

CASE NO.:
Appeal (civil) 3692 of 2007

PETITIONER:
Union of India

RESPONDENT:
M/s. Bharat Battery Manufacturing Co. (P) Ltd.

DATE OF JUDGMENT: 13/08/2007

BENCH:
H.K. Sema & Lokeshwar Singh Panta

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 3692 OF 2007
ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO. 19881 OF 2006

H.K. SEMA, J.

1. Leave granted.

2. This appeal preferred by the Union of India is directed against the judgment and order dated 26.5.2006 of the High Court of Delhi in Arbitration Petition No. 213 of 2006. By the aforesaid order the High Court appointed an arbitrator on a petition filed by the respondent under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short 'the Act').

3. To answer the question involved in this appeal, it may not be necessary to delve the entire facts leading to the filing of the present appeal. Suffice it say that in response to an invitation to tender inquiry No. A.M-5/RC-14100105/ 072003/ WT/ BTYS/ Defence/ 2003-04/ 75 for supply of battery secondary lead acid, an offer dated 7.10.2002 was submitted which was revised by letter dated 8.4.2003. On the basis of the revised offer dated 8.4.2003 a rate contract No. AM-5/RC-14100105/ 072003/ WT/ BTYS/ DEF/ 2003-04/ 75/ BHARAT/ COAC/ 185 dated 5.5.2003 for the period 5.5.2003 to 16.3.2004 was executed between the appellant and the respondent.

4. Clause 12 of rate contract entered into between the parties contained a price variation clause. As the variation factor of the batteries, on account of fluctuation of lead price had not been incorporated, the respondent made a request to the appellant to incorporate the same. The respondent herein also requested the appellant to issue amendment towards rate of sales tax. It appears that the said request was complied with almost after one year by a letter dated 2.7.2004. However, it is alleged that during the pendency of the rate contract, the appellant issued a supply order No. 01/ RC/Z9/ BTY/ 047/ BHARAT/ 2004-05 dated 16.3.2004 for supply of 19,021 batteries. The respondent herein supplied the same to the appellant. The respondent also submitted detailed calculation of unit price of battery as per price variation clause and the photocopies of Hindustan Zinc Price Circular. It is contented that although the appellant continued to receive the batteries but did not issue the amendment with respect to price variation clause for the quarter April to June, 2004, July to September 2004, October to December 2004, January to March 2005, April to June 2005, July to September 2005,

October to December 2005 and January to March 2006. As the appellant did not issue the amendment with respect to price variation clause, nor settled the dispute, which had arisen between the parties, the respondent herein sent a notice under Section 11 of Arbitration and Conciliation Act, 1996 on 7.6.2005. Through the said notice the respondent demanded that the appellant either issue the necessary amendments on account of price variation with respect to the above mentioned quarters or appoint an arbitrator within 30 days. The notice dated 7.6.2005 was acknowledged by the appellant vide acknowledgement slip bearing No. 26110 dated 9.6.2005. Having not complied with the notice, another notice dated 2.1.2006 was issued by the respondent invoking the arbitration agreement and seeking appointment of arbitrator. The second notice was also acknowledged by the appellant by slip no. 33190 dated 3.1.2006.

5. Despite the aforesaid notices and the receipt thereof, the appellant neither resolved the disputes between the parties nor appointed an arbitrator within 30 days from the receipt of the request to do so, compelling the respondent to file a petition under Section 11(6) of the Act on 30.3.2006.

6. Clause 24 of the agreement deals with the arbitration between the parties. The relevant portion of Clause 24 reads as under:

" i) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the Sole arbitration of an officer in the Ministry of Law, appointed to be the Arbitrator by the Director General of Supplies and Disposals. It will be no objection that the arbitrator is a Govt. Servant that he had to deal with the matters to which the contract relates or that in the course of his duties as a Govt. servant he has expressed views on all or any of the matters in dispute or difference. The award to the Arbitrator shall be final and binding on the parties to this contract.

ii) In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the Court for any reason, shall be lawful for the Director General of Supplies & Disposals to appoint another Arbitrator in place of the outgoing Arbitrator in the manner aforesaid.

iii) It is further a terms of this contract that no person other than the person appointed by the Director General of Supplies & Disposals as aforesaid should act as Arbitrator and that, if for any reason that is not possible, the matter is not to be referred to arbitration at all."

