

(2014) 11 DEL CK 0056

Delhi High Court

Case No: ARB.P. 527/2014

Utkal Galvanizers Ltd.

APPELLANT

Vs

Power Grid Corporation of India
Ltd.

RESPONDENT

Date of Decision: Nov. 13, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(6), 4

Citation: (2015) 1 ARBLR 80

Hon'ble Judges: Deepa Sharma, J

Bench: Single Bench

Advocate: Jayant K. Mehta and Shovan Mishra, Advocate for the Appellant; K.K. Rai, Senior Advocate and P.K. Mishra, Advocate for the Respondent

Judgement

Deepa Sharma, J.

The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for the relief that the appointment of Justice K.S. Gupta (Retd.) , the retired nominee Arbitrator, appointed by the petitioner, be upheld. The other request, which has been made by the petitioner in the present petition, is that since the respondent has already nominated his Arbitrator, pursuant to the arbitration clause and the petitioner has also appointed his nominee Arbitrator and since both the nominated arbitrators have failed to reach the consensus to appoint a Presiding Arbitrator, the Court should appoint a Presiding Arbitrator. A request has also been made to quash the notice dated 04.09.2014 of the respondent, whereby the respondent had appointed his nominated Arbitrator as a sole Arbitrator.

2. The brief facts of this case are that the petitioner and the respondent had entered into a contract which was subsequently terminated by the respondent and the respondent had raised a demand of sum of Rs. 48,05,76,414/- vide their letter dated 13.02.2014. The petitioner had refuted the said liability vide their letter dated

06.03.2014. The respondent, thereafter, invoked the arbitration clause 39(2) of the agreement vide their letter dated 14.05.2014 and informed the petitioner that they had nominated Justice S.N. Aggarwal (Retd.) as their Arbitrator and called upon the petitioner to appoint its nominee Arbitrator. The arbitration clause had required the petitioner to nominate their Arbitrator within 60 days of the receipt of the notice from the respondent. However, instead of nominating their Arbitrator, the petitioner sought extension of time till 01.08.2014 on the ground that they were unable to nominate their Arbitrator due to unforeseen circumstances vide their letter dated 20.05.2014. Despite that the petitioner did not nominate his Arbitrator and wrote a letter dated 31.07.2014 seeking further time of 30 days for nominating their Arbitrator.

3. The case of the petitioner is that although they had written a letter dated 31.07.2014 seeking further extension of time, but, they had nominated Justice K.S. Gupta (Retd.) as their Arbitrator even before 02.08.2014 and also informed the respondent of this nomination vide their letter dated 02.08.2014. It is contended that despite that the respondent vide its letter dated 06.08.2014 appointed their nominee as the sole Arbitrator on the ground that the petitioner had failed to nominate its Arbitrator within 60 days in terms of clause 39(2) of the agreement. A protest letter dated 13.08.2014 was sent by the petitioner to Justice S.N. Aggarwal (Retd.) , nominated Arbitrator of the respondent and also to the respondent asking them to accept the nomination of their Arbitrator. The petitioner had received a letter dated 24.08.2014 from Justice S.N. Aggarwal (Retd.) , wherein it was disclosed that he had a meeting on 22.08.2014 with Justice K.S. Gupta (Retd.) , nominated Arbitrator of the petitioner, but, since they could not reach to any consensus over the issue of appointment of a Presiding Arbitrator, the meeting was adjourned. In the same letter, Justice S.N. Aggarwal (Retd.) has also informed the petitioner that he had received a letter of respondent dated 06.08.2014 on 23.08.2014, whereby he had been asked to act as a sole Arbitrator. The learned Arbitrator vide its written communication fixed the date of hearing before him.

