

CASE NO.:
Appeal (civil) 1783 of 2007

PETITIONER:
Ace Pipeline Contracts Private Limited

RESPONDENT:
Bharat Petroleum Corporation Limited

DATE OF JUDGMENT: 04/04/2007

BENCH:
A.K. Mathur & Tarun Chatterjee

JUDGMENT:
J U D G M E N T
[ARISING OUT OF S.L.P.(C) NO.6073 OF 2006]

A.K.MATHUR, J.

Leave granted.

This appeal is directed against the order dated 18.1.2006 passed by learned Single Judge of the High Court of Delhi in Arbitration Petition No.181 of 2005 whereby learned Single Judge dismissed the application for appointment of Arbitrator. Hence, the present appeal against the aforesaid order.

Brief facts which are necessary for disposal of this appeal are that an application styled under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') was moved by the Ace Pipeline Contracts Private Limited, the appellant herein, for appointing a retired Judge of the Supreme Court of India to adjudicate the claims and disputes between the parties arising out of the contract between the parties dated 10.06.2002. The said contract pertained to the laying down of a pipeline and associated facilities for Section-1 [Manmad in Maharashtra to M.P. Border near (Shirpur)] for Mumbai-Manmad Pipeline Extension Project of the respondent-Bharat Petroleum Corporation Limited (hereinafter referred to as 'BPCL'). The main issue was with regard to interpretation of Clause 91 of the contract which pertains to appointment of arbitrator. Clause 91 of the contract reads as under :

"91. ARBITRATION

All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution or maintenance thereof under this Contract or the right touching or concerning the works or the execution or the maintenance effect thereof or to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before or after determination foreclosure or breach of the Contract (other than those in respect of which the decision of any person is by the Contract expressed to be final and binding) shall after written notice by either party to the Contract to the other of them and to the Appointing Authority be referred for adjudication, to a sole Arbitrator to be appointed as hereinafter provided.

a. Any dispute or difference of any nature whatsoever any claim, cross-claim, counter-claim or set off of the Corporation against the Vendor or

regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the Sole Arbitration of the Director (Marketing) of the Corporation or of some officer of the Corporation who may be nominated by the Director (Marketing). The Vendor will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is an Officer of the Corporation or that he has dealt with the matters to which the contract relates or that in the course of his duties as an Officer of the Corporation he had expressed views on all or any other matters in dispute or difference. In the event of the Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Director (Marketing) as aforesaid at the time of such transfer, vacation of office or inability to act may in the discretion of the Director (Marketing) designate another person to act as Arbitrator in accordance with the terms of the agreement to the end and intent that the original Arbitrator shall be entitled to continue the arbitration proceedings notwithstanding his transfer or vacation of office as an Officer of the Corporation if the Director (Marketing) does not designate another person to act as arbitrator on such transfer, vacation of office or inability of original arbitrator. Such persons shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Director (Marketing) or a person nominated by such Director (Marketing) of the Corporation as aforesaid shall act as an Arbitrator hereunder. The award of the Arbitrator so appointed shall be final conclusive and binding on all parties to the agreement subject to the provisions of the Conciliation & Arbitration Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall apply to the arbitration proceedings under this clause."

Clause 91 provides that any dispute arising between the parties shall be settled through arbitration and the appointing authority i.e. the Director (Marketing) himself or he may nominate any other person of the Corporation to act as an Arbitrator to resolve the disputes and the vendor will not be entitled to raise any objection to such arbitrator on the ground that the Arbitrator is an officer of the Corporation or that he has dealt with the matters to which the contract relates or that in the course of his duties as an Officer of the Corporation he had expressed views on all or any other matters in dispute or difference. Since some differences arose between the parties with regard to the claim of the appellant, a letter dated 21.7.2005 was written to the Director (Marketing) invoking clause 91 of the agreement and requesting him to refer the matter to arbitration for resolving the differences. It was also requested that the Director (Marketing) may accede to the request of the appellant for adjudication of the dispute by a former Judge of the Supreme Court of India so as to remove any justifiable doubts to the independence or impartiality of the said Arbitrator. It was further submitted that on receiving the communication, the appellant would suggest the name of the retired Judge of the Supreme Court of India for the purpose of appointment as Arbitrator. It was alleged that no one was appointed as Arbitrator, therefore, on 22.8.2005 the appellant filed the present application

