

**2022 LiveLaw (SC) 9**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**AJAY RASTOGI; ABHAY S. OKA, JJ.**

**JANUARY 04, 2022**

**CIVIL APPEAL NO(S). 54 OF 2022**

**(Arising out of SLP(Civil) No(s). 28682 of 2019)**

**M/S. DURGA WELDING WORKS**

**VERSUS**

**CHIEF ENGINEER, RAILWAY ELECTRIFICATION, ALLAHABAD & ANR.**

**Arbitration and Conciliation Act, 1996 - Section 11(6)- A party to the arbitration agreement can appoint an arbitrator even after an Arbitration Petition has been filed by the other party before the High Court for appointment of an arbitrator if the party has not been given due notice of the same. (Para 16)**

(Arising out of impugned final judgment and order dated 26-07-2019 in ARBP No. 61/2009 passed by the High Court Of Orissa at Cuttack)

*For Appellant(s) Mr. Gaurav Agrawal, AOR Mr. Abhikalp Pratap Singh, Adv. Ms. Bhavya Tyagi, Adv. Ms. Aadya Yadav, Adv. Mr. Himanshu Tripathi, Adv.*

*For Respondent(s) Mr. Jayant K Sud, Ld ASG. Ms. Archana Pathak Dave, Adv. Ms. Priyanka Das, Adv. Ms. Shantanu Sharma, Adv. Mr. Rohit Pandey Adv. Mr. Amrish Kumar, AOR Mr. Raj Bahadur Yadav, AOR Mr. Randeep Sachdeva, Adv.*

**J U D G M E N T**

**Rastogi, J.**

1. Leave granted.
2. The instant appeal has been filed assailing the order dated 26<sup>th</sup> July, 2019 declining to appoint an Arbitrator in exercise of its power under Section 11(6) of the Arbitration and Conciliation Act, 1996(hereinafter being referred to as “the Act”).
3. The seminal facts not in dispute are that the tender of the appellant was accepted and the same was communicated by letter dated 30<sup>th</sup> November, 2006 in reference to which a contract agreement was executed between the parties containing clauses 63 and 64 of the general conditions of

contract containing the clause of arbitration for settlement of claims and/or disputes between the parties. Since there were claims which could not be settled, the appellant served a legal notice dated 3<sup>rd</sup> August, 2009 for appointment of an Arbitrator and for settlement of claims. Although, there was no express reference made of clauses 63 and 64 in the notice, but the pith and substance of the notice dated 3<sup>rd</sup> August, 2009 was for settlement of disputes through the process of arbitration in terms of the clause of arbitration under general conditions of agreement which is a part of the contract agreement executed between the parties.

4. It is not disputed that the notice dated 3<sup>rd</sup> August, 2009 was duly served upon the respondents. It is alleged that since the respondents failed to appoint an arbitrator pursuant to notice dated 3<sup>rd</sup> August 2009, Arbitration Petition (ARBP No. 61 of 2009) came to be filed on 23<sup>rd</sup> October, 2009 in the High Court of Orissa for appointment of an Arbitrator under Section 11(6) of the Act.

5. It reveals from the record that just after filing of the arbitration petition, the appellant has completely forgotten of taking action in furtherance thereto and it was never in notice of the respondents of such petition being filed since no notice was served at any stage.

6. In the meanwhile, the respondents vide letter dated 28<sup>th</sup> January, 2010, in response to the letter of the appellant dated 3<sup>rd</sup> August, 2009 asked the appellant to select two names from a panel of four persons.

7. It is alleged that immediately thereafter, on 17<sup>th</sup> February 2010, Miscellaneous Case No. 4 of 2010 was filed in Arbitration Petition No. 61 of 2009 seeking an order restraining the respondents from appointing an Arbitrator and that application too remained pending and no action was taken up by the appellant to pursue either the Arbitration Petition No. 61 of 2009 or the Miscellaneous Case No. 4 of 2010 before the High Court.

8. In the meanwhile, by letter dated 28<sup>th</sup> August 2010, two officers from the panel suggested by the respondents were selected by the appellant and in furtherance thereto, the respondents constituted an Arbitration Tribunal by letter dated 24<sup>th</sup> September, 2010. The appellant thereafter appeared before the Arbitral Tribunal on 25<sup>th</sup> October, 2010 and preferred statement of claim. The respondents also submitted their statement of defence on 15<sup>th</sup> November, 2010.