7. Having stated the brief facts in a nut-shell, we may now note a few important dates, which are relevant for the purpose of proper adjudication of the present controversy:

(a) Notices of appointment of arbitrator were issued on 7.6.2005 and 2.1.2006 respectively, which were duly received by the appellant with acknowledgment.

(b) The appellant failed to appoint an arbitrator within 30 days from the date of receipt of request to do so from the respondent.

- (c) On 30.3.2006, the respondent filed Section 11(6) petition before the High Court.
- (d) The High Court, by the impugned order dated 26.5.2006, appointed Justice K.S. Gupta, a retired Judge, Delhi High Court, as an arbitrator.
- (e) On 15.5.2006, the appellant said to have appointed one Dr. Gita Rawat as a sole arbitrator, purportedly in terms of Clause 24 of the agreement.

8. It is contended by Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the appellant, that the High Court did not follow the procedure prescribed under Section 11(8) of the Act. According to him, the appointment of Justice K.S. Gupta as a sole arbitrator is not in consonance with Clause 24 of the agreement inasmuch as Clause 24 of the agreement provides that if any dispute arises, the same shall be referred to the sole arbitration of an officer in the Ministry of Law, appointed to be the Arbitrator by the Director General of Supplies and Disposals.

9. We are unable to countenance with the submission of the learned counsel for the appellant. Section 11(8) of the Act could have come to the aid of the appellant had the appellant appointed the arbitrator within 30 days from the date of receipt of request to do so from the respondent or the extended time as the case may be. In the present case, as noticed above, Section 11(6) petition was filed on 30.3.2006 by the respondent. The appellant stated to have appointed one Dr. Gita Rawat on 15.5.2006, i.e. after Section 11(6) petition was filed by the respondent on 30.3.2006, which is not permissible in law. In other words, the appellants are stopped from making an appointment of the arbitrator in terms of Clause 24 of the agreement after Section 11(6) petition is filed by the respondent. Once Section 11(6) petition is filed before the Court, seeking appointment of an arbitrator, the power to appoint an arbitrator in terms of arbitration clause of the agreement ceases.

10. Mr. Malhotra, learned ASG referred to the decision of a three-Judge Bench of this Court in Union of India And Another (appellant) v. M.P. Gupta (respondent) (2004) 10 SCC 504, wherein this Court held that since there was express provision contained that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. This case was not in a situation where Justice P.K. Bahri was appointed after Section 11(6) petition was filed. It appears from the facts that Justice P.K. Bahri was appointed a sole arbitrator dehors clause (3)(a)(iii) of the arbitration agreement in that case. It also appears that Justice P.K. Bahri was appointed by the Court as the sole arbitrator on a petition filed by the respondent therein by an ex-parte order.

11. The facts of that case, therefore, are clearly distinguishable from the facts of the present case. The aforesaid decision is of no help to the appellant in the present case.

12. Learned counsel for the appellant also referred to the decision of this Court in S. Rajan (appellant) v. State of Kerala and Another (respondent) (1992) 3 SCC 608. In that case, this Court was of the view that in a case where the agreement itself specifies and names the arbitrator, the Court has no jurisdiction to appoint an arbitrator not specified in the agreement itself.

13. In the given facts of this case afore-stated, the ratio of this decision is also of no help to the appellant.

14. A three-Judge Bench of this Court in Punj Lloyd Ltd. (appellant) v. Petronet MHB Ltd. (2006) 2 SCC 638

considered the applicability of Section 11(6) petition and considered the facts which are similar to the facts of the present case 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. (appellant) v. Tata Finance Ltd. and Another (2000) 8 SCC 151 wherein at page 158 (para 19) SCC, this Court held as under: "19. 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 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. 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."

15. As already noticed, the respondent filed Section 11(6) petition on 30.3.2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15.5.2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.

16. We are, therefore, of the view that the order of appointment of Dr. Gita Rawat by the appellant as a sole arbitrator dated 15.5.2006 was passed without jurisdiction. Once Section 11(6) petition is filed by one party seeking appointment of an arbitrator, the other party cannot resurrect the clause of the agreement dealing with the appointment of the arbitrator, in this case Clause 24 of the agreement.

17. In the view that we have taken, there is no merit in this appeal and the same is, accordingly, dismissed with no order as to costs.