

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 2713 OF 2012
UNION OF INDIA - Appellant

Versus

BHIKARICHARAN SAHU - Respondent

O R D E R

The present appeal has been filed against the judgment and order dated 30th

July, 2010 whereby the learned Chief Justice of the High Court of Orissa has struck down Clause 64(3) (a) (ii) of the Standard General Conditions of the Contract formulated by the Indian Railways on the ground that the concept of appointment of independent arbitrator to arbitrate the disputes between the parties cannot be taken away by entering into an agreement. The Learned Chief Justice had appointed one retired District Judge as the sole arbitrator to decide the disputes between the parties and pass the award.

Briefly stated, the facts giving rise to the present appeal are as follows:-

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Pursuant to the tender issued by the Railway for the work of the execution of compound wall, Earth work and other ancillary works for improvement of 6.9 acres in Rail Vihar at Chandrasekharpur, the respondent submitted his tender on 31.08.2001 which was accepted on 19.11.2001 and work order for a sum of Rs. 11,10,710/- was issued. The work was to be completed by 18.02.2002, i.e. within three months. However, extension was granted. The respondent was paid an amount of Rs. 7,28,010/- and the final bill was yet to be settled. The respondent made a request on 28.01.2009 to the General Manager, East Coast Railways, Bhubaneswar to settle the claims and also to appoint an arbitrator. Vide letter dated 28.02.2009, the Senior ADJM and Deputy Secretary (PG) on behalf of the General Manager (Arbitration), East Coast Railway, Bhubaneswar intimated the respondent that the papers are being looked into. As the appellant had not given the names of the selected nominees for appointment of arbitrators within 60 days as provided in Clause 64(3) (a) (ii) of the Standard General Conditions of the Contract, the respondent approached the High Court by filing an application under Section 11(6) of the Arbitration and Reconciliation Act, 1996 (hereinafter referred to as "the Act").

The said application was filed on 13.04.2009. On 19.05.2009, the General Manager, Arbitration, East Coast, Railways Bhubaneswar

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sent a panel of four names for appointment of arbitrator from which at least two names were to be selected but the respondent did not reply. The learned Chief Justice, by the impugned order had not only appointed an independent arbitrator but has also struck down the conditions regarding appointment of arbitrator contained in Clause 64(3) (a) (ii) in the General terms and conditions.

We have heard Mr. Ashok Panda, learned senior counsel for the appellant and Mr. Suresh Chandra Tripathi, learned counsel for the respondent.

Mr. Ashok Panda, learned counsel for the appellant submitted that the learned Chief Justice was not justified in striking down Clause 64 (3) (a) (ii) of the General Conditions of Contract i.e., the contract for arbitration only on the ground that concept of appointing independent arbitrator to arbitrate the dispute between the parties cannot be taken away by entering into an agreement. In support of his submission, he has relied upon the following decisions:-

1. Punj Llyod Ltd. vs. Petronet MHB Ltd. [(2006) 2 SCC 638]

2. Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd. [(2008) 10 SCC

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3. North Eastern Railway vs. Tripple Engg. Works [(2014) 9
SCC 288]

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4. ACE Pipeline Contracts (P) Ltd. vs. Bharat Petroleum
Corporn. Ltd. [(2007) 5 SCC 304]

Learned counsel for the respondent, however, submitted that if the appellant has not appointed the arbitrator within the stipulated period, it was open for the respondent to approach the High Court under Section 11 of the Act for seeking appointment of an arbitrator and in support thereof, he had relied upon a decision of this Court in Union of India & Anr. vs. M/s. V.S. Engineering (P) Ltd. [(2006) 13 SCC 240]

We have given our anxious consideration to the various pleas raised by the learned counsel for the parties. It is not in dispute that pursuant to the order placed by the Appellant on 19.11.2001, the respondent started to carry out the work for which he had been paid a substantial amount. However, there arose certain differences regarding the balance amount to be paid. The Respondent, vide letter dated 28.01.2009, requested the Appropriate Authority of the Appellant to appoint Arbitrators. The appellant, vide letter dated 20.02.2009 had informed the respondent that the papers are being looked into. However, vide letter dated 19.05.2009, the appellant sent the names of 4 officers to the respondent so as the respondent may select 2 names of the officers to act as Arbitrators. In the meantime, on 13.04.2009, i.e., much before the appellant had

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intimated the probable names of the officers to act as Arbitrators, the respondent had filed an application under Section 11(6) of the Act before the Orissa High Court for appointing an Arbitrator to settle the disputes between the parties. The learned Chief Justice, by the impugned order, not only appointed an Arbitrator but also struck down Clause 64(3) (a) (ii) of the Standard General Conditions of the Contract as being arbitrary.

