

V.GOPALA GOWDA, C.J.

ARBP No. 25 of 2009 (Decided on 30.04. 2010.)

M/S. SUBASH CHANDRA KANCHAN & ANR *Appellant*

.Vrs.

B.S.N.L. & ANR. *Respondent*

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – SEC.11(6).

For Petitioner – M/s. S.K.Sanganeria, P.C.Patnaik & P.C.Nayak.
For Opp.Parties – M/s. S.Ku.Das & B.C.Pradhan.

GOPALA GOWDA, C.J. The petitioners have filed this petition under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called 'the Act' in short) seeking for appointment of an arbitrator or to constitute an arbitral Tribunal unconnected with and independent of the opposite parties to adjudicate the claims and resolve the dispute between the parties urging various facts and legal contentions.

2. Relevant facts are stated for the purpose of examining and considering the claim of the petitioners herein. The petitioners herein submitted tender quotation for the execution of the work, namely, "Construction of administrative building including water supply, sanitary installation and external services at Koraput (Orissa)" by offering tender of the value of Rs.1,11,14,351.00 with a stipulation to commence the work immediately to complete the same within the period of 20 months as per letter No.1124 dated 24.9.1998 of the Executive Engineer-opposite party no.1. Even before execution of the agreement the petitioners started the work and vide letter dated 15.12.1998 requested the opposite party no.1 to enter into an agreement and to include the detail items of work and also to give the detail working drawings which were not provided to the petitioners by opposite party no.1, is the allegation made in the petition.

3. Subsequently, the first petitioner entered into an agreement for the aforesaid work vide Agreement No.28/CDB/98-99 which agreement contains clause 25 relating to arbitration. Relevant portion of the said clause reads thus :

"The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer or administrative head of the Telecommunication/Postal as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the Telecommunication/Postal Department as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases, where the amount of the claim in dispute is Rs.50,000/- (Rupees fifty thousand) and above, the arbitrator shall give reasons for the award."

3. It is the case of the petitioners that on 27.3.1999 they sent a letter to the opposite party no.1 to furnish a certified copy of the agreement, other papers and documents and requested for issuance of the departmental materials. During the course of execution of the work, there arose some dispute between the parties, as the opposite party no.1 went on changing the instructions from time to time and also failed to make payment in terms of the agreement and, therefore, petitioner raised demand with opposite party no.1 and as opposite party no.1 did not settle the demand, they approached opposite party no.2 in terms of clause 25 of the agreement by way of a notice dated 11.10.2004 sending the same by speed post to appoint an arbitrator. When no arbitrator was appointed in terms of the aforesaid clause 25 of the agreement, the petitioner approached the Chief Justice of this Court which was registered as ARBP No.55 of 2004. Opposite party no.2 in its reply agreed to appoint an arbitrator. ARBP No.55 of 2004 was disposed of by the then Chief Justice of this Court vide order dated 28.9.2007 with a direction to opposite party no.2 to appoint an arbitrator and complete the proceeding with the stipulated period. After disposal of the aforesaid ARBP No.55 of 2004, one Mr.A.K.Nagar, the Principal Chief Engineer (Arbitration) was appointed as arbitrator to adjudicate the claims and disputes between the parties. He sent a notice to the petitioners on 19.10.2007 to submit their claim statements and documents. Since the said Mr.A.K.Nagar resigned as he was transferred, in his place another Chief Engineer by name Mr.V.K.Malhan was appointed as arbitrator vide order No.1236 dated 30.9.2008. It is the case of the petitioners that Mr.V.K.Malhan did not hold a single sitting of the arbitration proceeding and therefore the matter has been pending. Therefore, not only he has delayed the proceedings but the petitioners have lost faith in him as he was negligent in not holding the arbitral proceedings and to resolve the claims and disputes. Therefore, it is contended that his appointment is non-est in the eye of law. Hence, the present petition is filed seeking the aforesaid reliefs.

4. Counter affidavit has been filed on behalf of the opposite parties by one Makara Marindi who is serving as Executive Engineer-opposite party no.1 and is duly instructed and authorized to file the same by the opposite party no.2. In the counter affidavit he has stated that the arbitration petition filed by the petitioners is not maintainable in law and prayer of the petitioners cannot be granted to appoint a new arbitrator who is unconnected with and independent of opposite parties to adjudicate the claims and disputes between the parties. The arbitrator Mr.A.K.Nagar, Principal Chief Engineer, after his appointment sent notice to the parties to submit their statement of claim and documents vide his letter dated 19.10.2007. The petitioners submitted their claim on 14.1.2008 and the opposite parties submitted their counter claims on 2.2.2008. Rejoinder was submitted by the petitioners on 27.6.2008 and the reply to the rejoinder was filed by the opposite parties on 19.11.2008. The arbitrator in exercise of his power under Section 26 of the Act decided to appoint an expert to assess the correct work done by the claimant and requested the Chief Engineer (Civil), Civil Orissa Zone, Bhubaneswar vide letter dated 26.5.2008 (Annexure-B) to nominate an officer for the said purpose. As per the request, one P.K.Mohapatra, Executive Engineer (Civil), BSNL Civil Division –I, Bhubaneswar was nominated as inspecting officer to carry out the direction vide letter dated 5.6.2008 (Annexure-C).

