

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Arb.P.No.69 of 2009**

% **Date of decision:11.09.2009**

HYDERABAD POLLUTION CONTROLS LTD. Petitioner

Through: Ms. Nitya Rama Krishanan & Mr.
Sarim Naved, Advocates.

Versus

M/S INDURE PVT. LTD. ... Respondent

Through: Mr. Atul Nigam, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? yes
2. To be referred to the reporter or not? yes
3. Whether the judgment should be reported
in the Digest? yes

RAJIV SAHAI ENDLAW, J.

1. The petition has been preferred under Section 11 (6) of the Arbitration Act, 1996. The respondent has filed the reply. The counsels have been heard.

2. The counsel for the respondent has not disputed that this court is the appropriate court i.e. it has the territorial jurisdiction to entertain this petition. The counsel for the respondent has also not disputed that the petitioner is a party to the arbitration agreement which has been invoked and the respondent is the other party thereto. In fact there are two agreements between the parties one for supplies and the other for erection. The clause relating to settlement of disputes in one of the agreements is as under:-

“48.00 Settlement of Disputes

48.1 Any dispute(s) or differences arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.

48.2 All unsettled disputes(s) or difference(s) arising out of or in connection with the contract shall be decided by the Engineer whose decision shall be final and binding on the parties.

48.3 Prior to the initiation of any/or arbitration proceedings permitted by this contract to resolve disputes between them, in the event a dispute arises between the Purchaser and the contractor regarding the application or interpretation of this contract (a “Dispute”), the Purchaser’s Project Incharge and the contractor’s representative shall use their best efforts in good faith to reach a reasonable and equitable resolution of the matter. If the Purchaser’s Project Incharge and the contractor’s representative are unable to resolve the matter within 30 days, either party by written notice may refer the matter for resolution by good faith negotiation between their respective senior officers with decision making power and who shall not have had substantive involvement in the matters involved in the dispute, unless the parties otherwise agree.”

49.00 Arbitration

Where any dispute is not resolved as provided for in the clause 48 then the following provisions shall apply :

- a) The dispute shall be referred to arbitration at the request of either party upon written notice to that effect to the other party (a “Notice of Reference”) in accordance with the Arbitration Rules of Indian Arbitration and Conciliation Act, 1996 in force at the date of the agreement. Where the rules do not deal with any issue arising in connection with the conduct and/or procedure of the arbitration such issue shall be resolved in accordance with the law of the place in which the arbitration is held and GCC clause 50 shall be construed accordingly.
- b) The place of arbitration shall be Delhi and the language of the arbitration shall be English.
- c) The parties agree that any arbitration award shall be final and binding upon the parties and (to the fullest extent permitted by applicable law) the parties waive their right to any form of appeal or other similar recourse to a court or law.
- d) The arbitration will take place before a arbitrator who shall be nominated by the Chairman of Desein Private Limited, Desein House, Greater Kailash-II, New Delhi-48.
- e) Performance of the contract shall continue during any arbitration proceedings pursuant to above clause unless the Purchaser shall order the suspension thereof pursuant to GCC clause 47.”

3. The provision for settlement of disputes in the other contract except for minor inconsequential differences is the same save for the procedure for appointment of arbitrator which is as under:-

“The arbitration will take place before a Sole arbitrator who shall be nominated by the Chairman of Desein Private Limited, Desein House, Greater Kailash-II, New Delhi 110048 **and acceptable to the Contractor/Seller.**”

4. Disputes are stated to have arisen between the parties relating to both the contracts; the petitioner claims a sum of approximately Rs.20,14,575/- to be due under the supply contract and a sum of Rs. 7,41,301/- to be due under the erection contract. It is not disputed that the petitioner invoked the arbitration clause and the respondent communicated to the petitioner of the appointment of Mr. Y.A. Ismail, Vice President, Desein International Pvt. Ltd. to be the arbitrator. The petitioner approached this court with the case that the arbitrator so appointed was not acceptable to the petitioner, being an employee of a sister concern of the respondent and the petitioner having no faith in his impartiality. It is further contended that as per the agreement in one of the contracts, the arbitrator had to be acceptable to the petitioner and the arbitrator so appointed is not acceptable to the petitioner. The petitioner thus seeks appointment of an impartial arbitrator.

5. The counsel for the respondent has vehemently opposed the petition. It is his contention that the petition is pre-mature for the reason of the petitioner having not followed the two tier procedure agreed to for amicable settlement of disputes i.e. first of the meeting of their named officers and then of their senior officials for equitable resolution of the matter. It is contended that the parties had agreed that only if the disputes cannot be resolved in the manner aforesaid

could the petitioner invoke the arbitration. It was further urged that the petitioner had not made out any case of bias of the appointed arbitrator and the averments in the petition in this regard are sketchy. It was urged that this court could not remove an arbitrator so appointed by the appointing authority based on such apprehensions.

6. This court had found both of the aforesaid contentions also taken in the reply of the respondent to be baseless and for this reason only, at the outset suggestion was made for appointment of an independent arbitrator without taking up the time of the court.

