

A BHARAT SANCHAR NIGAM LTD. AND ANR.

v.

DHANURDHAR CHAMPATIRAY
(Civil Appeal No. 8230 of 2009)

DECEMBER 11, 2009

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[TARUN CHATTERJEE AND AFTAB ALAM, JJ.]

Arbitration and Conciliation Act, 1996:

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s.11(6) – Appointment of arbitrator – Arbitrator not appointed within 30 days of demand – Right to make appointment of arbitrator would not be forfeited but would continue, but such right should be exercised before the other party files application under s.11 before High Court – On facts, High Court did not focus on the agreement or conditions necessary to secure appointment of independent and impartial arbitrator – Since requirement of sub-section (8) of s.11 was not dealt with by High Court, appointment of arbitrator became vulnerable – Matter remanded to High Court for decision afresh.

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Parties entered into a contract for work construction. The contract contained arbitration clause in terms whereof the Chief Engineer in charge of work at the time of dispute and in absence of Chief Engineer, Administrative head of the department was to be appointed as a sole arbitrator. The said provision envisaged that in terms thereof no person other than the one appointed by such Chief Engineer or Administrative Head should act as arbitrator to decide the disputes referred to him. Dispute arose between the parties. Respondent sent letters to the Chief Engineer of the appellant no.1 on different dates requesting for appointment of an arbitrator to adjudicate the disputes. The appellants did not give response to the letters of

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respondent. Thereafter respondent filed petitions under Section 11(6) of the Arbitration and Conciliation Act, 1996. However, according to the case made out by the appellants appointment of Principal Chief Engineer as an arbitrator was already made on 9.3.2005. By impugned order, High Court allowed the application under Section 11(6) and appointed arbitrator in place of the departmental nominee who was appointed by the Chief Engineer of the appellants. Hence the appeals.

Partly allowing the appeals and remitting the matter to High Court, the Court

HELD: 1. A plain reading of Section 11(5) of the Arbitration and Conciliation Act, 1996 would show that if one party demands appointment of an arbitrator and the other party does not appoint any arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the appellant makes an appointment even after thirty days of demand but the first party has not moved the Court under Section 11, that action on the part of the appellant would be sufficient. In the instant case, High Court did not focus on requirements required by the agreement or other conditions necessary to secure the appointment of independent and impartial arbitrator. Since the requirement of sub-section (8) of Section 11 was not at all dealt with by High Court, appointment of arbitrator without dealing with the said sub-section became vulnerable. [Para 8 and 11] [403-E-G; 406-G-H; 407-A-H]

Northern Railway Administration, Ministry of Railway v. Patel Engineering Company Ltd. (2008) 10 SCC 240, relied on.

Punj Liloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638; Datar Switchgears Ltd. v. Tata Finance Ltd. And Another

- A (2000) 8SCC 151; *Ace Pipeline Contracts Private Limited v. Bharat Petroleum Corporation Limited* (2007) 5 SCC 304; *Union of India v. Bharat Battery Manufacturing Co. Pvt. Ltd.* (2007) 7 SCC 684, referred to.

Case Law Reference:

- B (2006) 2 SCC 638 referred to Para 8
(2000) 8SCC 151 referred to Para 9
(2007) 5 SCC 304 referred to Para 10
C (2007) 7 SCC 684 referred to Para 10
(2008) 10 SCC 240 relied on Para 10

CIVIL APPELLATE JURISDICTION : Civii Appeal No. 8230 of 2009.

- D From the Judgment & Order dated 5.1.2007 of the High Court of Orissa at Cuttack Arbitration Petition No. 11 of 2005.

WITH

- E C.A. Nos. 8231, 8232, 8233, 8234 of 2009.

Debasish Moitra, Ajit Kumar Pande for the Appellants.

Parmanand Gaur (N.P.) for the Respondent.

- F The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted.

