Datar Switchgears Ltd vs Tata Finance Ltd. & Anr on 18 October, 2000

Author: M.J.Rao

Bench: M.J.Rao

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           CASE NO.:
Special Leave Petition (civil) 13812  of  2000

PETITIONER:
DATAR SWITCHGEARS LTD.

        Vs.

RESPONDENT:
TATA FINANCE LTD.  & ANR.

DATE OF JUDGMENT:       18/10/2000

BENCH:
K.G.Balakrishnaan, M.J.Rao



JUDGMENT:
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Balakrishnan, J.

Leave granted.

L.....I.....T.....T.....T.....T.....T.....T..J The appellant challenges an order passed by the Chief Justice of Bombay High Court, under Section 11 of the Arbitration and Conciliation Act, 1996 [for short, "the Act"]. The appellant had entered into a lease agreement with the 1st respondent in respect of certain machineries. Dispute arose between the parties and the 1st respondent sent a notice to the appellant on 5.8.1999 demanding payment of Rs. 2,84,58,701 within fourteen days and in the notice it was specifically stated that in case of failure to pay the amount, the notice be treated as one issued under Clause 20.9 (Arbitration clause) of the Lease Agreement. The appellant did not pay the amount as demanded by the 1st respondent. The 1st respondent did not appoint an Arbitrator even after the lapse of thirty days, but filed Arbitration Petition No. 405/99 on 26.10.99 under Section 9 of the Act for interim protection. On 25.11.99, the 1st respondent appointed the 2nd respondent as the sole Arbitrator by invoking clause 20.9 of the Lease Agreement and the Arbitrator in turn issued a notice to the appellant asking them to make their appearance before him on 13th March, 2000. Thereafter, the appellant filed Arbitration Application No. 2/2000 before Hon'ble the Chief Justice of Bombay and prayed for appointment of another Arbitrator and the 1st respondent

opposed this application. This petition was rejected by the Chief Justice holding that as the Arbitrator had already been appointed by the first respondent, the Lessor, the petition was not maintainable. This order is challenged before us.

We heard the appellant's Counsel Mr. V.A. Mohta and respondent's Counsel Mr. R.F. Nariman. The appellant's Counsel questioned the authority of the 1st respondent in appointing an Arbitrator after the long lapse of the notice period of 30 days. According to the appellant, the power of appointment should have been exercised within a reasonable time. The appellant's Counsel also urged that unilateral appointment of Arbitrator was not envisaged under the Lease Agreement and the 1st respondent should have obtained the consent of the appellant and the name of the Arbitrator should have been proposed to the appellant before appointment. On the other hand, the Counsel for the 1st respondent supported the impugned order.

Learned counsel for the appellant , Shri V.A. Mohta argued that the order passed by the Chief Justice is amenable to Article 136 of the Constitution of India. Even if it is an administrative order as decided by a three Judge Bench in Konkan Railway Corporation Ltd. Vs. M/s Mehul Construction Co. 2000(6) SCALE 71, it is amenable to Article 136. Learned Senior Counsel for the 1st respondent, Shri R.F. Nariman, however, stated that in this case we need not go into this controversy and we may decide the matter on merits on the assumption that Article 136 is attracted. In view of the above stand taken for the respondents, we are not deciding the question of maintainability.

The Arbitration and Conciliation Act, 1996 made certain drastic changes in the Law of Arbitration. This Act is codified in tune with the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). Section 11 of the Act deals with the procedure for appointment of Arbitrator. Section 11(2) says that the parties are free to agree to any procedure for appointing the Arbitrator. If only there is any failure of that procedure, the aggrieved party can invoke sub-clause (4), (5) or (6) of Section 11, as the case may be. In the instant case, the Arbitration clause in the Lease Agreement contemplates appointment of a sole Arbitrator. If the parties fail to reach any agreement as referred to in Sub-Section (2), or if they fail to agree on the Arbitrator within thirty days from receipt of the request by one party, the Chief Justice can be moved for appointing an Arbitrator either under sub-clause (5) or sub-clause (6) of Section 11 of the Act.