4. It is also pleaded by the petitioner that the notice of the respondent dated 14.05.2014 was actually received by them only on 20.05.2014 and, therefore, 60 days for appointment of an Arbitrator be counted from that date and those 60 days thus expired only on 20.07.2014. It is further pleaded that the petitioner understood by the silence of the respondent on their letter seeking extension of time till 01.08.2014 that the respondent had conceded to their request for extension of time till 01.08.2014. It is also contended that the respondents have now lost their right to object the nomination of the Arbitrator by the petitioner. Since the Arbitrator has been validly appointed by the petitioner and since both the nominated Arbitrators in the meeting for appointment of a principal Arbitrator had failed to reach a consensus, it is prayed that the Court should appoint a third Arbitrator declaring that the petitioner had legally nominated their Arbitrator and also quash the appointment of the nominated Arbitrator as a sole Arbitrator.

5. It is further argued by the learned counsel for the petitioner that the right of a party to appoint an Arbitrator does not automatically cease, but continues till the application under Section 11(6) of the Act is made and, therefore, it cannot be said that the petitioner had since nominated its Arbitrator after 60 days, his nomination is invalid. Reliance has been placed on [Bharat Sanchar Nigam Ltd. and Another Vs. Dhanurdhar Champatiray.](#)

6. Learned counsel for the respondent has not filed any reply, but has argued the matter. It is argued that the present petition under Section 11(6) of the Act is not maintainable. It is submitted that under Section 11(6), a petition can be filed against a defaulting party and a defaulting party, without resorting to the terms of the agreement, cannot move the Court under Section 11(6) of the Act. It is also submitted that the petitioner itself is a guilty party. It is submitted that as per arbitration clause 39, a procedure has been prescribed and the petitioner has not adhered to the said procedure and, therefore, cannot invoke the jurisdiction of this Court under Section 11(6) of the Act. Reliance has been placed on [India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.,](#) [National Highways Authority of India and Another Vs. Bumiheway DDB Ltd. \(JV\) and Others,](#) and [Indo Pacific Aviation Private Ltd. Vs. Pawan Hans Helicopters Limited.](#)

7. It is argued that in all the above-mentioned cases, it has been held that whenever an arbitration clause has been invoked and the other party has defaulted in following the procedure of the arbitration clause, the aggrieved party can approach the Court. It is argued that in the present case, the defaulting party, i.e., the party, who has failed to comply with the terms and conditions of the arbitral clause, is the petitioner and the defaulting party cannot approach the Court.

8. I have given due consideration to the arguments of the parties and also the relevant case laws relied upon.

9. The dispute in this case revolves around the interpretation of clause 39.2 which governs the arbitration agreement between the parties. The said clause is reproduced as under:-

"Clause 39.2- The arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Employer and the third to be appointed by both the arbitrators in accordance with the Indian Arbitration Act. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration."

10. This arbitration clause has two parts. One part lays down the procedure for appointment of the Arbitrator. It requires that the arbitration shall be conducted by three Arbitrators. Both the parties, contractor and the employer has to first nominate their Arbitrator and thereafter both the Arbitrators, so appointed, has to

appoint a third Arbitrator. The clause also requires that both the parties shall nominate their Arbitrator within 60 days after receipt of a notice from the party invoking the arbitration clause. The second part of this arbitration clause prescribes the procedure to be followed by the parties in case either of the parties fail to appoint an Arbitrator within 60 days. The clause prescribes that in such eventuality, the Arbitrator appointed by the party invoking the arbitration clause shall become the sole Arbitrator to conduct the arbitration.

From the bare reading of this clause, it is apparent that the clause itself prescribes a mode of appointment of an Arbitrator in case of default of either of the parties to nominate its Arbitrator for constitution of the Arbitral Tribunal, within 60 days.

