

**(2010) 09 JH CK 0076**

**Jharkhand High Court**

**Case No:** Arbitration Application No. 20 of 2007

Standard Mercantile Company  
(Mining Division) Pvt. Ltd.

APPELLANT

Vs

Steel Authority of India Ltd.

RESPONDENT

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**Date of Decision:** Sept. 9, 2010

**Acts Referred:**

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

**Citation:** AIR 2010 Jhar 136

**Hon'ble Judges:** Gyan Sudha Mishra, C.J

**Bench:** Single Bench

**Final Decision:** Allowed

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**Judgement**

@JUDGMENTTAG-ORDER

Gyan Sudha Misra, C.J.

This is an application for appointment of an arbitrator u/s 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Act") primarily on the ground that although there is a Clause for arbitration in the agreement for appointment of an arbitration in the case of existence of a dispute under Clause 11.23 of the agreement, yet this Court should exercise its jurisdiction u/s 11(6) of the Act by appointing an arbitrator as Clause 11.23 of the agreement has not been followed by the Respondents in terms of the agreement.

2. A dispute admittedly has arisen between the Petitioner-applicant (M/s. Standard Mercantile Company) and the Respondent- Steel Authority of India Ltd. (in short "SAIL"), as according to the Respondent-SAIL, it had placed purchase order for 24000 Metric Tonne of High Silica Sand at the rate of Rs. 301.16 per Metric Tonne and the applicant although made the supply for some time, it failed to complete the supply in terms of the purchase order Consequently, the Respondent-SAIL suffered a loss "and Respondents : had to make purchase from another supplier. Since the

Respondents suffered loss and de-lay in production on account of non supply, a dispute arose which was not addressed by the applicant the Managing Director of the Respondent-Company appointed an arbitrator in terms of Clause 11.23 which clearly declared that in case any claims, disputes or differences of any kind arose between the parties on any ground whatsoever, the same shall be referred by the parties thereto for the decision by a Sole arbitrator to be appointed as per the provisions enumerated therein Clause 11.23 envisages that the notice regarding the invoking of the Arbitration Clause was to be served by the parties there to by registered post at their address given in the contract and the matter in question, dispute, claim of differences other than the expected matter in respect of contract was to be submitted to the arbitrator for adjudication and decision to a sole arbitrator to be appointed by the Managing Director, Bokaro Steel Plant, Steel Authority of India Ltd. The agreement further envisaged that the sole arbitrator appointed shall from the time of his appointment and throughout the arbitration proceedings, would decide the dispute without any delay.

This was the provision in sum and substance incorporated in the agreement in Clause-11.23.

3. The Respondent-SAIL in view of Clause 11.23 of the agreement, appointed an arbitrator and the AGM (Law) of SAIL sent a letter by registered post to the sole arbitrator, namely, Shri Shitanshu Prasad, DGM (Education) at Bokaro Steel Plant, Bokaro Steel City, indicating that the same was an invocation of arbitration clause, in view of the purchase orders dated 15-9-2003 and 16-9-2004. The applicant submitted to the jurisdiction of the arbitrator and the arbitrator initiated proceeding. During pendency of the same, the applicant-Supplier filed this application for appointment of an arbitrator under Clause 11(6) of the Arbitration & Conciliation Act, 1996, which is the instant application for appointment of an arbitrator.

4. Learned Counsel for the applicant submitted that the Respondent-SAIL which was a signatory to the agreement between the parties, in view of the purchase order did not appoint an arbitrator in terms of Clause 11.23 of the agreement as no notice was served on the applicant-Petitioner invoking Clause 11.23 of the agreement. It was, therefore, submitted that as no notice was served on the applicant in regard to invocation of Clause 11.23 of the agreement, the appointment made by the Respondents cannot be treated to be an appointment in consonance with Clause 11.23 of the agreement.

It was further submitted that as the Respondents failed to appoint an arbitrator in terms of Clause 11.23 of the agreement this Court should exercise its jurisdiction and appoint a new arbitrator in view of Section 11(6) of the Act.

Counsel for the applicant still further submitted that the appointment of the arbitrator which is shown to have been appointed by the Managing Director was, in

fact, not an appointment by the Managing Director as it was the letter of AGM (Law Officer) of the Company, who had issued a letter to the arbitrator communicating him that he had been appointed as an arbitrator as there is no order on record issued by the Managing Director for appointment of an arbitrator, the communication sent by Law Officer of the Company cannot be treated to be an appointment of the arbitrator by the Managing Director, as a result of which the appointment ought not to be held as an appointment of an arbitrator under the procedure laid down under Clause 11.23 of the agreement.

5. Learned Counsel for the Respondent-SAIL instantly countered the submissions of the counsel for the applicant and stated that a dispute arose between the parties and as the applicant-Supplier failed to make the supply in terms of the purchase order and put the Respondent-SAIL to a loss, he was informed that the Arbitration Clause had to be made effective and the same is clearly reflected in the letter by which the arbitrator had been appointed. Thereafter the applicant duly submitted to the jurisdiction and participated in the proceeding but during pendency of this proceeding filed an application for appointment of a new arbitrator at the instance of the Court in terms of Section 11(6) of the Act, 1996. It was, therefore, submitted that it is not a case of failure on the part of the Respondents by not appointing an arbitrator so as to offer a chance to the applicant to file an application for taking recourse to Section 11(6) of the Act, 1996, so that the Court can appoint an arbitrator. Since the Managing Director of the Respondent-Company had duly appointed an arbitrator and the applicant had duly submitted to the jurisdiction of the arbitrator by participating in the proceeding, he cannot be legally permitted to turn around and take recourse to the provisions of Section 11(6) of the Arbitration & Conciliation Act, 1996 by requesting the Court to appoint a new arbitrator.