7. The Supreme Court in ***M.K. Shah Engineers & Contractors Vs. State of Madhya Pradesh*** AIR 1999 SC 950 though holding the steps preceding coming into operation of the arbitration clause to be essential, held that the same can be waived. It was held that if one party has by its own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived and the party at fault cannot be permitted to set up the bar of non-performance of pre-requisite obligation so as to exclude the applicability and operation of the arbitration clause. Waiver in that case was found from acquiescence in the appointment of arbitrators and participation in the arbitration.

8. I had during the hearing enquired from the counsel for the respondent as to whether the respondent after knowing of the disputes raised by the petitioner, invoked the amicable settlement mechanism. The answer was in the negative. However, the counsel for the respondent contended that since it was the petitioner which was invoking the arbitration, it was for the petitioner to initiate the

amicable settlement procedure. However, without entering into the said controversy, I find the respondent to have by its conduct of appointment of the arbitrator, in any case waived the agreed amicable settlement procedure preceding the arbitration. The respondent cannot blow hot and cold. The respondent cannot on the one hand appoint an arbitrator and oppose the petition on the ground of the arbitrator having been appointed and the petitioner being not entitled to challenge the appointment and on the other hand contend that the petition is pre-mature. The conduct of the respondent in this regard is found dilatory and malafide.

9. The counsel for the respondent faced with the above, contended that there could be no waiver of right without the respondent being aware that by appointing the arbitrator, it was waiving the right of amicable settlement. I find the said argument to be preposterous. The acrimony with which the petition has been opposed in any case leads me to believe that there can be no possibility of any amicable settlement between the parties and the insistence by the respondent on the same appears to be dilatory.

10. Thus the petition cannot be said to be pre-mature.

11. As far as the other aspect of the matter is concerned, though the counsel for the respondent is correct in contending that the petitioner if had agreed to an appointment procedure cannot object to the arbitrator so appointed, and though I further find that in such situation the petition under Section 14 and not the petition under Section 11 (6) is the remedy, I find that the appointment of the arbitrator at least qua the agreement where it is provided that the

same should be acceptable to the petition is contrary to the agreement and thus nonest.

12. The counsel for the respondent urged that this court ought to decide whether the non-acceptance by the petitioner of the arbitrator proposed, even under the agreement where such appointment was subject to acceptance of the petitioner, is reasonable or not. It was contended that in the facts of this case no ground was made out for non-acceptance of the arbitrator. It was however not disputed that M/s Desein International Pvt. Ltd. whose Vice President has been appointed as the arbitrator is the sister concern of the respondent company.

13. In my view, once it was found that under the agreed procedure, the arbitrator proposed had to be acceptable to the petitioner, this court need not enter into the domain of the reasons given by the petitioner for not accepting the arbitrator proposed by the respondent. One of the meaning of "accept" in Black's Law Dictionary 6th Edition is "to agree to, accede to or to consent to" or "to adopt". The nomination by the Chairman of Desein Pvt. Ltd., of the arbitrator is in the nature of an offer which had to be accepted by the petitioner to become an appointment of the arbitrator. The petitioner having not accepted the said offer, no appointment of arbitrator came into being. The clause (Supra) tantamounts to appointment of arbitrator with mutual consent and in the absence of such mutual consent/agreement the court becomes entitled to appoint the arbitrator and is not required to enter into the question of why the parties are not able to mutually agree. Again the contentions of the respondent in this regard are found to be farfetched.

14. Thus it is held that the appointment of the arbitrator is not in accordance with the agreement and is in fact no appointment at all. The court is thus entitled to appoint the arbitrator, at least qua the contract aforesaid.

15. Undoubtedly, under the other contract the petitioner had no say in the matter of appointment of the arbitrator and if the petitioner has any grievance in that regard the remedy of the petitioner is not in this petition.

16. However, considering that the claims of the petitioner under the two contracts are not of very high value and further considering that both contracts were with respect to the same project and there may be certain overlapping, it was again suggested to the counsel for the respondent that instead of the arbitrator already appointed continuing qua one contract and an independent arbitrator being appointed qua the other contract, as claimed by the counsel for the petitioner, an independent arbitrator be appointed qua both contracts. The counsel for the respondent is agreeable to the same. Accordingly, the petition is allowed.

18. Ms. Maninder Acharya, Advocate is appointed as the arbitrator to adjudicate the disputes, subject matter of the arbitration agreement in both the contracts. On the basis of the claims disclosed, the consolidated fee of the arbitrator is fixed at Rs.40,000/- to be borne equally by the parties besides out of pocket expenses and subject to award as to costs. The parties to appear before the arbitrator with prior appointment on 6th October, 2009 I was inclined to impose heavy costs on the respondent. However,

since the respondent has ultimately agreed to one arbitrator for arbitration under both contracts and which is found economical, expedient and in the interest of the parties, no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**September 11th, 2009
pp**