Sub-clause (5) of Section 11 can be invoked by a party who has requested the other party to appoint an Arbitrator and the latter fails to make any appointment within thirty days from the receipt of the notice. Admittedly, in the instant case, the appellant has not issued any notice to the 1st respondent seeking appointment of an Arbitrator. An application under sub-clause (6) of Section 11 can be filed when there is a failure of the procedure for appointment of Arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an Arbitrator refuses to appoint the Arbitrator or where two appointed Arbitrators fail to appoint the third Arbitrator. If the appointment of Arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of Arbitrator.

The appellant in his application does not mention under which sub- section of Section 11 the application was filed. Evidently it must be under Sub-section (6) (a) of Section 11, as the appellant has no case that a notice was issued but an Arbitrator was not appointed or that there was a failure to agree on certain Arbitrator. The contention of the appellant might be that the first respondent failed to act as required under the procedure.

Therefore, the question to be considered is whether there was any real failure of the mechanism provided under the Lease Agreement. In order to consider this, it is relevant to note the Arbitration clause in the Agreement.

Clause 20.9 of the Agreement is the Arbitration clause, which is to the following effect:-

> 20.9 " It is agreed by and between the parties that in case of any dispute under this Lease the same shall be referred to an Arbitrator to be nominated by the Lessor and the award of the Arbitrator shall be final and binding on all the parties concerned. The venue of such arbitration shall be in Bombay. Save as aforesaid, the Courts at Bombay alone and no other Courts whatsoever will have jurisdiction to try suit in respect of any claim or dispute arising out of or under this Lease or in any way relating to the same."

The above clause gives an unfettered discretion to the 1st respondent-lessor to appoint an Arbitrator. The 1st respondent gave notice to the appellant and later appointed the 2nd respondent as the Arbitrator. It is pertinent to note that no notice period is prescribed in the above arbitration clause and it does not speak about any concurrence or consent of the appellant being taken in the matter of the choice of Arbitrator.

The question then arises whether for purposes of Section 11(6) the party to whom a demand for appointment is made, forfeits his right to do so if he does not appoint an arbitrator within 30 days. Learned Senior counsel for the appellant contends that even though Section 11(6) does not prescribe a period of 30 days, it must be implied that 30 days is a reasonable time for purposes of Section 11(6) and thereafter, the right to appoint is forfeited. Three judgments of the High Courts from Bombay, Delhi and Andhra Pradesh are relied upon in this connection.

Learned Senior counsel for the respondents submits that the Bombay, Delhi and Andhra pradesh cases relied upon are distinguishable. It is also contended that under Section 11(6) no period of time is prescribed and hence the opposite party can make an appointment even after 30 days, provided it is made before the application is filed under Section 11.

The appellant contended that the 1st respondent did not appoint the Arbitrator within a reasonable period and that amounts to failure of the procedure contemplated under the Agreement. Our attention was drawn to a decision of the Bombay High Court reported in 1999(2) Bombay CR. 189 (Naginbhai C. Patel Vs. Union of India). There, the petitioner, a Govt. Contractor, as per the form of the Arbitration clause requested the Secretary P.W.D to appoint the arbitrator. The Secretary, P.W.D. did not take any action and the petitioner filed an application under Section 11(6) of the Act.

After the filing of this application, the respondent appointed an Arbitrator and urged before the Chief Justice that application under Section 11(6) filed by the petitioner became infructuous. It was held that the petitioner had waited for 30 days for appointment of the arbitrator and as the respondent had failed to appoint the arbitrator the objection was not sustainable and the appointment of arbitrator made by the respondent was not valid in the eye of law.