11. In the present case, the admitted facts clearly show that the respondent invoked the arbitration clause and nominated its Arbitrator and the petitioner did not nominate his Arbitrator within 60 days, the period prescribed in the clause. The contention of the petitioner is that on receiving a letter from the respondent invoking the arbitration clause, they wrote a letter dated 20.05.2014 and asked the respondent to give them time up to 01.08.2014 for appointment of the Arbitrator. It is pertinent to mention here that the petitioner did not appoint their Arbitrator even by 01.08.2014, the time they sought from respondent for appointment of the Arbitrator. Their contention that they did so is contrary to their own documents placed on record. Their letter dated 31.07.2014 clearly shows that till 31.07.2014, they had not nominated any Arbitrator. Vide this letter, they had sought further time of 30 days from the respondent for appointment of the Arbitrator. The letter dated 13.08.2014 of the petitioner clearly shows that a letter for appointment of the Arbitrator dated 02.08.2014 was signed by their Director only on 07.08.2014. Vide letter dated 02.08.2014 the petitioner had informed the respondent that they had appointed Justice K.S. Gupta (Retd.) as the nominee Arbitrator. Since the letter dated 02.08.2014, appointing the Arbitrator by the petitioner, was executed only on 07.08.2014, it cannot be said that the petitioner had nominated his Arbitrator before 07.08.2014. Even if we presume that the respondent by remaining silent on the letter of the petitioner for seeking time till 01.08.2014 to appoint an Arbitrator amounts to consent or acquiescing to the request, still the petitioners were bound to nominate their Arbitrator atleast by 01.08.2014. It is also apparent from the letter of the respondent dated 06.08.2014 that they turned down the request of the petitioner in its letter dated 31.07.2014 for grant of further time for nomination of the Arbitrator and pursuant to second part of the arbitration clause appointed their nominated Arbitrator as the sole Arbitrator. The respondent had done so before the petitioner appointed its arbitrator. From these facts, it is apparent that while the respondent had acted as per the procedure prescribed under the arbitration clause binding the parties, it was the petitioner, who had failed to comply the procedure under the arbitration clause. This clearly shows that the petitioner is a defaulting party.

12. The petitioner has also raised a contention that in view of the findings in Bharat Sanchar Nigam Limited (supra), he could appoint an Arbitrator at any time before the filing of the present case and since he has done so, his appointment of the Arbitrator is valid and the Court should appoint the third Arbitrator. It is argued on behalf of the respondent that the facts in this case and the facts in Bharat Sanchar Nigam Limited (supra) are entirely different and the findings of that case is not applicable on the facts of this case, especially when the petitioner himself is a defaulting party. On this point, I have given careful consideration to the rival contention and has also gone through the case law relied upon by the petitioner. From the facts of the case supra, it is apparent that it was the respondent Dhanurdhar Champatiray who had invoked the arbitration clause and when the appellant, i.e., BSNL failed to appoint the Arbitrator within the stipulated period, approached the Court under Section 11(6) of the Act for appointment of the Arbitrator. The contention of BSNL was that they had already appointed an Arbitrator before the respondent Dhanurdhar Champatiray could approach the Court under Section 11(6) of the Act. Herein in this case, the petitioner is the defaulting party, who had failed to appoint/nominate his Arbitrator in terms of the arbitration clause binding both the parties. He could not take advantage of his own wrong. In view of this, the ratio laid down by the Supreme Court in Bharat Sanchar Nigam Limited (supra) has no application to the facts of this case.

13. An arbitration agreement is an independent agreement and is binding on both the parties. It is a settled law that neither of the parties can unilaterally change the terms and conditions of any agreement. The petitioner under this agreement was bound to nominate its Arbitrator within 60 days, but admittedly, he did not do so for some reason given by him in his letter dated 20.05.2014 and requested the respondent to give him the time to nominate his Arbitrator till 01.08.2014. Even if I say that the silence on the part of the respondent to this request of the petitioner amounts to consent and grant of time to petitioner for nominating the Arbitrator till 01.08.2014, still, admittedly, the petitioner did not appoint the Arbitrator within that extended period. There is therefore a complete violation of procedure of Arbitration clause by the petitioner. The contention of the petitioner that the respondent has waived his right to object in view of Section 4 of the Act and, therefore, even if the petitioners had appointed an Arbitrator beyond 01.08.2014, still the respondent cannot object to it, has no merit in it because the petitioner had failed to appoint the Arbitrator even within the time it asked for. The contention of the petitioner that vide its letter dated 31.07.2014 the petitioner had further asked for the extension of time by 30 days for nomination of his Arbitrator and since the respondent had not objected to the earlier extension of time, so they bona fide believed that the respondent would not object to the further extension of time but still as an abundant caution within 3 days of their writing the letter dated 31.07.2014, they nominated their Arbitrator and informed the respondent vide letter dated 02.08.2014. These arguments of petitioner are contrary to record. Firstly, because

