
(2019) 11 JH CK 0006

Jharkhand High Court

Case No: Arbitration Application No. 6 Of 2019

M/s United Telecoms
Limited

APPELLANT

Vs

State Of Jharkhand
And Ors

RESPONDENT

Date of Decision: Nov. 7, 2019

Acts Referred:

- Arbitration And Conciliation Act, 1996 - Section 11, 11(6), 11(6A)

Hon'ble Judges: Anubha Rawat Choudhary, J

Bench: Single Bench

Advocate: Rahul Lamba, Zaid Imam, Atanu Banerjee, Ashwini Bhushan

Final Decision: Dismissed

Judgement

1. Heard Mr. Rahul Lamba, counsel appearing on behalf of the petitioner along with Mr. Zaid Imam, Advocate.

2. Heard Mr. Atanu Banerjee, counsel appearing on behalf of the State and Mr. Ashwini Bhushan, counsel appearing on behalf of the respondent no.

2.

3. This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator for

adjudicating the dispute between the petitioner and the respondents arising out of contract dated 25.10.2005 which was executed between the parties

for implementation of Jharkhand State Wide Area Network (Jhar Net) Project proposed by the Government of Jharkhand.

4. The Contract dated 25.10.2005 has been annexed as annexure-1 to the main petition. The petitioner offered to the Respondents for Partial

Acceptance Testing and on 15.11.2006 the "Jhar Net" service was inaugurated and on 31.07.2009 final acceptance certificate was issued in

favour of the petitioner with effect from 01.08.2009. Dispute arose between the parties mainly regarding payment of difference between Partial

Acceptance Test (PAT) and Final Acceptance Test (FAT) (herein after referred to as PAT-FAT Gap). State Dispute Resolution Committee was

constituted on 20.06.2013. On 12.02.2014, the petitioner made representations for releasing the outstanding payment due to the petitioner under the

aforesaid contract. On 28.02.2014, the Respondents conducted the Second State Dispute Resolution Committee Meeting in which the petitioner was

not present and it was unilaterally decided to pay Rs. 5.97 Crores and odd to the petitioner. Thereafter on 27.03.2015, the Respondents paid an

amount of Rs. 5.91 Crores and odd to the petitioner. The petitioner vide its letter dated 21.08.2015 submitted that the petitioner had claimed Rs. 56.57

Crores for PAT-FAT Gap period with all the justifications, but the petitioner received only Rs. 5.91 Crores and the petitioner requested the

Respondents to release the aforesaid balance payment. It is the specific case of the petitioner that thereafter the petitioner continued making several

representations to the Respondents including its letter dated 09.03.2017, 16.06.2017 & 06.10.2018 demanding for making the payment of the balance

amount, but the Respondents for some or the other excuse never paid the said outstanding amount.

5. The learned counsel for the petitioner by referring to paragraph 27 of the petition submits that it is evident from the aforesaid facts that the

petitioner made several efforts to amicably settle the dispute with the Respondents and such reasonable attempts were continued for more than 30

days, but the Respondents did not agree and accordingly the efforts for amicable settlement failed. The learned counsel for the petitioner further

submits that since the attempt to bring about an amicable settlement had failed, the petitioner had issued the letter dated 06.10.2018 to the

Respondents and thereafter on 22.12.2018 the petitioner had given notice to the Respondents for referring the dispute to an Arbitrator. Thereafter the

petitioner vide its letter dated 19.03.2019 sent a reminder to the Respondents for referring the disputes to an Arbitrator. Ultimately, the Respondents

vide their letter dated 27.03.2019 rejected the request of the petitioner for appointment of an Arbitrator and accordingly the instant application was

filed by the petitioner with a request to appoint an Arbitrator.

6. Counsel for the petitioner further submits that the respondents have filed a counter affidavit in this case and specific case of the respondents is that

the petitioner had received Rs. 5.91 crores on 27.03.2015 which the petitioner had accepted without any objection as full and final settlement and

having accepted the said amount, there is no dispute which needs to be adjudicated by the Arbitrator. Further the respondents have also raised a point

that the claim of the petitioner is a stale claim and accordingly no Arbitrator is required to be appointed.

7. Counsel for the petitioner submits that during the course of argument the respondents have raised a plea that condition precedent for invoking the

provisions of Section 11 (6) of the Arbitration and Conciliation Act, 1996 as per the arbitration clause contained in Article 15 of the terms and

conditions of contract has not been satisfied in as much as the required 15 days' notice as contemplated under Article 15.1 has not been given.

