Union Of India & Anr vs Premco - Dkspl (Jv) & Ors on 25 July, 2016

Equivalent citations: AIR 2016 SUPREME COURT 5420, 2016 (14) SCC 651, AIR 2017 SC (CIVIL) 534, (2016) 4 RECCIVR 138, (2016) 7 SCALE 365, (2016) 2 WLC(SC)CVL 736, (2016) 4 JCR 60 (SC), (2016) 165 ALLINDCAS 118 (SC), (2016) 4 CAL HN 205, (2016) 4 ARBILR 144, (2017) 1 ANDHLD 189, (2016) 118 ALL LR 481, (2016) 5 ALL WC 5276

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Bench: R. Banumathi, Shiva Kirti Singh

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6179 OF 2016
(Arising out of SLP (C) No. 28851 of 2014)

Union of India & Anr. …..Appellants

Versus

Premco-DKSPL (JV) & Ors. .....Respondents

J U D G M E N T

SHIVA KIRTI SINGH, J.

The appellants have assailed the legality and correctness of final order dated 25.02.2014 passed in Arbitration Petition No.14 of 2013 by an Hon'ble Judge of Gauhati High Court designated by the Chief Justice of that Court to decide respondents' applications under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). By the impugned order the designated Judge allowed the application under Section 11 of the Act and appointed a former Judge of that Court as the Arbitrator after holding that the appellants had forfeited their right to appoint railway officers as arbitrators in terms of clause 64(3)(a)(ii) of the agreement.

According to Ms. Kiran Suri, learned senior counsel for the appellants the impugned order suffers from apparent error of fact on account of misreading or non-reading of the relevant clause of the Agreement, i.e., clause 64(3)(a)(ii) which requires the contractor/respondent to make a written

demand for arbitration and permits 60 days' time to the Railways from the date of receipt of the demand, to send a panel of more than three names of eligible gazetted railway officers so that the contractor may suggest to General Manager at least two names out of that panel for appointment of the contractor's nominee. Such suggestion from the contractor should come within 30 days from the dispatch of the request by Railways. According to learned senior counsel, the relevant clause though indicated in paragraph 4 of the impugned order has been misread leading to an erroneous inference in the following words :

> "…. This Clause permits the respondents to nominate a railway officer, provided of course, the nomination is made within 30 days of receipt of the demand letter from the petitioner. But since there was no reaction from the railways side within the permissible 30 days and since in the meantime the contractor has approached the High Court under Section 11(6) of the Arbitration Act, having regard to the decision in Datar Switchgears Ltd. (supra) it is apparent that the respondents have forfeited their right to appoint a railway officer as the arbitrator." It has been further contended on behalf of the appellants that the law laid down in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr.[1] has not been correctly appreciated by the learned Judge because in that case failure to meet the demand to appoint an arbitrator was apparent on account of expiry of the notice period of 30 days indicated in the demand.

Even then the Court held that since the application was under Section 11(6)(a) of the Act and since that Section does not prescribe any time limit rather gives an unfettered discretion to appoint an arbitrator without any time limit, such power will stand forfeited only after the party making the demand has moved the Court under Section 11 and not on mere expiry of the notice period of 30 days. It is appellants' stand that in view of stipulations in the relevant clause providing for arbitration, the respondent-contractor admittedly sent a notice demanding arbitration on 12.06.2013 which was served on the appellants on 14.06.2013 and hence it had to wait for 60 days for receipt of a panel of more than three names. Thereafter the contractor had to suggest two names for appointment of his nominee arbitrator within 30 days. The cause of action for sending a notice of 30 days or any reasonable period, in view of clear terms in the Arbitration Agreement which has not been repudiated, can arise only after 60 days. Hence according to learned senior counsel for the appellants, the learned Judge erred in holding that the appellants had forfeited their right to appoint arbitrators. Instead, the finding should have been that the application under Section 11(6) of the Act was premature. On behalf of appellants reliance has been placed upon judgment of this Court by a three Judges Bench in the case of Northern Railway Administration, Ministry of Railway v. Patel Engineering Company Limited[2] in support of the proposition that in the appointment of arbitrator by court under Section 11(6), the Chief Justice or the designated person shall have "due regard to the two conditions in Section 11(8)(a) and (b) relating to qualifications required for the arbitrator by the agreement of the parties; and other considerations relevant to secure the appointment of an independent and impartial arbitrator". Hence, in any event appointment of a non-technical person, a former judge as arbitrator was unwarranted.

On behalf of respondent contractor the relevant facts have not been disputed and hence on facts it is beyond any doubt that the learned Judge has misread or omitted to read the relevant clause of the agreement which allows 60 days' time to the Railways to respond to the demand of the contractor by sending a panel containing more than three names out of which the contractor has to suggest at least two names to the Railways which has to appoint one out of them as the contractor's nominee. The relevant dates are also not in dispute. Since the notice for appointment of arbitrators dated 12.06.2013 was served on the railways on 14.06.2013, the contractor had to respect the terms of the agreement which was unrepudiated and to wait for a period of at least 60 days before Section 11 application could have been filed. Instead of waiting for 60 days the contractor/respondent preferred such application prematurely on 23.07.2013. The Railways sent a panel of 4 names to the respondent on 30.07.2013, well within 60 days limit.

In the aforesaid facts and circumstances it did not lie in the mouth of the respondent contractor that the appellants had committed a default and had forfeited their right to appoint arbitrators as per terms of the agreement. The learned Judge failed to read the relevant clause of the agreement properly and therefore wrongly placed reliance upon judgment in the case of Datar Switchgears (supra). In that case this Court had extracted the relevant terms of agreement in paragraph 9 which showed that there was no stipulation of any time limit like that of 60 days in the present case. The terms of the Agreement bind the parties unless they have chosen to repudiate the same. Relevant terms, if provided, will be material for deciding when the right of a party to appoint the arbitrator will suffer forfeiture and when the other party would be entitled to give notice and on failure, move application under Section 11(6) of the Act. Such terms deserve respect of the parties and attention of the Court. In view of aforesaid discussions we find no option but to set aside the impugned order under appeal. We order accordingly. In case the respondent contractor is still desirous of pursuing its claim through arbitration in terms of the agreement, it is given the option to serve a fresh notice for arbitration within a month and on receipt of the same the appellants/railways shall be at liberty to send a panel of requisite number of names to the respondents within 60 days of receipt of the notice so that Arbitral Tribunal is constituted in terms of the Agreement. It goes without saying that if the Railways default in sending the panel within the stipulated time, the contractor will be at liberty to pursue its further remedies as per provisions of the Act and law. The appeal is allowed in aforesaid terms but without any order as to costs.

……J. [SHIVA KIRTI SINGH] ……J. [R. BANUMATHI] New Delhi.

July 25, 2016.

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[1] (2000) 8 SCC 151
[2] (2008) 10 SCC 240
