per Clause 11 of the Terms and Conditions of the agreement an Officer of the CCI shall be appointed as Arbitrator by the Chairman and Managing Director of the Corporation whose decision shall be final and binding on the parties. The apprehension of your client that the officers of the CCT is appointed as Arbitrator would not be impartial is unjustified and baseless. The appointment of a Retired High Court or Supreme Court Judge as Arbitration is not warranted but the terms and conditions of the Agreement. Since the suit for injunction and the petition under Section 9 of the Arbitration and Conciliation Ordinance No. 8 of 1996 filed by your client are pending the Civil Courts and the matter is subjoined, so you are requested to advise your client to withdraw the said proceedings so that the steps for appointment of Arbitrator may be taken.”

Before the respondent could have reacted to the reply of the petitioner, in as much as, by withdrawing the civil suit for mandatory injunction filed by the respondent for restraining the petitioner from encashing the bank guarantee and application filed by the respondent under Section 9 of the Act before the District Judge, Bhiwani was withdrawn, respondent filed an application under Section 11 of the Act for the appointment of an Arbitrator specifically requesting for the appointment of the retired Supreme Court Judge, retired High Court Judge or retired District & Sessions Judge or any other independent or impartial sole Arbitrator to resolve the dispute between the parties. The application was filed on 6.06.1998. Counsel for the respondent has submitted that civil suit for mandatory injunction was withdrawn on 10.10.1997 but the application filed under Section 9 of the Act was dismissed on 8.06.1998. Be that as it may, the application filed under Section 11 of the Act was allowed by the Civil Judge(Senior Division), Bhiwani vide his impugned order dated 15.06.1998 while applying Section 11(5)(7) of the Act, appointing a retired Additional District & Sessions Judge as the sole Arbitrator.

Aggrieved against the said order, the present petition has been filed.

Counsel for the petitioner has argued that the impugned order is patently erroneous as the learned Civil Judge has erred in applying Section 11(5)(7) of the Act instead of Section 11(2)(5)(6)(a) of the Act. In order to appreciate the argument, it would be relevant to reproduce Section 11(1)(2)(5)(6)(7) of the Act which is as under:-

“11 Appointment of arbitrators. —

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the

parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) xxx

(4) xxx

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) xxx

(9) xxx

(10) xxx

(11) xxx

(12) xxx”

Counsel for the petitioner has submitted that Section 11(2) of the Act provides that if the parties have agreed to the procedure for appointment of an Arbitrator and do not appoint the Arbitrator in terms of Section 11(6) of the Act then Court has the power to appoint the Arbitrator whereas Section 11(5) of the Act provides that if there is no agreement between the parties for the appointment of an Arbitrator then Court can pass the order for appointment of an Arbitrator. It is further submitted that learned trial court has erred in applying Section 11(5)(7) of the Act to the facts and circumstances of this case, though the case is governed by Section 11(2)(6) of the Act because there was an agreement between the parties for the appointment of an Arbitrator and the court could have taken the cognizance for the purpose of exercising its jurisdiction only when the party fails to act in terms of the procedure for the appointment of an Arbitrator. It is submitted that there is no failure on the part of the petitioner for the appointment of the Arbitrator because the petitioner had responded the legal notice of the respondent as they themselves wanted to appoint an Arbitrator in terms of the provisions of the contract and the petitioner had responded showing its willingness to appoint the Arbitrator as per the provisions of the contract but subject to the condition that respondent would first withdraw the civil court matters which were sub judice at that time so that steps may be taken for the appointment of an Arbitrator and arbitration. It is further submitted that instead of taking requisite steps, the respondent approached the civil court in terms of Section 11 of the Act and got an Arbitrator appointed other than the one to which the petitioner was willing

and respondent was also willing in its reply.

On the other hand, counsel for the respondent has submitted that if Section 11(2)(6)(a) of the Act is applied, even then the said provision helps the respondent because the petitioner had failed in the procedure for appointment of an Arbitrator as it did not appoint the Arbitrator despite the expiry of 4 months from the date of filing reply to the legal notice and after waiting for sufficient time, the respondent had approached the civil court on 16.06.1998 i.e. after 4 months to be precise and obtained the order which has been challenged in this Court. It is also submitted that the civil suit filed by the petitioner had already been over on 10.10.1997, much before the reply was filed by the petitioner on 24.02.1998 though the application filed under Section 9 of the Act, pending before the District Judge, for interim orders, was dismissed on 08.06.1998 which had no concern with the matter.

I have heard both the learned counsel for the parties and after examining the available record, am of the considered opinion that the impugned order is patently erroneous and illegal because there is a provision made in the contract in clause 11.1, referred to herein above, about the reference of a dispute between the parties to the Arbitrator who was to be appointed by the C & MD of the petitioner-corporation. Further, it provides that the contractor shall furnish to the Corporation details of such disputes and shall also intimate amount involved in each dispute with the basis of the same while invoking the Arbitration clause. In the present case, after reply was filed on 24.02.1998 by the petitioner to the legal notice of the respondent in which he had invoked the arbitration clause for the purpose of appointment of Arbitrator, the respondent did not accept all the conditions raised by the petitioner in its reply, in as much as, the

respondent did not withdraw the application filed under Section 9 of the Act pending before the District & Sessions Judge, Bhiwani before the steps could have been taken by the petitioner for the purpose of appointment of the Arbitrator. There is no material brought on record by the respondent to show that any effort was made by the respondent for the appointment of the Arbitrator after reply to the legal notice dated 24.02.1998 was received rather it appears that the respondent had straightway gone to the civil court for the purpose of appointment of a retired judge for the purpose of arbitration under the apprehension that the petitioner perhaps may not appoint an impartial and independent Arbitrator. This procedure adopted by the respondent is totally perverse as there was no reason for the respondent to carry this impression that the petitioner was not interested in appointment of an Arbitrator in terms of clause 11.1 of the agreement. Until unless any material much as cogent evidence is brought on record to show that the parties have failed to act as required by the procedure, Section 11(6)(a) cannot be applied for the benefit of the respondent rather it goes in favour of the petitioner in assailing the validity of the impugned order on the ground that there was no occasion for the civil court to apply Section 11(5)(7) of the Act for the purpose of the appointment of an Arbitrator. Consequently, I find merit in the present petition and the same is hereby **allowed**. Hence, the impugned order passed by the civil court is hereby set aside.

Counsel for the respondent has submitted that since the order for appointment of an Arbitrator passed by the civil court has been set aside, the petitioner may be directed to appoint the Arbitrator in terms of the provisions of clause 11.1 of the agreement.

Counsel for the petitioner has submitted that if any such

direction is issued by this Court, it would be complied with. Hence, the direction is issued to the petitioner to appoint the Arbitrator as per clause 11.1 of the agreement within a period of 4 weeks from the date of receipt of certified copy of this order.

16th January, 2017
Shivani Kaushik

[Rakesh Kumar Jain]
Judge

<i>Whether Speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether Reportable</i>	<i>Yes/No</i>