when the petitioner did not appoint the Arbitrator by 01.08.2014 and again wrote a letter dated 31.07.2014, the respondent vide their letter dated 06.08.2014 did not agree to any further extension of time and in terms of arbitration clause appointed their nominated Arbitrator as a sole Arbitrator. It is pertinent to mention here that the sole Arbitrator was appointed by the respondent vide their letter dated 06.08.2014, before even the petitioner had informed respondent about nomination of their Arbitrator. Although the petitioner has contended that vide their letter dated 02.08.2014 they informed the respondent of appointment of their nominated Arbitrator, but, in their own letter dated 13.08.2014, they have clearly stated that the said letter dated 02.08.2014 was sent by them on 07.08.2014 as their Director was out of station and could not sign the letter earlier.

14. The relevant portion of the said letter is reproduced as under:-

"The said letter dated 02.08.2014 was sent by us on 07.08.2014 as our Director was out of station and could not sign the letter earlier. You have also received our letter dated 02.08.2014 after you have issued the letter dated 06.08.2014 and before we received your letter dated 06.08.2014."

If the petitioner is himself a defaulting party, he cannot move the Court under Section 11(6) of the Act. Provisions under Section 11(6) of the Act can be invoked against a defaulting party and not by a defaulting party.

15. In case of National Highways Authority of India (supra) , the Supreme Court has held as under:-

"The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong."

16. In the case of India Household and Healthcare (supra) , the Supreme Court, after discussing various case laws, has held as under:-

"An application for appointment of an arbitrator, therefore, is not maintainable unless the procedure and mechanism agreed to by and between the parties is complied with."

17. In Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another , the Supreme Court has held as under:-

"An application under sub-section (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 falls to discharge such function, the aggrieved party can approach the Chief Justice for appointment of Arbitrator."

Thus, the ratio of these judgments clearly stipulate that the parties are required to act as per procedure agreed upon by them for appointment of an Arbitrator and if a party defaults, the aggrieved party can move to the Court against the defaulting party.

18. In the present case, as discussed above, it was the petitioner who had failed to follow the procedure of appointment of Arbitrator and thus is a defaulting party. Since the petitioner had failed to appoint its nominee Arbitrator in terms of Arbitration agreement, it cannot be said that the appointment of nominee Arbitrator by him is as per the agreed procedure.

19. The another contention of the petitioner is that since the nominated Arbitrators had already met on 22.08.2014 for appointment of a principal arbitrator, but could not reach to any consensus, therefore, this Court should appoint a third Arbitrator so that the Arbitral Tribunal be completed. This argument of the petitioner, as discussed above, has no merit in it and their meeting on 22.08.2014 when they were unaware that pursuant to arbitration clause, Justice S.N. Aggarwal (Retd.) had been appointed as a sole Arbitrator, is of no consequence.

20. Part II of Clause 39(2) clearly stipulates that if either of the parties fails to appoint their Arbitrator, the nominated Arbitrator appointed by one party shall act as a sole Arbitrator. In the present case since the respondent had invoked the arbitration clause, and petitioner had failed to nominate his Arbitrator in terms of agreement, the respondent has rightly vide letter dated 06.08.2014 nominated its Arbitrator as a sole Arbitrator. This Court under Section 11(6) of the Act therefore has no jurisdiction to appoint any other person as an Arbitrator.

21. In view of the above, it is apparent that the petition has no merit and the same is liable to be dismissed.

22. The petition is hereby dismissed.