

RAJASTHAN HIGH COURT

Murari Lal Khandelwal

Vs.

Rajasthan State Seeds Corporation

S.B. Arbitration Appln. No. 30 of 2007

(Shiv Kumar Sharma, J.)

07.03.2008

ORDER

Shiv Kumar Sharma, J.

1. In this application under Section 11(6) of the

Arbitration and Conciliation Act, 1996 (for short 'Act') the applicant seeks to appoint independent arbitral tribunal.

2. Contextual facts depict that as per clause 20 of the contract agreement in case of any dispute between the Managing Director of Rajasthan State Seeds Corporation and the applicant the Managing Director would be the sole arbitrator for resolution of the dispute. The applicant served a notice on December 11,2006 stating therein the details of dispute and claims to Managing Director, Rajasthan State Seeds Corporation Ltd. for conducting the arbitration proceedings for the settlement of disputes. But no proceeding as per clause 20 of the contract agreement was effected. Rather non applicant failed to perform the functions entrusted to him under the procedure and vide reply dated December 19,2006 the Managing Director refused to conduct proceedings. In reply to the notice sent by Advocate of applicant, Advocate of respondent replied vide notice dated December 20,2006, wherein it was stated that since there was no dispute in regard to agreement appointment of arbitrator was not at all required.

3. A reply to the application has been filed on behalf of respondent wherein it was stated that since arbitrator was appointed and award was already passed on January 10, 2008, therefore the application moved by applicant may be dismissed. Mr. J. K. Singhi, learned counsel for respondent verbally informed this Court that the Arbitrator

was appointed by respondent in the month of March, 2007.

4. The material facts of the case, which are relevant for adjudication of the controversy, may be summarized thus:-

(i) Notice for appointment of arbitrator was issued by applicant on December 11, 2006, which was duly received by respondent.

(ii) Respondent failed to appoint Arbitrator within thirty days of receipt of the request of applicant.

(iii) Reply of notice was sent to applicant by the Advocate of respondent, wherein it was stated that since there was no dispute in regard to agreement the appointment of arbitrator was not required.

(iv) On February 27, 2007 the applicant moved application under Section 11(6) of the Act.

5. A three Judge Bench of the Apex Court in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* ¹ considered the applicability of Section 11(6) petition and held that once notice period of 30 days had lapsed and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in *Datar Switchgears Ltd. v. Tata Finance Ltd.* ² wherein the Apex Court indicated thus :-

"So far as cases falling under Section 11 (6) are concerned - such as the one before us - no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11 (4) and Section 11 (5) of the Act. In our view, therefore, so 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 case 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. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator, under Section

11(6) is forfeited."

6. Learned counsel for the respondent in support of his contention placed reliance on *Ace Pipeline Contracts Pvt. Ltd, v. Bharat Petroleum Corporation Ltd.* ³ wherein two-Judge Bench of the Apex Court Indicated that once a party has entered into an agreement with wide eyes open, it cannot wriggle out of the situation that if any person of the respondent is appointed as arbitrator, he will not be impartial or objective. If the appellant feels that arbitrator has not acted independently or impartially or he has suffered from any bias, it will always be open to the party to make an application under Section 34 to set aside the award.

The Apex Court explaining the ratio indicated in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (supra) and *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra) indicated thus :-

"Once a party has entered into an agreement with wide eyes open, it cannot wriggle out of the situation that if any person of the respondent BPCL is appointed as arbitrator, he will not be impartial or objective."

7. That takes me to the question as to what would happen when designated Arbitrator passed Award after the party already moved under Section 11 (6) of the Act seeking appointment of Arbitrator? As already noticed the. respondent has come up with specific reply that the arbitrator was appointed in the month of November, 2007 and he had already passed the award on January 10, 2008. In my opinion, when one of the party approaches the Chief Justice under Section 11 (6) of the Act the appointment of the Arbitration by respondent was without jurisdiction as also the award so given by the said Arbitrator would be without jurisdiction and non est in the eyes of law. My view finds support from the ratio indicated in *M/s. Universal Construction and Trading Company Lucknow v. Garhwal Mandal Vikas Nigam Ltd. Dehradun* ⁴ wherein learned single Judge of Allahabad High Court indicated thus :-

(Para 32)

"The last contention of the opposite parties is that the designated arbitrator has already given the award which is a decree as provided under Section 36 of the Act. It has been further argued by the opposite parties that the proceedings under Section 11 of the Act are administrative in nature and the decree already passed by the arbitrator cannot be set aside. In my opinion, the award given by the Managing Director is without jurisdiction. His right to proceed ceases after moving of the application under Section 11 by the petitioner. This view is supported by the decision in *Datar Switchgears Ltd, v, Tata Finance Ltd.* (2000

AIR SCW 3925) and Sharma and Sons v, Engineer-In- Chief Army Headquarters, New Delhi (2000 (2) Arbi LR 31). The award given after moving of the application under Section 11 of the Act is non est in the eye of law."

8. As a result of above discussion the appointment of independent arbitrator under Section 11 of the Act is necessary.

9. For these reasons, I allow instant application and appoint Hon'ble Justice M. A. A. Khan (Retired) as arbitrator to settle the disputes. Fees and other terms and conditions of arbitration shall be settled by the Arbitrator. A copy of the order be sent to Arbitrator.

Application allowed.

Cases Referred.

1. (2006) 2 SCC 638
2. (2000) 8 SCC 151: 2000 AIR SCW 3925
3. (2007 CDR 678 (SC)): AIR 2007 SC 1764
4. (AIR 2004 All 115)