6. Having weighed the implication of the argument advanced by the counsel for the contesting parties, it is clear that a specific procedure has been laid down in the agreement vide Clause 11.23, laying down therein that in case of existence of a dispute between the parties, it shall be the sole discretion of the Managing Director to appoint an arbitrator and the applicant had duly submitted to this Clause by accepting the agreement. The Managing Director of the Respondent-Company had duly exercised his discretion by appointing an arbitrator who also started discharging his function in which the applicant duly participated. Thus the applicant having duly participated in the proceeding, it cannot be held to be legally permissible to raise a dispute alleging want of notice in regard to appointment of an arbitrator.

7. The sole object of notice to a party is clearly to apprise him of the action that is to be taken for and against him, whether it be Arbitration & Conciliation Act or it be some other provisions under any Act but whether a party can raise objection by taking plea that notice was not served on him, will have to be raised at the first instance so that the preliminary issue as to whether the proceeding should be

allowed to continue or not, can be addressed at the threshold. If any party raising a plea of not having knowledge of the proceeding, including an arbitration proceeding, cannot be permitted to use a double edged weapon, meaning thereby that he cannot be permitted to participate in the proceeding, contest the matter and subsequently raise a plea that he was not given a notice. The very purpose of serving a notice on any party is to save or protect him from any prejudice that might be caused against him for want of notice as also to offer opportunity of hearing to him and prevent the passing of an ex parte order. But, if any party not only is aware of the proceeding but is also duly participating in it, yet does not raise any objection regarding non-service of notice and contested the matter in full-fledged manner, he cannot be permitted to take defence at a subsequent and highly belated stage, that his interest has been affected and has been prejudiced for want of a legal notice.

8. Thus, any party taking the shelter of non- service of notice will have to establish that his interest had been prejudiced in any manner for want of a notice as also the fact that he had not been served with the notice at the earliest instance and not after he duly participated and contested the matter. The case of the applicant surely does not lie within this parameter as the applicant in the first place was duly aware that a dispute has arisen between the parties and an arbitrator has been appointed to whose jurisdiction he had duly submitted and after having participated in the proceeding, he filed an application before the High Court for appointment of a New" arbitrator in place of the arbitrator, who had been appointed in terms of the agreement by the Managing Director.

9. Insofar as the argument advanced by the counsel that the order of the Managing Director appointing an arbitrator ought not to be treated as order appointing an arbitrator by the Managing Director since the communication appointing arbitrator was only by the Law Officer and not through the Managing Director is also without substance as the Managing Director obviously has to act through his Law Officer and there is no affidavit or even a letter of the Managing Director that he had not appointed the arbitrator as per his choice. Therefore, the communication that was sent by the Law Officer appointing an arbitrator will have to be treated as an appointment through the Managing Director and it is a well acknowledged position that any head of the institution, who is functioning in his official capacity, operates through his subordinates and the competent authorities who are the legatee to act on behalf of the legal Head and authoritative functionary. Thus, this argument, too, does not come to the rescue of the Petitioner in any manner.

10. I further find substance in the argument advanced by the counsel for the Respondent-Company that this is not a case where there has been a violation on the part of the Respondents, not to have acted in terms of the agreement by not appointing an arbitrator, so as to invoke Section 11(6) of the Arbitration & Conciliation Act, 1996. It was, therefore, not open for the applicant-Supplier to approach this Court for appointment of a new arbitrator in order to get over the

agreement which clearly stipulates that in the event of any dispute or difference arising between the parties, it is the Managing Director who will appoint a sole arbitrator for adjudication of such dispute.

11. However, in spite of the hurdle and limitation in the way of the applicant for appointment of a new arbitrator in place of the existing one the Respondent Company through the Managing Director has offered to appoint a new arbitrator in place of the previous one and thus the parties obviously has arrived at a mutual settlement, at least, insofar as appointment of a new arbitrator in place of the previous arbitrator is concerned.

12. Thus the applicant although has failed to make out a case for appointment of an arbitrator by the Court u/s 11(6) of the Arbitration & Conciliation Act, 1996, yet this Court, in the interest of justice, prefers not to come in the way of the parties arriving at a mutual settlement and since they have mutually agreed to appoint a new arbitrator in place of the previous arbitrator, the Respondents have now offered three fresh names, out of which one has been agreed to be appointed by the Managing Director. The first name in the list is Sri Kamal Nayan, Deputy General Manager (Corporate Social Responsibilities), SAIL, Bokaro Steel Plant, Bokaro Steel City.

13. Since the Managing Director through his counsel suggested the aforesaid name, he is appointed an arbitrator in place of the previous arbitrator to adjudicate the dispute between the parties. As the Managing Director is the exclusive authority in terms of the agreement to appoint a sole arbitrator, the name of Sri Kamal Nayan, Deputy General Manager (Corporate Social Responsibilities), SAIL, Bokaro Steel Plant, Bokaro is accepted by this Court also for adjudication of the dispute and difference between the parties. He may accordingly be communicated to start the proceeding.

14. The application, accordingly, stands disposed of in view of the mutual settlement between the contesting parties.