

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

+ **Arb. P. No. 4/2009**

% **Date of Decision : 18.03.2009**

ITC Limited Petitioner
Through: Mr. Rishi Manchanda and Mr. Kapil
Kher, Advocates.

Versus

Mr. Shaleen Gambir & Another Respondents
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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+ **Arb. P. No.4/2009 & IA No.154/2009**

Notices of the petition under section 11 (6) of the Arbitration and Conciliation Act, 1996 were sent to the respondents pursuant to the order dated 9th January, 2009. Notices have been served on the respondents by registered A.D. post. No one is present on behalf of the respondents. They are, therefore, proceeded *ex parte* in the facts and circumstances.

The learned counsel for the petitioner has contended that it is a company within the meaning of the Companies Act, 1956 having its head quarters at ITC Green Centre, 10, Institutional Area, Sector 32, Gurgaon. The petitioner also have a hotels division which was earlier

ITC Hotels Limited.

ITC Hotels Limited (ITCHL) had selected respondent No. 1 as a trainee. To improve his professional skills and promotional aspects in his career, he had requested ITCHL to provide a specialized training, which was arranged involving a training cost of Rs. 4,10,000/-. The respondent No. 1 is alleged to have agreed to bear the cost of such training. However, on account of financial constraints, respondent No. 1 requested the petitioner to pay the said amount of Rs. 4,10,000/- to the Institute which had to impart the training to respondent No. 1.

The petitioner had agreed to pay a sum of Rs. 4,10,000/- to the Institute imparting training to respondent No. 1 on certain terms and conditions. Pursuant to the terms and conditions agreed between the parties, the respondent No. 1 executed a bond incorporating the terms and conditions agreed between the parties.

A bond dated 3rd July, 2002 was executed by respondent No. 1 in favour of ITC Hotels Limited, which stipulated that respondent No. 1 would work for ITCHL for a continuous period of three years from the date of his appointment and that if the respondent No. 1 would fail to work for a continuous period of three years, he would repay the entire cost of training besides a liquidated damages of Rs. 2,05,000/- to ITC Hotels Ltd.

The respondent No. 2 had also stood guarantor for due performance of the terms agreed between respondent No. 1 and ITC Hotels Ltd. He was a party to bond dated 3rd July, 2002 executed

between the ITC Hotels Ltd. and respondent No. 1. The bond (Service Agreement dated 3rd July, 2002) also has an Arbitration Agreement in terms of Clause-19 which reads as under:-

“19. It is agreed upon by the parties to this Agreement that any dispute, controversy or claim arising out of or relating to the said Agreement, or the breach, termination or invalidity thereof, shall be subject to, be governed and finally settled through arbitration. The law applicable to the arbitration proceedings and the contract therein shall be governed by the Indian law. The Parties agree that the venue for the arbitration proceedings shall be at Delhi and the proceedings shall be conducted by a sole arbitrator duly appointed by the Managing Director, ITC Hotels Ltd. in accordance with the provisions laid down by the Indian Arbitration and Conciliation, Act, 1996. The parties further agree that nothing herein contained shall bar ITCHL’s right to obtain injunctive relief under applicable equity rules. The Trainee agrees that ITCHL may seek injunctive relief against Trainees to enforce the ITCHL’s obligations under this agreement and to enjoin threatened conduct that may cause loss and/or damage to ITCHL. The parties agree that the Indian courts alone will have jurisdiction to try disputes, if any, arising out of the said Agreement.”

The contention of the petitioner is that the respondents breached the terms and conditions of service agreement and therefore, they became liable to pay the amounts to the petitioner as had been agreed by them under the service agreement which was executed between the parties. The respondents however, failed to pay the amounts which had become due to the petitioner and therefore, disputes arose between the petitioner and the respondents. Since the dispute have arisen between the petitioner and respondents No. 1 and 2 on account of alleged breaches committed by respondents No. 1 and 2 of the Service

Agreement dated 3rd July, 2002, the petitioner sought appointment of Arbitrator in terms of Arbitration Agreement by notices dated 15th February, 2007 and 1st March, 2007. The respondents have failed to agree to appointment of the Arbitrator till the filing of the present petition on 6th January, 2009.

The petitioner has contended that ITC Hotels Ltd. has amalgamated with ITC Ltd. and all the rights and liabilities of ITC Hotels Ltd. have been taken over by ITC Ltd. and consequently, the petitioner is entitled to maintain the petition.

The arbitration agreement between the parties cannot be denied in the facts and circumstances. It is also not denied that despite invoking the arbitration agreement, the respondents have not appointed any arbitrator before filing of the present petition under Section 11(6) of the Arbitration & Conciliation Act, 1996. Since the respondents have failed to appoint the arbitrator in terms of clause 19 of the agreement which is an arbitration clause, the respondents have lost their right to appoint an arbitrator.

In *Union of India v. M/s. R.R. Industries*, 120 (2005) DLT 572 (DB) it was held that once a party does not supply the vacancy or fails to supply the vacancy before filing of a petition under Section 11(6) of the Arbitration and Conciliation Act, such a party forfeits the right to supply the vacancy in terms of the arbitration clause and what remains is only the arbitration clause, i.e. the dispute has to be resolved under the mechanism of alternative dispute redressal scheme but no right

survives to the respondent to supply the named Arbitrator in the arbitration clause. In the present facts and circumstances there is no named arbitrator.

A three-Judge Bench of this Court in *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, III (2006) SLT 287=II (2006) CLT 251 (SC)=(2006) 2 SCC 638, considered the applicability of Section 11(6) and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint Arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Another*, VII (2000) SLT 543=IV (2000) CLT 191 (SC)=(2000) 8 SCC 151, wherein at page 158 (para 19) SCC, it was held as under :

“19. 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 does 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, that 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. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within

30 days of demand, the right to appoint an Arbitrator under Section 11(6) is forfeited.”

In the circumstances, it will be just and appropriate to appoint an arbitrator to adjudicate the disputes which are raised and which may be raised by the parties.

Considering the facts and circumstances, the petitioner is entitled for appointment of an Arbitrator. Therefore, Mr. G.P. Thareja, retired Additional & District Judge, D-201, Priyadarshini Vihar, Patparganj, New Delhi-110092 is appointed as an Arbitrator. The fees of the Arbitrator shall be Rs.7000/- per hearing subject to maximum fees of Rs. 56,000/-. The Arbitrator shall also be entitled to secretarial expenses. The Arbitrator shall devise his own procedure for conducting the arbitration proceedings. With these observations, the petition along with pending application is disposed of.

A copy of this order be sent to the Arbitrator forthwith and a copy of this order be also given *dasti* to learned counsel for the petitioner.

MARCH 18, 2009

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ANIL KUMAR, J.