- G 2. These appeals by special leave have been filed against the orders dated 5th of January 2005 in A.R.B.P. Nos. 11, 12, 17, 18 and 28 of 2005 passed by the High Court of Orissa whereby the High Court had appointed Sh. Bibhudhendra Mishra, a Senior Advocate of the Orissa High Court as the sole arbitrator on the application of the respondent filed under Section 11 (6) of the Arbitration and Conciliation Act 2006
H (hereinafter referred to as "the Act"). Since the parties and the

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subject matter of the dispute are the same, we have clubbed all these appeals and the same are being decided analogously by this common judgment to avoid any confusion. A

3. The relevant facts leading to the filing of these appeals as emerging from the records may be briefly stated as follows: B

The parties herein entered into a contract pursuant to distinct notices inviting tender by BSNL [in short 'the appellant'] for the work of construction of 4 Nos. of Type-II, 2 Nos. Type-III and 1 No. of Type-IV Staff Quarters at Bhanjanagar of vertical extension to combined building at Aska of 3 Nos. of Type III, 3 Nos. of Type II and 4 K type T.E. building at Jankia and of vertical extension to 8 Nos. of Type II and 6 Nos. of Type IV staff quarters at CTTC compound Vanivihar, Bhubaneshwar. C

4. The said contract contained an arbitration clause in terms whereof the Chief Engineer, Telecommunication/ Postal Department in charge of the work at the time of dispute, or if there be no Chief Engineer, the Administrative Head of the said Telecommunication/ Postal Department was to be appointed as a sole arbitrator. The said provision envisaged that in terms thereof no person other than the one appointed by such Chief Engineer or Administrative Head of the Telecommunication/ Postal as aforesaid should act as arbitrator to decide the disputes referred to him. D E

5. The Respondent by letters, requested the Chief Engineer (Civil) for appointment of an arbitrator to adjudicate the disputes between the parties in terms of clause 25 of the respective agreements. According to the respondent, letters were received by the Chief Engineer of the appellant no.1 on different dates. The Appellants having failed to respond to the letters of respondent requiring them to appoint an arbitrator and to appoint an arbitrator in response to such letters within the stipulated period in accordance with Clause 25 of the respective Agreements, the respondent was constrained to file petitions under Section 11(6) of the Act for appointment of an F G H

A Arbitrator. However, according to the case made out by the appellants, on 9th of March, 2005, Chief Engineer (Civil), BSNL had already appointed Sri. Gurbaux Singh, Principal Chief Engineer (Arbitration) BSNL vide its office letter No. 69- 41(05)/CE(c)/BBSR/205. By the impugned order, the High Court
B allowed application under S. 11(6) of the Act, and appointed one Sri. Bibhudhendra Mishra in place of departmental nominee Sri. Gurbaux Singh who was appointed by Chief Engineer (Civil) BSNL of appellant No.1.

C 6. Feeling aggrieved by the said order of the High Court, the appellant has filed these special leave petitions which on grant of leave, were heard in the presence of learned counsel
D for the parties.

D 7. Before we consider the arguments raised by the learned counsel for the parties before us, it would be necessary to refer to Section 11 of the Act, which reads as under:

E "Section 11. Appointment of arbitrators. (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

F (3) & (4).....omitted because these are not necessary for our purpose

G (5) 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.

H (6) Where, under an appointment procedure agreed upon

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by the parties,- (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to- (a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator..."

8. A plain reading of Section 11 [5] of the Act would show that if one party demands appointment of an arbitrator and the other party does not appoint any Arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the appellant makes an appointment even after thirty days of demand but the first party has not moved the Court under Section 11, that action on the part of the appellant would be sufficient. In other words, in cases arising under Section 11 [6], if the respondent has not made an appointment within thirty days of demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files the application under Section 11 seeking appointment of an arbitrator before the High Court. It is only then the right of the respondent ceases. In this connection, a three-Judge Bench decision of this Court in *Punj*

A *Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638, may be referred to. In this case, this Court considered the applicability of Section 11 [6] of the Act and after considering the scope and object of the Act held that once notice period of thirty days has expired and the party has moved the Hon. Chief Justice of the High Court under Section 11 [6] of the Act, the other party loses his right to appoint an arbitrator on the basis of arbitral agreement. While taking this view, this Court in the *Punj Lloyd's case* [supra] had relied on the judgment referred in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Another*, (2000) 8 SCC 151, wherein in paragraph 19 at page 158 this Court observed as follows:

D "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 do 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, which 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."

