

(1998) 11 GAU CK 0025

Gauhati High Court (Agartala Bench)

Case No: Arbitration Reference No. 5 of 1998

Nabin Designers and
Constructors Pvt. Ltd.

APPELLANT

Vs

National Project Construction
Corpn. Ltd.

RESPONDENT

Date of Decision: Nov. 5, 1998

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(1), 11(2), 11(3), 11(4)

Citation: (1999) 2 GLT 387

Hon'ble Judges: A.K. Patnaik, J

Bench: Single Bench

Advocate: S. Roy, for the Appellant; P.K. Biswas and H.K. Bhowmick, for the Respondent

Judgement

A.K. Patnaik, J.

This is an application u/s 11 of the Arbitration and Conciliation Act, 1996 for appointment of Sole Arbitrator.

2. The brief facts as stated in the application are that an agreement was executed between the Petitioner as the contractor and the opposite party as the construction agency on 22.1.89 whereunder the Petitioner was to construct the main administrative building at the Headquarters complex of the Tripura Tribal Areas Autonomous District Council, the owner of the said construction. The Petitioner on 27.5.94 submitted a claim of Rs. 19,79,429.00 to the opposite party as detailed hereinbelow:

But the opposite party in its letter dated 7.6.94 rejected the said claim of the Petitioner. Since a dispute arose between the Petitioner and the opposite party, a request was made by the Petitioner to the opposite party on 10.6.94 to appoint a sole arbitrator in terms of the agreement for the purpose of adjudication of the said dispute. But inspite of repeated reminders, the opposite party did not appoint the

sole arbitrator. Hence this petition to the Chief Justice of this Court for appointment of a sole arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act").

3. Mr. S. Roy learned Counsel for the Petitioner submitted that no counter-affidavit has been filed by the opposite party. Hence, admittedly there was a dispute between the parties and the said dispute had to be resolved by arbitration in accordance with Clause-25 of the General Conditions of Contract between the Petitioner and the opposite party. But despite request made by the Petitioner in its letter dated 10.6.94, the opposite party did not appoint the sole arbitrator. He relied on the provisions of Clause (a) Sub-section (4) of Section 11 of the 1996 Act to the effect that where party fails to appoint an arbitrator within 30 days from the date of request to do so from the other party, the appointment shall be made by the Chief Justice or any person or institution designated by him upon request of a party. According to Mr. Roy, since the learned Single Judge of this Court has been designated by the Chief Justice to appoint the sole arbitrator u/s 11 of the 1996 Act, an order may be passed for appointing the sole arbitrator to arbitrate the dispute between the parties.

4. Mr. P.K. Biswas, learned Counsel appearing for the opposite party, on the other hand, pointed out that under the said Clause-25 of the General Conditions of Contract, the dispute arising out of the agreement was to be referred to the sole arbitration of the person appointed by the Chairman and Managing Director of the Corporation acting as such at the time of dispute from amongst the names of arbitrators suggested by the owner. Accordingly, by a letter dated 4.6.96, the opposite party requested the owner of the construction, namely, Tripura Tribal Areas Autonomous District Council to name the sole arbitrator as per the said Clause 25 of the General Conditions of Contract and the Tripura Tribal Areas Autonomous District Council thereafter requested the Engineer in Chief, P.W.D., Tripura by letter dated 25.6.96 to name the arbitrator to whom the dispute between the Petitioner and the opposite party should be referred, but the Engineer-in-Chief, P.W.D. has not yet given the name of the arbitrator. In these circumstances, the opposite party has appointed Mr. R.C. Jain, DGM of the opposite party, working at Khuga Dam, Churachandpur, Imphal to act as an arbitrator.

5. By order dated 22.10.98, the Court requested Mr. U.B. Saha, learned Government Advocate, Tripura to obtain instruction as to whether any Engineer in the rank of Chief Engineer or Additional Chief Engineer of the P.W.D., Tripura could be spared by the said Department to act as an arbitrator and whether such person, if appointed as arbitrator can complete the arbitration proceeding and make award within the period of four months as prescribed by the 1996 Act. When the matter came up on 4.11.98, Mr. Saha in the first instance submitted that although he sought for such instruction from the Secretary, P.W.D., Govt. of Tripura, he had not yet received the said instruction. But soon after the Court rose on 4.11.98, Mr. Saha

filed in the Court a letter dated 28/30.10.98 from the Engineer-in-Chief, P.W.D. Tripura to the effect that no Chief Engineer could be spared as requested for and that die Public Works Department did not have Additional Chief Engineer at present.

6. Sub-sections (1) to (8) of Section 11 of the 1996 Act are quoted hereinbelow:

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) Failing any agreement referred to in Sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in Sub-section (3) applies and.

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(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) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to.

(a) any 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.

7. Sub-section (2) of Section 11 of the 1996 Act, quoted above, would show that subject to Sub-section (6), the parties may agree on a procedure for appointing the arbitrator or arbitrators and Sub-section (6) further provides that where under an appointment procedure agreed upon by the parties, an arbitrator cannot be appointed, the Chief Justice or any person or institution designated by him, may appoint an arbitrator after having due regard to the qualifications of the required arbitrator and other considerations as indicated in Sub-section (8) of Section 11 of the 1996 Act.

8. In the instant case, the procedure for appointment of sole arbitrator had been agreed upon by the parties in Clause-25 of the General Conditions of Contract as per the said procedure the Chairman and the Managing Director of the opposite party had to appoint the arbitrator from amongst the names of arbitrators suggested by the owner. But the owner of the construction, namely, the Tripura Tribal Areas Autonomous District Council desired that the arbitrator named by the Engineer-in-Chief of the P.W.D., Tripura from amongst any Chief Engineer or Additional Chief Engineer, P.W.D. should be appointed as arbitrator by the Chairman and the Managing-Director of the Opposite party. But it is clear from the letter dated 28/30.10.98 of the Engineer-in-Chief, P.W.D., Tripura that no Chief Engineer can be spared for such arbitration and no Additional Chief Engineer of the said Department is available at present. In these circumstances, the Court has to appoint an arbitrator keeping in mind the qualifications and considerations mentioned in Sub-section (8) of Section 11 of the 1996 Act.

9. It appears that Shri N.K. Dutta had been working as Engineer-in-Chief, P.W.D., Government of Tripura, and has retired in the meanwhile, and that he has experience as an arbitrator and has the required knowledge and integrity to act as an arbitrator in the present case.

10. In the result, I direct that Sri N.K. Dutta, retired Engineer-in-Chief, P.W.D., Government of Tripura will act as Arbitrator in the dispute between the Petitioner and the opposite party.

11. An authenticated copy of this judgment and order be sent to Sri N.K. Dutta at the addressed to be furnished by the Petitioner and Sri Dutta will make the award within four months as prescribed by the 1996 Act.

The reference is closed.