before the High Court for appointment of Arbitrator under Section 11(5) & (6) of the Act. It was also pointed out that after presentation of the application on 22.8.2005, the appellant received a letter of the Director (Marketing) nominating Shri P.S. Bhargava, Executive Director (Quality Control Cell) of the respondent- BPCL to act as sole arbitrator. It was contended that the letter appointing Shri P.S. Bhargava as sole Arbitrator was received by the appellant subsequent to the filing of the petition before the High Court on 26.8.2005. It was also pointed out that Shri P.S. Bhargava was appointed as Arbitrator on 22.8.2005 and the same was communicated and received by the appellant through courier on 26.8.2005. Therefore, it was submitted before the High Court that since the appointment of Arbitrator has been made after the filing of the petition by the appellant before the High Court, the Director (Marketing) ceased to have any right to appoint any Arbitrator after expiry of thirty days. Therefore, a request was made that any retired Judge of the Supreme Court may be appointed as Arbitrator. This was contested by the respondent by filing a reply. It was pointed out that the notice dated 21.7.2005 was received by the Director (Marketing) on 26.7.2005 and a request was made to the appellant to supply copy of the arbitration agreement and other corresponding documents as he was not aware of the procedure for appointment of the Arbitrator. The Director (Marketing) received reply to the communication dated 12.8.2005 on 16.8.2005 which was received in the Office on 17.8.2005. After receiving the communication and all the materials on 17.8.2005, the appointing authority appointed Shri P.S. Bhargava as Arbitrator on 22.8.2005 and a communication was sent to the appellant through courier which was received by him on 26.8.2005. It was also pointed out after receipt of the reply to the communication dated 12.8.2005 on 16.8.2005, 19th, 20th & 21st August, 2005 Office remained closed on account of Rakshya Bandhan and weekly holidays. The Director (Marketing) sent reply on 22.8.2005 appointing Shri P.S. Bhargava as Arbitrator. It was also pointed out that the whole action was done with urgency and there was no delay on the part of the Administration.

Learned Single Judge after examining the matter came to the conclusion that it cannot be said that the appointing authority did not act with due dispatch. Learned Single Judge also held that as per the terms of the agreement in question with regard to independence and objectivity of the arbitrator can be examined in view of the agreement and it was observed that this question can be raised before the arbitrator and even if they fail, it can be agitated under Section 34 of the Act. However, learned Single Judge concluded that the situation had not arisen to invoke the provisions of Section 11(6) of the Act at present and consequently, dismissed the petition. Aggrieved against the impugned order dated 18.1.2006, the present appeal was filed.

We have heard Shri Soli J. Sorabjee, learned Senior counsel for the appellant, and Shri Sudhir Chandra, learned senior counsel for the respondent, and perused the records. Though the application moved by the appellant under Section 11 of the Act was of course very confusing as it also mentioned Section 11(5) as well as Section 11(6) of the Act, in fact the application under Section 11(5) of the Act was not maintainable. Be that as it may, learned Single Judge proceeded on the basis of treating this application under Section 11(6) of the Act. This may be bona fide error. Mr. Sorabjee, learned Senior Counsel for the appellant, strenuously urged that after expiry of period of thirty days, the respondent has lost the right to appoint Arbitrator under Clause 91 of the agreement and in support thereof, invited our attention to the following decisions of this Court.

- i) (2000) 8 SCC 151
[Datar Switchgears Ltd. v. Tata Finance Ltd & Anr.]
- ii) (2006) 2 SCC 638
[Punj Lloyd Ltd. v. Petronet MHB Ltd.]

- iii) (2006) 8 SCC 279
[BSNL & Ors. v. Subash Chandra Kanchan & Anr.]
- iv) (2006) 2 SCC 628
[Shin Satellite Public Co.Ltd. v. Jain Studios Ltd.]
- v) 2006 (12) SCALE 144
[Union of India & Anr. v. M/s.V.S.Engineering (P) Ltd.]