It is further stated that since Mr.A.K.Nagar, Principal Chief Engineer, resigned from the arbitral Tribunal due to his transfer, one Mr.V.K.Malhan, Chief Engineer, was appointed as arbitrator on 30.9.2008. In the proceedings held by him on 16.10.2008, he intimated the parties about his appointment and requested the Chief Engineer (C), BSNL Civil Orissa Zone, Bhubaneswar to ensure the report of the nominated/inspecting officer. The said inspecting officer being promoted as Superintending Engineer, the Chief Engineer appointed his successor Shri P.K.Mallick as the inspecting

officer. Again on 2.1.2009, Mr.V.K.Malhan intimated the parties to ensure submission of report by the nominated officer. It is the further case of the opposite parties that in spite of letter dated 12.5.2009 issued by the inspecting officer for joint verification on 10.6.2009 and 11.6.2009 to verify the construction of building at Koraput, the same could not be done on account of the personal difficulties and work of the petitioners. Though the inspecting officer contacted the first petitioner from time to time, a suitable joint verification date could not be fixed. In the reply letter received from the petitioners by the Inspecting Officer, it is stated that since Arbitration Case No.25 of 2008 is pending before the Chief Justice of this Court, they are unable to visit the site on 10.6.2009 and 11.6.2009.

5. When the matter stood thus, Mr.V.K.Malhan resigned from the proceedings due to his transfer. Therefore, S.S.Dahiya, another Chief Engineer, has been appointed as the sole arbitrator by letter dated 30. 7.2009. He had in turn vide his letter dated 11.9.2009 intimated the parties and directed the inspecting officer to submit the report as per direction issued by the arbitral Tribunal earlier and he has allowed one more chance to the petitioners to attend the joint verification and submit the report by 30.11.2009. Shri P.K.Mallick, inspecting officer fixed 26.10.2009 and 27.10.2009 as the dates for joint verification and issued notice to the parties accordingly. He had reached the site as per the schedule date and time, but the petitioners did not attend the joint verification. After receipt of the letter dated 31.10.2009 from the inspecting officer, arbitrator Mr.S.S.Dahiya fixed the date of hearing to 18.1.2010 at 11.00 hours and intimated the petitioners and the opposite parties.

6. The allegations of the petitioners that the opposite parties are delaying the proceedings on account of negligence on the part of the arbitrator are all denied as false. Further it is specifically stated that there is no cause of action for the petitioners to approach this Court seeking for appointment of an arbitrator as prayed for. Rejoinder affidavit is filed denying certain averments made in the counter affidavit. Reply to the rejoinder affidavit is also filed by the opposite parties reiterating its stand. Learned counsel for the petitioners placed reliance on Union of India v. M/s. Singh Builders, 2009 AIR SCW 3374, Haryana Telecom Limited v. Union of India and another, 2004 (2) Arb.L.R. 364 and Devi SBI Industries Ltd. V. Government of NCT of Delhi and others, 2003 (2) Arb.L.R.523 in support of the contention that the petition is maintainable and the learned Chief Justice of this Court is empowered to appoint an arbitrator as section 15 is attracted to the facts of the case.

7. I have carefully gone through the facts pleaded by both parties to find out as to whether this Court is required to exercise its power under section 11(6) of the Act and grant the relief of appointment of an arbitrator unconnected with and independent of the opposite parties to adjudicate the claims, as prayed by the petitioners. My answer to the said question is in the negative for the following reasons. It is an undisputed fact that pursuant to the orders of this Court dated 28.9.2007 in ARBP No.55 of 2007, opposite party no.1 has appointed Mr.A.K.Nagar, Principal Chief Engineer to arbitrate the matter and resolve the dispute between the parties and it is alleged that he has not held a single sitting of the proceeding, nor completed the arbitration proceedings within 6 months as directed by this Court nor sought extension and without notice he resigned with an intention to delay the proceeding. The said allegations are denied by the opposite parties in their counter statement, wherein they have narrated in what circumstances the proceedings were not held by him and subsequently two officers of the rank of Chief Engineer were appointed as arbitrator and how successors of the arbitrator, namely, A.K.Nagar, V.K.Malhan and S.S.Dahiya, Chief Engineers, in exercise of power under section 26 of the Arbitration and Conciliation Act,

1996 wanted to ascertain the correct work done by the petitioners and pursuant to the same one P.K.Mohapatra, Executive Engineer was nominated as inspecting officer and upon his promotion one P.K.Mallick was nominated as the Inspecting Officer on 29.1.2009 who by letter dated 12.5.2009 to the petitioners fixed the date of inspection to 10.6.2009 and 11.6.2009 to verify the building at Koraput to assess the correct work done by the petitioners and submit his report. The petitioners did not co-operate with him and did not attend the same for the purpose of verification. Thereafter, the Inspecting Officer P.K.Mallick again issued notice on 5.10.2009 to the petitioners fixing date of inspection to 26.10.2009 and 27.10.2009 but the petitioners have not cooperated for inspection. Thereafter the arbitrator himself has fixed the date of hearing to 18.1.2010 at 11 hours vide notice dated 10.11.2009 for which also the petitioners have not co-operated. The petitioners are not participating in the arbitral proceedings. The delay attributed to the opposite parties in the petition is not deliberate but for the administrative reasons. Therefore, the appointment of the arbitrator and termination of the same and again appointment of another arbitrator by the opposite parties is in exercise of their power under clause 25 of the agreement read with sections 11 and 15 of the Arbitration and Conciliation Act, 1996. Therefore, the present petition filed by the petitioners cannot be maintained as the arbitrator is already appointed by the opposite parties in conformity with clause 25 of the agreement to resolve the dispute between the parties. Reliance placed by the petitioners' counsel on various decisions of the apex court and High Court which are referred above are wholly misplaced to the fact situation and, therefore, those decisions cannot be applied to the case on hand. For the aforesaid reasons, the petition is misconceived and devoid of merit and is dismissed but without costs.

Application dismissed.