8. In response to specific plea, which has been taken by the respondents in the counter affidavit and the aforesaid oral submission made by the

respondents, counsel for the petitioner submits that the respondents having not raised the plea regarding 15 days' notice in the counter affidavit

and such plea cannot be permitted to raise by way of oral argument. He also submits that this plea has not been taken by the respondents in the last

letter dated 27.03.2019 and the specific ground for rejection of the request of the petitioner to refer the matter to Arbitrator was that there does not

exist any claim on account of PAT-FAT gap. Counsel for the petitioner submits that neither such plea of 15 days notice has been taken in the

counter affidavit, nor such plea has been taken in the last communication dated 27.03.2019, therefore the ground of 15 days notice cannot be a

ground to reject the present petition. Learned Counsel for the petitioner has also submitted that it has been held by the Hon'ble Supreme Court in

paragraph no. 8 in the case of Mohinder Singh Gill vs. Chief Election Commission reported in AIR 1978 S.C. 85 1 that no supplementary ground can

be taken in the counter affidavit which is not available in the impugned order or letter and accordingly present petition cannot be dismissed on account

of alleged non-compliance of required 15 days notice.

9. Learned counsel for the petitioner further submits that without prejudice to the aforesaid contention, upon perusal of Article 15.1 of the contract and

considering the facts and circumstances of this case, 15 days notice was not at all required to be given in the present case, as Article 15.2 does

not indicate that Arbitration Clause can be invoked only upon giving 15 days notice in writing. Counsel further submits that upon true

interpretation of Article 15 of the contract, the petitioner was only required to wait for 15 days after making the representation or a request for

clearing the remaining dues of the petitioner and thereafter upon expiry of 30 days it was open to the petitioner to invoke the arbitration clause.

Learned counsel has further submitted that the petitioner has attempted to resolve the dispute since 2015 and continued such attempt till 06.10.2018 to

bring about an amicable settlement with the respondents, but the said attempt failed and accordingly the said attempt for amicable settlement continued

for more than 30 days as required under Article 15.1 of the Contract dated 25.10.2005. In such circumstances, the petitioner again issued letter dated

06.10.2018 to the respondents for releasing the outstanding payment to the petitioner and as the petitioner did not receive any response from the

respondents, the petitioner after waiting for 15 days issued notice invoking Arbitration clause on 22.12.2018 requesting for appointment of an

Arbitrator, but the Respondents vide their letter dated 27.03.2019 refused to appoint an Arbitrator, consequently the present application has been filed

by the petitioner before this Court.

10. Counsel for the petitioner has also submitted that the point regarding stale claim or the entire outstanding payment having been received as full and

final settlement, cannot be subject matter of consideration while considering the application under Section 11(6) of the Arbitration and Conciliation Act,

1996 in view of the Section 11 (6A) which has been inserted in the aforesaid Act of 1996 by virtue of amendment Act of 2015. He further submits

that these issues are mix questions of fact and law which is required to be taken care of by the Arbitrator. However, during the course of arguments,

he does not dispute the fact that before entertaining this petition, first point which is required to be considered is as to whether the condition precedent

for invoking Article 11(6) of the Arbitration and Conciliation Act, 1996 has been satisfied or not.

11. Learned counsel for the respondents has also raised a preliminary issue regarding maintainability of the present application by referring to Article

15.1 of the agreement. He submits that the arbitration clause clearly mentions that both parties shall endeavour to settle such dispute amicably and the

attempt to bring about an amicable settlement is considered to have failed as soon as one of the parties, after reasonable attempts [which attempt shall

continue for not less than 30 (thirty) days] gives 15 days' notice thereof to the other party in writing. Learned Counsel has submitted that condition

precedent for invocation of Arbitration clause has not been satisfied by the petitioner in as much as required 15 days' notice was never given by

the petitioner and the petitioner straightway gave notice for appointment of Arbitrator. Accordingly, he submits that present application for

appointment of an Arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996 itself is not maintainable. Learned counsel also submits

that the maintainability of the present petition should be decided as a preliminary issue and if this issue is decided in favour of the respondents, then

other issues need not be gone into by this Court.