For ready reference, Clause 64(3) (a) (ii) of the Standard General Conditions of the Contract is reproduced below:-

â S 64. (3)(a)(ii) In cases not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade, as the arbitrators. For this purpose, the Railways will send a panel of more than 3 names of gazetted Railway Officers of one or more departments of the Railways to the contractor who will be asked to suggest to the General Manager up to 2 names out of the panel for appointment as contractorâ "!'s nominee. The General Manager shall appoint at least one out of them as the contractorâ "!'s nominee and will also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the â Üpresiding arbitratorâ "!' from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the accounts department. An officer of Selection Grade of the accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.â \235

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A perusal of the afore-mentioned clause shows that it gives the authority to the Railways to appoint a panel of three Gazetted Railway Officers not below JA grade as the arbitrators. It is required to send a panel of more than 3 names of Gazetted

Railway Officers of one or more departments to the contractor to suggest at least 2 names out of the panel for appointment as contractor's nominee. The General Manager shall appoint at least one of them as contractor's nominee and also appoint the balance number of arbitrators either from the panel or outside duly indicating the presiding arbitrator from among the three arbitrators so appointed. Out of the 3 arbitrators so appointed one should be from the accounts department who should be of Selection Grade and treated to be equal to JA Grade of other departments.

Under Section 11 of the Act, a party which has sought appointment of the arbitrator by the other party to the Agreement and the other party does not appoint the arbitrator within 30 days of such intimation, the party which has sought appointment of the arbitrator can approach the Chief Justice under sub-Section 6 of Section 11 of the Act prior to the Amendment made by Act 3 of 2016 w.e.f. 23.10.2015.

In the case of Punj Llyod Ltd. (supra), this Court has held as follows:-

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¶ 5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. wherein this Court has held as under:

¶ [S]o far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. ¶ \235

(emphasis in original)

6. The case at hand is squarely covered by the abovesaid view of the law taken by this Court. The learned designated Judge of the High Court, as also the Division Bench were not right in taking a contrary view. ¶ \235 In the case of Patel Engineering Company Ltd. (supra), this Court has held as follows:-

¶ 10. The crucial sub-sections are sub-sections (2), (3), (4), (5) and (6). Sub-sections (3) to (5) refer to cases where there is no agreed procedure. Sub-section (2) provides that subject

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to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides

other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are: (i) a party fails to act as required under agreed procedure; or (ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure; or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators.

11. The crucial expression in sub-section (6) is "Sa party may request the Chief Justice or any person or institution designated by him to take the necessary measure" (underlined for emphasis *). This expression has to be read along with requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. "due regard" to the qualifications required by the agreement and other considerations.

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In the case of *Tripple Engg. Works (supra)*, this Court has held as follows:-

"S 7. The apparent dichotomy in *ACE Pipeline and Bharat Battery Mfg. Co. (P) Ltd* was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn. v. Patel Engg. Co. Ltd* wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression "to take the necessary measure" appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd* Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (*Indian Oil case* , SCC p. 537)

"S 48 . (vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause .

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an

independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.â- \235 (emphasis in original)

8. The above discussion will not be complete without reference to the view of this Court expressed in Union of India v. Singh Builders Syndicate wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not been concluded for over a
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decade, making a mockery of the process. In fact, in para 25 of the Report in Singh Builders Syndicate this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in Deep Trading Co. v. Indian Oil Coprn followed the legal position laid down in Punj Lloyd Ltd which in turn had followed a two-Judge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.â- \235

In the case of ACE Pipline Contract Pvt. Ltd. supra), this Court has held as follows:-

â- S 20. It may also not be out of place to mention that we are aware of the departmental lethargy in making appointment of arbitrators in terms of the arbitration clause. Therefore, mandamus can be issued by the courts in exercise of powers under Section 11(6) of the Act but the demand should be in the event of failure by the authorities to appoint arbitrators within the reasonable time. Courts are not powerless to issue mandamus to the authorities to appoint arbitrators as far as possible as per the arbitration clause. But in large number of cases if it is found that it would not be conducive in the interest of parties or for any other reasons to be recorded in writing, choice can go beyond the designated persons or institutions in
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appropriate cases. But it should normally be adhered to the terms of arbitration clause and appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties agree for common name.â- \235

Thus from the aforesaid decisions, it is amply clear that the position is well settled that if in terms of the contract, the appointment of arbitrator is sought for by one of the parties and the other party does not respond within 30 days of its

intimation, it will be open to the aggrieved person to approach the High Court under Section 11 of the Act and the Chief Justice would be empowered to appoint an arbitrator bereft of the agreement or the persons given in the arbitrator clause. Similar is the position in the case of M/s V.S. Engineering (P) Ltd. (supra) relied upon by the respondent wherein this Court has held as follows:-

â S 6. However, before parting with this case we may also observe that Railways and public institutions are very slow in reacting to the request made by a contractor for appointment of the arbitrator. Therefore, in case appointment is not made in time on the request made by the contracting party, then in that case the power of the High Court to appoint arbitrator under Section 11 of the Act will not be denuded. We cannot allow administrative authorities to sleep over the matter and leave the citizens without any remedy. Authorities shall be vigilant and their failure shall certainly give rise to cause to the affected party. In case the General Manager, Railways does not appoint the Arbitral Tribunal after expiry of the notice of 30 days or 11

before the party approaches the High Court, in that case, the High Court will be fully justified in appointing arbitrator under Section 11 of the Act. It is the discretion of the High Court that they can appoint any railway officer or they can appoint any High Court Judge according to the given situation.â \235

In the present case, we find that admittedly the respondent, vide letter dated 28.01.2009, had requested the General Manager to settle the claim and to appoint an Arbitrator. The appellant did not sent the panel of names as required under Clause 64 (3) (a)(ii) till 19.05.2009. The respondent had filed the application under sub-Section 6 of Section 11 of the Act before the Chief Justice seeking appointment of an arbitrator which he was entitled to do and the learned Chief Justice had rightly appointed an Arbitrator.

In view of the foregoing discussions, we are of the considered opinion that even though the appointment of the sole arbitrator by the Chief Justice cannot be called in question but while appointing an arbitrator, the Chief Justice has to take into consideration the terms of the contract qua the post held by the persons to be appointed. Therefore, the striking down of Clause 64 (3)(a)(ii) of the Standard General Conditions of the Contract was not called for. In view of the above, the order of the learned single Judge is modified to the extent that Clause 64 (3)(a)(ii) shall stand. The learned counsel for the respondent 12

submitted that the sole arbitrator appointed by the Chief Justice is not keeping good health and the matter is not proceeding, it will be open for the respondent to approach the Chief Justice of the High Court for change of the arbitrator. The appeal is, accordingly, disposed of. There shall be no order as to costs.

.....,J.
(R.K. Agrawal)

.....,J.
(Prafulla C. Pant)

New Delhi ;
August 4, 2016
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RECORD OF PROCEEDINGS

Civil Appeal No(s). 2713/2012

UNION OF INDIA

Appellant(s)

VERSUS

BHIKARICHARAN SAHU

Respondent(s)

Date : 04/08/2016 This appeal was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE R.K. AGRAWAL

HON'BLE MR. JUSTICE PRAFULLA C. PANT

For Appellant(s) Mr. Ashok Panda, Sr. Adv.

Mr. Arvind Kumar Sharma, AOR

For Respondent(s) Mr. Suresh Chandra Tripathy, AOR

UPON hearing the counsel the Court made the following

O R D E R

The appeal is disposed of in terms of the signed order. There shall be no order as to costs.

(Gulshan Kumar Arora) (Neetu Khajuria)

Court Master Court Master

(Signed order is placed on the file)