Our attention was also invited to a Full Bench decision of the Delhi High Court in J.V. v. Union of India & Ors. decided on 31.8.2006 and a decision of the Calcutta High Court in Great Eastern Shipping Co. Ltd. v. Board of Trustees for the Port of Calcutta [2005 (1) Arb. LR 389].

Before we deal with each case cited above, it may be relevant to deal with scope of Section 11 of the Act. A person of any nationality may be appointed as Arbitrator, unless otherwise agreed between the parties. Sub-section (2) of Section 11 says that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (3) provides that failing any agreement referred to in sub-section (2), one arbitrator can be appointed by each party and the two arbitrators so appointed shall appoint the third arbitrator who shall act as the presiding arbitrator. Sub-section (4) says that in case a party fails to make appointment within thirty days from the date of receipt of the request to do so from the other party, or that the two appointed arbitrators fail to nominate the third arbitrator within thirty days from the date of their appointment, the appointment shall be made by the Chief Justice or by any person or institution designated by him. Sub-section (5) says 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. Therefore, the concept of thirty days is there in Sub-sections (4) & (5). This is in the event of the parties did not come to appoint arbitrator or the two nominated arbitrators fail to agree within thirty days for appointment of third arbitrator, application can be moved under Section 11(5) of the Act to the Chief Justice for appointment of arbitrator. But in sub-section (6), where, the procedure has already been agreed upon by the parties, as in the present case, and in that event, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may in that event, request the Chief Justice or a person or an institution designated by him to make necessary measures, unless the agreement on the appointment procedure provides other means for appointment of arbitrator. Therefore, so far as the period of thirty days is concerned, it is not mentioned in Sub-section (6). The period of limitation is only provided under sub-sections (4) & (5) of Section 11. As such, as per the statute, the period of limitation of thirty days cannot be invoked under sub-section (6) of Section 11 of the Act. In this context, their Lordships in Datar Switchgears Ltd. (supra) did not permit to count 30 days as such in sub-section (6). We cannot do any better than to reproduce paragraphs 19, 20 & 21 of the judgment in that case.

"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.

20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

21. We need not decide whether for purposes of sub-sections (4) and (5) of Section, which expressly prescribe 30 days, the period of 30 days is mandatory or not."

The observations made by their Lordships are very clear and Their Lordships negatived the contention that 30 days should not be read in sub-section (6) of Section 11 of the Act if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues. Their Lordships in paragraph 20 have also very categorically held that in the present case the respondent made the appointment before the appellant filed the application under section 11(6), though it was beyond 30 days from the date of demand, the appointment of the arbitrator by the respondent was valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand. Their Lordships were also very clear in their mind in paragraph 21 and observed, "we need not decide whether for purpose of sub-sections (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not. " We are only concerned with reading of 30 days within sub-section (6) of Section 11. So far as the period of 30 days with regard to Section 11(6) is concerned, there is no manner of doubt that their Lordships had not invoked 30 days as mandatory period under Section 11(6) and beyond that it cannot be invoked by the appointing authority. Therefore, it is totally misnomer to read 30 days in Section 11(6) of the Act, though Shri Sorabjee, learned senior counsel appearing for the appellant tried to emphasize that the decision in Datar has been affirmed by a three Judge Bench and therefore, 30 days should be read in Section 11(6) of the Act is also not correct.

In the case of *Punj Lloyd Ltd. (Supra)*, Their Lordships only quoted paragraph 19 in part and not in full. Full paragraph 19 of the judgment in *Datar (supra)* has been reproduced above. In fact subsequent observation of their Lordships, "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", this portion of order was not reproduced. Therefore, it is not a case that the decision given by two Judge Bench in *Datar (supra)* has been reaffirmed and this is binding on us. We regret to say this is not correct. In the case of *Punj Lloyd Ltd.* Their Lordships only set aside

the order and remitted the matter back to the High Court for appointment of arbitrator by the Chief Justice. But the ratio laid down in Datar (supra) holds good and it is not negated, the period of 30 days cannot be read in Section 11(6) of the Act. The relevant portion of Punj Lloyd's case (supra) reads as under:-

"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. (SCC p.158, para 19) wherein this Court has held as under :

"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."

The /aforesaid quotation would clearly reveal that the crucial words in paragraph 5 were not quoted in the aforesaid case which has been reproduced above.