12. Learned Counsel further submits that in order to resolve the dispute between the parties, State Dispute Resolution Committee was constituted in

the light of the direction issued by the Government of India on 20.06.2013 and the applicant was also a member of the State Committee. The applicant

attended its first meeting on 11.11.2013, but did not attend the second meeting on 28.02.2014. In the second meeting, it was decided to release an

amount of Rs. 5,97,14,551/- and an amount of Rs. 5,91,42,149 was released to the petitioner on 27.03.2015 by way of full and final settlement and the

petitioner has accepted the said amount without any protest. Accordingly, there was no remaining dispute between the parties to be referred to

arbitrator. Counsel for the State has also submitted that after about five months letter dated 21.08.2015 was written for reconsideration for release of

payment, in response to which letter dated 16.12.2015 was issued to the petitioner that there is nothing payable. He further submits that no further

assurance was ever given by the respondents to the petitioner. After more than 3 ½ years since the receipt of an amount of Rs. 5,91,42,149/-, the

petitioner sent a notice dated 22.12.2018 to initiate arbitration referring to the agreement. Counsel for the respondents further submits that the claim of

the petitioner is a stale claim as the payment of Rs. 5.91 Crores and odd was accepted by the petitioner without any protest. Even if, the amount

received by the petitioner is presumed to be accepted under protest, the notice dated 22.12.2018 for appointment of arbitrator was given after expiry

of more than 3 ½ years and is accordingly time barred considering Article 137 of the Limitation Act which prescribes a limitation period of 3 years

from the date of cause of action. In the instant case, the cause of action arose on 25.03.2015.

13. The learned counsel for the respondents has relied upon the judgment passed by the Hon'ble Supreme Court in the case of being Civil Appeal

No. 967 of 2010 M/s Geo Miller and Company Pvt. Ltd. vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd paragraph no. 9 and 11, and submits

that the Hon'ble Supreme Court in the said case referred to the judgment reported in (1988) 2 SCC 338 and observed that a party cannot

postpone the accrual of the cause of action by writing reminders or sending reminders. Learned Counsel has also referred judgment reported in (2018)

17 SCC 607 paragraph no. 10 to 13 and reported in (2005) 8 SCC 614 to submit that the issues raised by the respondents can be decided in Section 11

of the Arbitration & Conciliation Act, 1996.

14. After hearing the counsel for the parties and after considering the facts and circumstances of this case, this court finds that the preliminary issue

which has been raised by the respondents regarding maintainability of the petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, is

required to be considered at the threshold.

15. Article 15 of the contract is quoted as under: -

Article 15

Resolution of Dispute

“15.1 If any dispute arises between the parties hereto during the subsistence or thereafter, in connection with the validity, interpretation,

implementation or alleged material breach of any provision of the Agreement or regarding a question, including the questions as to whether the

termination of the Agreement by one Party hereto has been legitimate, both parties hereto shall endeavour to settle such dispute amicably. The

attempt to bring about an amicable settlement is considered to have failed as soon as one of the parties hereto, after reasonable attempts [which

attempt shall continue for not less than 30(thirty days), give 15 days notice thereof to the other party in writing.

15.2 In the case of such failure the dispute shall be referred to a sole arbitrator who would be secretary/Principal Secretary Information Technology

Government of Jharkhand.

15.4 The Arbitration proceeding shall be governed by the Arbitration and Conciliation Act of 1996 as amended.

15.5 The proceedings of arbitration shall be in English language.

15.6 The arbitrator's award shall be substantiated in writing. The arbitration tribunal shall also decide on the costs of the arbitration procedure.

15.7 The parties hereto shall submit to the arbitrator's award and the award shall be enforceable as final and binding upon the parties.

16. As per the provisions of Section 11 of the Arbitration and Conciliation Act, 1996, it has been clearly provided that subject to the provisions of sub

section 6, the parties are free to agree on a procedure for appointing the arbitrator. Sub Section 6 of Section 11 of the aforesaid Act of 1996 clearly

provides that where under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, the party may

request the Chief Justice or any person or institution designated by him to take necessary measure, unless the agreement on the appointment

procedure provides other means for securing the appointment.

17. Upon perusal of Article 15 of the contract, this Court finds that as per Article 15.1 dispute arising out of the agreement is to be first taken up for

settlement amicably and the parties are under an obligation to make all endeavour to such amicable settlement. Article 15.1 also provides that attempt

to bring about an amicable settlement is considered to have failed as soon as one of the parties, after reasonable attempts, gives 15 days' notice

thereof to the other parties in writing and such reasonable attempt shall continue for not less than 30 days. Thus, from perusal of Article 15.1 of the

Contract, this Court finds that minimum 30 days' time is required to be given for reasonable attempt for amicable settlement and in order to arrive

at the conclusion that attempt for amicable settlement has failed, 15 days' notice is required to be given in writing. Article 15.2 of the said

agreement provides that in case of such failure, the dispute shall be referred to the sole Arbitrator.

18. This court finds that the condition precedent for invoking Arbitration clause as per the agreement is attempt for amicable settlement and its failure.