The above decision has no application to the facts of this case as in the present case, the Arbitrator was already appointed before the appellant invoked Section 11 of the Act. The Counsel for the appellant contended that the Arbitrator was appointed after a long lapse of time and that too without any previous consultation with the appellant and therefore it was argued that the Chief Justice should have appointed a fresh arbitrator. We do not find much force in this contention, especially in view of the specific words used in the Arbitration clause in the Agreement, which is extracted above. This is not a case where the appellant requested and gave a notice period for appointment of arbitrator and the latter failed to comply with that request. The 1st respondent asked the appellant to make payment within a stipulated period and indicated that in the event of non-payment of the amount within fourteen days, the said notice itself was to be treated as the notice under the Arbitration clause in the Agreement. The amount allegedly due from the appellant was substantial and the 1st respondent cannot be said to be at fault for having given a larger period for payment of the amount and settling the dispute. It is pertinent to note that the appellant did not file an application even after the 1st respondent invoked Section 9 of the Act and filed a petition seeking interim relief. Under such circumstances, it cannot be said that there was a failure of the procedure prescribed under the contract.

The decision of the Delhi High Court in B.W.L. Ltd. Vs. MTNL & Ors. [2000(2) Arb. LR 190 (Del.)] decided on 23.2.2000 is also distinguishable inasmuch as the respondent, in spite of being given opportunity on 11.10.99 by the Court after filing of the application under Section 11 to appoint an arbitrator, failed to do so and the Court felt that it was a fit case for appointment of an arbitrator under Section 11. This case is also distinguishable as the appointment was not made before the filing of the application under Section 11.

In Sharma & Sons vs. Engineer-in-Chief, Army Headquarters, New Delhi & Ors. [2000 (2) Arb.LR 31 (AP)], the respondents were requested on 26.6.95, 6.8.95 and other dates in 1997 to appoint an arbitrator. Application under Section 11 was filed after nearly 4 years on 21.4.99. Only thereafter the respondent appointed an arbitrator on 13.5.99, but only in respect of some of the disputes. The respondent felt that the other disputes were outside the ambit of the arbitration clause. The High Court of Andhra pradesh held that in view of Section 11(6) read with Section 11(8) the respondent had forfeited his right to appoint an arbitrator after the expiry of 30 days from the date of demand for arbitrator. Even in the above case, the appointment was not made before the application under Section 11 was filed. Hence, the case is not applicable to the facts of this case.

In all the above cases, therefore, the appointment of the arbitrator was not made by the opposite party before the application was filed under Section 11. Hence, all the above cases are not directly in point.

In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?

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.

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.

We need not decide whether for purposes of sub-clauses (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not.

While interpreting the power of the Court to appoint arbitrator under Section 8 of the Arbitration Act, 1940, this Court in Bhupinder Singh Bindra Vs. Union of India and Another (1995) 5 SCC 329, in para 3 held as under:-

> "It is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation."

When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavor to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.

Therefore, we do not think that the first respondent, in appointing the second respondent as the Arbitrator, failed to follow the procedure contemplated under the Agreement or acted in contravention of the Arbitration clause.

Lastly, the appellant alleged that "nomination" mentioned in the arbitration clause gives the 1st respondent a right to suggest the name of the Arbitrator to the appellant and the appointment could be done only with the concurrence of the appellant. We do not find any force in the contention.

In P. Ramanatha Aiyar's Law Lexicon (2nd Edition) at page 1310, the meaning of the word 'Nomination" is given as follows:- "The action, process or instance of nominating;

2. The act, process or an instrument of nominating; an act or right of designating for an office or duty.

"Nominations" is equivalent to the word "appointments", when used by a mayor in an instrument executed for the purpose of appointing certain persons to office."

Nomination virtually amounts to appointment for a specific purpose and the 1st respondent has acted in accordance with Section 20.9 of the Agreement. So long as the concurrence or ratification by the appellant is not stated in the arbitration clause, the nomination amounts to selection of the Arbitrator.

Hence, the appellant, while filing the application under Section 11 of the Act had no cause of action to sustain the same as there was no failure of the agreement or that the 1st respondent failed to act in terms of the agreement. The application was rightly rejected. The appeal deserves to be and is accordingly dismissed, however, without any order as to costs.

NATIONAL FERTILIZERS VS PURAN CHAND NANGIA