

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: February 10, 2009

Date of Order: March 02, 2009

+ ARB. P. 219/2008

%

02.03.2009

**M/s Arvind Construction Company
Pvt. Ltd.**

...Petitioner

Through: Mr. Sandeep Sharma, Advocate

Versus

Union of India & Ors

...Respondents

Through: Mr. Paritosh Budhiraja, Advocates

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. This petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter, "the said Act") has been made by the petitioner relying upon the arbitration clause No.2900 of the contract entered into between the parties.

2. The contention of the petitioner is that the petitioner wrote a letter to the respondent dated 26th May 2008 seeking appointment of an Arbitrator for referring the dispute between the parties. This notice was also served through courier as well as by speed post. Despite service of notice, the respondent did not appoint the arbitrator and hence the petitioner has approached this Court under Section 11(6) of the said Act asking the Court for appointment of an Arbitrator.

3. The respondent has taken the stand that the dispute racked up by the petitioner was contrary to the terms and conditions of the contract. However, the respondent in exercise of its powers had already appointed Mr. Dinesh Dayal, Senior BEM as the Sole Arbitrator and a letter dated 11th September 2008 was written by the respondent to the petitioner informing him about appointment of the Sole Arbitrator. It is submitted that in view of the arbitrator having already been appointed, this petition has become infructuous.

4. The contention of the petitioner, per contra, is that the appointment of arbitrator was made beyond 30 days of the receipt of letter from the petitioner and the respondent had, therefore, lost right to appoint an Arbitrator. The instant petition was filed on 1st July 2008 and the respondent appointed the Arbitrator only after receipt of notice of this petition. The Arbitrator appointed by the respondent, therefore, was bad in law and this Court should appoint the Arbitrator. Counsel for the petitioner relied upon *HBHL-VKS(J.V.) v. Union of India & Ors.* 2007(1) Arb. LR 252, Delhi (Full Bench) wherein this Court held as under:

“39. Admittedly, notices were served upon the respondents stating the disputes and request was made for appointment of arbitrator. There is no dispute that in Arb. P. No. 217 and 219 of 2005 no steps were taken by the respondents. However, in Arb. P. No. 213/2005 after the petition was filed and the respondents had appeared, they had offered a panel of arbitrators, which was not accepted by the petitioner in view of the stand taken before the Court. The default on the part of the respondents, thus, in fact was not even in dispute. Despite such default, if jurisdiction of the Court is said to be

only to take measures to request the defaulting party to follow the procedure provided for appointment of arbitrator under the terms of the agreement, then it would not only be travesty of justice but would defeat the very purpose and object of the Act as well as the arbitration clause i.e. Clause 64. This arbitration clause provides various time limits for performance of different steps to ensure expeditious completion of arbitral proceedings. The loss of right, in the facts of the present cases, thus, arises both from default of contractual terms and non-compliance to the statutory provisions. There is no justification before us explaining the default of the respondents though in view of the settled principles of law, it would hardly be material. The order of the court directing the party to take recourse to the prescribed procedure would be unfair as it will be an exercise which will spread over months and would unduly delay completion of the proceedings. The arbitration process and objectivity of the amended law for expeditious resolution of dispute would be rendered ineffective. In face of loss of right, the compliance to the remaining procedure of the clause would become impracticable. If all that the Court has to do is to call upon the respondents to follow all over again the procedure for appointment of arbitrator in their own discretion, then it would not only cause delay and bring stalemate in implementation of the clause but would also provide advantage to the respondents for their own default and thus would frustrate the very object and essence of the Arbitration and Conciliation Act, 1996. Under the procedure, choice of arbitrators, choice of panel and appointment of arbitrators even after option exercised by the contractor, entirely vests in the respondent authority. Restoring this

choice to the respondents on the pretext that they have only lost the right to make appointment but the procedure for appointment would still have to be adopted and followed strictly, would raise a question as to what right in fact the respondents have lost? Cause of action for making a petition under Section 11(6) arises only when a party or an institution fails to comply with its obligation under the terms of the arbitration clause. The respondents certainly cannot be placed in a better position than what they were despite their default. Therefore, acceptance of respondents' contention would lead to adverse and absurd consequences.”

5. Learned counsel for the petitioner also relied upon 2008 (4) LR 256 (Orissa) *Vinay Agrawal v. The General Manager, East Coast Railway, Bhubaneswar*. On the other hand, counsel for the respondent has relied upon 2008 (11) SCALE Northern Railways Administration, Ministry of Railway, New Delhi *v. Patel Engineering Company Limited* wherein the Supreme Court observed as under:

“10. The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures". This expression has to read alongwith requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

11. 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 done. The court must

first ensure that the remedies 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 agreement and other considerations. (emphasis added)

12. The expression 'due regard' means that proper attention to several circumstances have been focussed. The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken."

6. I consider that in the present case Court has to keep in view of the peculiar Arbitration Clause between the parties. The Arbitration Clause reads as under:

"(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or by the Special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the railway Board and by the head of the Organization in respect of contract entered into by the other Organizations under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have

expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all. (emphasis added)

(d)
(e)
(f)
(g)
(h) ”

7. From a bare perusal of the Arbitration Clauses, it is obvious that the parties had agreed that the matter would either be referred to the Arbitrator appointed by the respondent in accordance with clause 2900 (a) or there shall be no arbitration at all in view of clause 2900 (c) of the contract.

8. It is settled law that parties are bound by the contract entered into between them including the arbitration clause. If the Arbitration Clause provides that the arbitration proceedings shall be conducted only by a particular arbitrator otherwise there shall be no arbitration and the matter

can be taken up under ordinary civil law, the petitioner does not have a right to get other arbitrator appointed through the Court under Section 11(6) of the said Act. The petitioner entered into this Arbitration Clause knowing fully well the implication of the Arbitration Clause. The petitioner is bound by the entire arbitration clause and not only a part thereof. Since no Arbitrator had been appointed by the respondent, the petitioner was at liberty to approach the civil court. The petitioner has asked for appointment of an arbitrator through this Court. In view of the judgment of the Supreme Court in *Patel Engineering (supra)* considering that emphasis of the Court has to be on the terms of the agreement being adhered to and given effect as closely as possible, I consider the Court cannot write new terms of the agreement between the parties and appoint an arbitrator outside the agreement.

9. In my opinion since the respondent has already appointed an arbitrator, the petitioner is at liberty to approach the arbitrator, so appointed by the respondent. The arbitrator shall enter upon the reference as soon as claims are filed by the petitioner before him.

10. This petition stands disposed of in above terms.

March 02, 2009
rd

SHIV NARAYAN DHINGRA J.