9. The appellant thereafter appeared before the Arbitral Tribunal on 27<sup>th</sup> December, 2011 and submitted an application that the Tribunal has not been nominated within the stipulated time and hence, the constitution of the Arbitral Tribunal is not valid and further submitted that the Tribunal should not proceed with the arbitration proceedings. The fact still remains that the arbitration petition filed by the appellant on 23<sup>rd</sup> October, 2009 has not seen the light of the day except the fact that it was filed in the Registry of the High Court.

10. Since the Arbitral Tribunal was constituted, with consent of the appellant, the Tribunal proceeded with the arbitration proceedings and since the appellant failed to participate despite the opportunity being afforded, *exparte* award came to be passed on 21<sup>st</sup> June, 2013 rejecting the claim of the appellant. The fact is that finally in the arbitration petition filed by the appellant, notices were issued to the respondents by the High Court in the year 2016, almost 3 years after passing of the *exparte* award dated 21<sup>st</sup> June, 2013. The High Court, taking note of such peculiar facts and circumstances, dismissed the arbitration petition by an Order dated 26<sup>th</sup> July, 2019 with liberty to the appellant to submit its objections under Section 34 or 37 of the Act, if so advised.

11. We have heard learned counsel for the parties and with their assistance perused the material available on record.

12. The exposition of legal principles is indeed well settled by this Court in ***Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr;*** 2000(8) SCC 151 followed in ***Punj Lloyd Ltd. Vs. Petronet MHB Ltd;*** 2006(2) SCC 638 that once an application under Section 11(6) of the Act has been filed for appointment of an Arbitrator before the High Court, the respondents forfeited their right to appoint an Arbitrator and the High Court alone holds jurisdiction to appoint an Arbitrator in exercise of power under Section 11(6) of the Act. Indisputedly, the appointment of an Arbitrator was made by the respondents after arbitration petition was filed by the appellant under Section 11(6) of the Act in the Registry of the High Court on 23<sup>rd</sup> October, 2009.

13. This Court cannot be oblivious of the peculiar facts and circumstances brought to our notice that after filing of an arbitration petition on 23<sup>rd</sup> October 2009 in the Registry of the High Court, the appellant completely

slept over the matter and the respondents were never served of any notice of the Arbitration Petition (ARBP No. 61 of 2009) filed before the High Court of Orissa. At the given time, when the respondents called upon the appellant to suggest and select two names out of the panel of four for constitution of the Arbitral Tribunal, the appellant vide letter dated 28<sup>th</sup> August, 2010 selected two officers from the panel suggested by the respondents. Pursuant thereto, the Arbitral Tribunal was constituted by the respondents vide letter dated 24<sup>th</sup> September, 2010 and the appellant thereafter appeared before the Arbitral Tribunal on 25<sup>th</sup> October, 2010 and submitted his statement of claim and in furtherance, statement of defence was submitted by the respondents.

**14.** The fact still remains that except the letter being once sent by the appellant on 27<sup>th</sup> December, 2011 informing of the arbitration petition being filed under Section 11(6) of the Act before the High Court, no steps were taken thereafter to pursue his arbitration application and since the appellant had not participated before the Arbitral Tribunal after filing of the statement of claim, *ex parte* award came to be passed by the Arbitral Tribunal on 21<sup>st</sup> June, 2013. It may be noticed that notices were issued for the first time by the High Court of the arbitration petition filed by the appellant in the year 2016 almost 3 years after passing of the *ex parte* award dated 21<sup>st</sup> June, 2013.

**15.** In the given facts and circumstances, the High Court was not inclined to exercise its jurisdiction under Section 11(6) of the Act for appointment of an Arbitrator and dismissed the petition by an Order dated 26<sup>th</sup> July, 2019 with liberty to the appellant to submit objections against the *ex parte* award dated 21<sup>st</sup> June, 2013 under Section 34 or 37 of the Act, if so advised.

**16.** In our considered view, so far as the question of law is concerned, certainly being settled that after the application has been filed for appointment of an Arbitrator under Section 11(6) of the Act, before the High Court the respondents forfeited their right to appoint an Arbitrator under the clause of arbitration thereafter but from the narration of facts which has been noticed by us, we are of the view that no error was committed by the High Court in dismissing the petition filed under Section 11(6) of the Act for appointment of an Arbitrator by an Order dated 26<sup>th</sup> July, 2019.

**17.** Consequently, the appeal fails and accordingly dismissed.

**18.** Pending application(s), if any, stand disposed of.

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