Our attention was also invited to a decision of this Court in the case of Union of India v. Popular Construction Co. [(2001) 8 SCC 470]. This was in relation to Section 34(3) of the Act. This is with regard to the period of limitation for moving the Court under Section 34 of the Act for setting aside the award i.e. the period of limitation was prescribed in Section 34 itself. Therefore, Section 5 of the Limitation Act was not made applicable. This is not the case before us in the present controversy.

Our attention was also invited to a decision of this Court in the case of The State of Uttar Pradesh & Ors. v. Babu Ram Upadhyia [(1961) 2 SCR 679]. In that case, their Lordships have dealt with the interpretation of the statute and they have referred to "Statute Law" by Craies and "The Interpretation of Statutes" by Maxwell. Their Lordships have quoted a passage from Maxwell which reads as under:

"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

This observation, so far as this case is concerned, has no relevance as we have already mentioned above that the period of 30 days cannot be read in Sub-section (6) of Section 11 of the Act as the statute does not permit it. Therefore, this case does not help the case of the appellant in any manner.

Our attention was invited to a Full Bench decision of the High Court of Delhi [J.V. v. Union of India & Ors. decided on 31.8.2006] and a decision of the Calcutta High Court in Great Eastern Shipping Co.Ltd. (supra). Both these decisions are in total ignorance of the law laid down by this Court in Datar (supra). Therefore, they cannot hold good. We again reemphasize that in paragraphs 19, 20 & 21 Their Lordships have clearly negated the submission that period of 30 days cannot be read in sub-section (6) of Section 11 of the Act. Our attention was also invited to a decision of this Court in Shin Satellite Public Co.Ltd. v. Jain Studios Ltd. [(2006) 2 SCC 628]. This decision was given by Hon'ble C.K. Thakker, J. in chambers. There also, no such view has been taken by learned Judge that the period of 30 days should be read in sub-section (6) of Section 11 of the Act. Our attention was also invited to a decision of this Court in BSNL & Ors. v. Subash Chandra Kanchan & Anr. [(2006) 8 SCC 279]. There also, the question was whether the appellant was consenting party to appointment of arbitrator or not. Appointment of arbitrator was made by the High Court with the consent of parties which was subsequently sought to be revoked on the ground that no instruction in that behalf was given. But that contention was negated by the Court and there also, the question of appointment of arbitrator within the period of 30 days was not decided. In this connection a reference may also be made to a decision of this Court in the case of Union of India & Anr. v. M.P.Gupta [(2004) 10 SCC 504]. In that case, arbitrator was appointed by the High Court directly a Judge of the High Court because no arbitrator was appointed by the Railway Authorities as per Clause 64 of their agreement. Their Lordships after considering the matter observed that the appointment of arbitrator by the High Court under Section 20 of the Arbitration Act, 1940 cannot be upheld in view of Clause 64 of the agreement because as per Clause 64 of the agreement, two arbitrators have to be appointed who should be gazetted railway officers. Therefore, as per the terms of the agreement their Lordships held that the appointment of arbitrator by the High Court was not correct and set aside the order and directed the Railways to appoint arbitrators within 30 days. Similar issue came up before this Court in Union of India & Anr. v. M/s. V.S. Engineering Pvt. Ltd. [2006 (12) SCALE 144]. This Court after considering the decision in Union of India & Anr. v. M.P.Gupta [(2004) 10 SCC 504] and Datar Switchgears Ltd. (supra) directed that as per Clauses 63 & 64 of the General Clauses of the Contract, only two gazetted officers of the railways have to be appointed as arbitrators. However, it was observed that failure on the part of the Department to take a decision for appointment of arbitrators would not defeat the right of the party to approach the High Court for appointment of arbitrator. Direction was given to the Department for appointment of arbitrators within 30 days.

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 appropriate cases. But it should normally be adhered to the terms of arbitration clause & appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties

agree for common name.

In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide 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. However, if the appellant feels that the 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 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.

In view of our above discussion, we find no reason to interfere with the order passed by the learned Single Judge of the High Court of Delhi in Arbitration Petition No.181 of 2005. The arbitrator has already been appointed. He should proceed in the matter and decide the dispute expeditiously. Consequently, the appeal is dismissed with no order as to costs.