9. Similarly in the case of *Ace Pipeline Contracts Private Limited v. Bharat Petroleum Corporation Limited*, (2007) 5 SCC 304, this Court went to observe that:

H "But in sub-section (6), where, the procedure has already

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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."

10. On a perusal of the above quoted observations of this Court made in *Ace Pipeline Contracts Private Limited* (supra), the reasons advanced in the orders passed by the High Court must be found to be a correct interpretation of the aforesaid provision and so far as the period of 30 days with regard to Section 11(6) is concerned, there is no doubt at all that thirty days limitation cannot be invoked as mandatory period under Section 11 [6] of the Act. But a somewhat different view was expressed in a latter decision of this Court in the case of *Union of India vs. Bharat Battery Manufacturing Co. Pvt.Ltd.* [2007 (7) SCC 684]. In view of the difference of opinion of the two coordinate benches of this Court, the matter was referred to a three-Judge Bench in the case of *Northern Railway Administration, Ministry of Railway vs. Patel Engineering Company Ltd.* [2008 (10) SCC 240] in which the decision in *Ace Pipeline Contracts Pvt. Ltd.* (supra) was also referred to. Arijit Pasayat, J. (as His Lordship then was), heading the three-Judge Bench of this Court, after considering the scope and object of the Act particularly Section 11 of the Act, concluded the following :

A "A bare reading of the scheme of Section 11 shows that
 the emphasis is on the terms of the agreement being
 adhered to and/or given effect as closely as possible. In
 other words, the Court may ask to do what has not been
 B provided for are exhausted. It is true as contended by Mr.
 Desai, that it is not mandatory for the Chief Justice or any
 person or institution designated by him to appoint the
 named arbitrator or arbitrators. But at the same time, due
 regard has to be given to the qualifications required by the
 C agreement and other considerations.

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D In all these cases at hand the High Court does not
 appear to have focused on the requirement to have due
 regard to the qualifications required by the agreement or
 other considerations necessary to secure the appointment
 of an independent and impartial arbitrator. It needs no
 reiteration that appointment of the arbitrator or arbitrators
 named in the arbitration agreement is not a must, but while
 E making the appointment the twin requirements of Sub-
 section (8) of Section 11 have to be kept in view,
 considered and taken into account. If it is not done, the
 appointment becomes vulnerable. In the circumstances, we
 set aside the appointment made in each case, remit the
 F matters to the High Court to make fresh appointments
 keeping in view the parameters indicated above."

G 11. In the aforesaid decision in the case of Northern
 Railway Administration (Supra), Arijit Pasayat, J. (as His
 Lordship then was), found that the High Court in the said case
 did not appear to have focused on the requirement to have due
 regard to the qualifications required by the agreement or other
 conditions necessary to secure the appointment of an
 independent and impartial arbitrator. In the aforesaid decision,
 this Court also concluded that since the requirement of sub-
 H section (8) of Section 11 was not at all dealt with by the High

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Court in its order, the appointment of an arbitrator without dealing with Sub-Section 8 of Section 11 of the Act became vulnerable and accordingly, such appointment was set aside. Similar is the position in this case. In this case also, before appointing an arbitrator under Section 11(6) of the Act, the High Court had failed to take into consideration the effect of Section 11(8) of the Act as was done in *Northern Railway Administration* (supra).

12. In view of the discussions made hereinabove and particularly, in view of the principles laid down by this Court in *Northern Railway Administration* (supra), we set aside the impugned order and remand the case back to the High Court for fresh decision of the application under Section 11(6) of the Act and while considering the application afresh, the High Court is directed to take into consideration the aforesaid decision of this Court.

13. The appeals are allowed to the extent indicate above. There will be no order as to costs.

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Appeals partly allowed.