Attempt to bring about an amicable settlement is considered to have failed only upon giving 15 days notice to the other party in writing and the

Article further mandates for attempt of amicable settlement for at least 30 days, but no outer period has been provided. There is nothing in the Article

15 of the contract to the effect that the attempt for amicable settlement will be deemed to have failed upon expiry of certain period of attempts for such settlement.

19. This Court further finds that the dispute was initially taken up by the State Dispute Resolution Committee in which the petitioner was also party

and certain decision was taken on 28.02.2014 and admittedly on that day, the petitioner was not present in the meeting and it was decided to make

payment of Rs. 5.97 crores and odd to the petitioner. However, the petitioner was paid an amount of Rs. 5.91 crores and odd on 27.03.2015 vide

cheque dated 25.03.2015. Thereafter, the petitioner again raised his grievance vide letter dated 21.08.2015 requesting for reconsideration of

representation dated 12.02.2014 to release to PAT-FAT gap payment with further request for release of balance payment for the gap period. The

petitioner also claims to have issued series of letters for reconsideration of his grievance which included letter dated 19.03.2017, 16.06.2017 and

06.10.2018 which have been annexed along with the rejoinder to the counter affidavit, but the fact remains that no notice as contemplated under

Article 15.1 of the contract was given by the petitioner. The petitioner has made specific statement in paragraph 27 of the main petition that the

petitioner had made several efforts to amicably settle the dispute with the respondents, but the respondents did not agree and accordingly several

attempts for amicable settlement failed. This Court finds that it is an admitted fact on record that no notice as contemplated under Article 15.1 of the

Contract Act was given by the either parties.

20. This Court further finds that condition precedent for invoking arbitration clause under Article 15.2 is failure of amicable settlement which stands

failed only upon giving 15 days' notice. Admittedly, in the instant case, 15 days' notice has not been given in terms of Article 15.1 of the

contract. This Court finds that in absence of 15 days' notice as contemplated under Article 15 of the Contract, the invocation of Arbitration clause

as per Article 15.2 of the contract was itself premature and accordingly the present application of appointment of an Arbitrator under section 11 (6) of

the Arbitration and Conciliation Act, 1996 is not maintainable, as the petitioner has failed to act as per the agreed procedure.

21. The learned Counsel for the petitioner has also argued that the respondents in their counter affidavit have not taken this plea of maintainability and

such plea cannot be taken by oral argument and has also referred to the judgment passed by the Hon'ble Supreme Court in the case of Mohinder

Singh Gill (supra) to submit that reasons given in the impugned letter/order cannot be supplemented by the counter affidavit and in the present case,

same is sought to be supplemented by oral argument. This Court finds that in an application under section 11(6) of aforesaid Act of 1996, there is no

impugned order so as to have any occasion for the respondents to supplement the same by filing counter affidavit or by oral arguments. Accordingly,

the aforesaid judgement relied upon by the respondents does not apply to the facts and circumstances of this case.

22. This Court is of the considered view that in an application under Section 11 (6) of the aforesaid Act of 1996, there is no impugned letter as such

and only upon failure of the party to appoint an arbitrator as per the agreed procedure, Article 11 (6) of the Arbitration and Conciliation Act 1996 can

be invoked. Thus, the point as to whether the agreed procedure has been followed or not touches upon the jurisdiction of this court to entertain an

application under section 11(6) of the aforesaid Act of 1996.

23. This court is of the considered view that it is for the petitioner to make out a case for appointment of an Arbitrator and satisfy this court that the

petitioner has undertaken the procedure for appointment of an Arbitrator as per the agreed terms and upon such satisfaction, this Court in exercise of

power conferred under Article 11 (6) of the Arbitration and Conciliation Act, 1996 shall appoint an arbitrator. The petitioner in the main petition has

itself given a complete go by to the required 15 days notice by indicating that since more than 30 days have expired, the amicable settlement

stands failed. In such circumstance, this Court finds that the petitioner has not been able to make out a case for appointment of an Arbitrator as

required 15 days notice as contemplated under Article 15 of the Contract, has admittedly not been given by either party. This Court is of the

considered view that such plea of maintainability of the case being a jurisdictional issue could have been orally taken by the respondents in view of the

specific case as made out by the petitioner in the main petition itself regarding 15 days notice as contemplated under Article 15 of the Contract.

Accordingly, the argument of the petitioner that such objection cannot be taken by way of oral argument, is hereby rejected.

24. In view of the aforesaid findings, the present application is hereby dismissed as not maintainable. As this court has decided the case on the point of

maintainability, the other points raised by the parties need not be decided.