

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

+ **Arb. P. No.34/2010**

5th March, 2010

M/S. GEO MILLER & CO. PVT. LTD.

...Petitioner

Through: Mr. S.D. Singh, Advocate with Mr.
Rahul Kumar Singh, Advocate.

VERSUS

INDIAN OIL CORPORATION LIMITED

....Respondent

Through: Mr. D. Moitra, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. This is a petition under Sections 11, 14 & 15 of the Arbitration & Conciliation Act, 1996 for the appointment of a new Arbitrator with respect to the disputes which have arisen between the parties under the Agreement dated 12.1.1997 as per which the petitioner was to construct a Waste Water Treatment Plant for the respondent's Refinery Project at Panipat. Earlier, a petition under Section 11 of the Act was filed and the respondent had appointed one Mr. S.S. Mishra as the sole Arbitrator. Subsequently, on an application, moved under Section 16 of the Arbitration

& Conciliation Act, 1996, the Arbitrator terminated the arbitration proceedings. On a petition by the petitioner herein being O.M.P. No.179/04 filed in this Court, the aforesaid order of the Arbitrator was set aside and this Court directed the Ld. Arbitrator or his successor to conduct further proceedings. It is stated that the appointed Arbitrator thereafter has not held any further proceedings. The present petition is therefore filed for appointment of a new Arbitrator after serving of a notice dated 7.9.07 and also a letter dated 12.12.07.

2. By this petition, the prayer is that the existing Arbitrator Mr. S.S. Mishra be removed and a new Arbitrator be appointed because Mr. S.S. Mishra has failed to act with reasonable dispatch. It is stated that the said Arbitrator cannot continue and would stand removed. In fact, Mr. Moitra, on behalf of the respondent has given a list of three fresh names of Arbitrators to the petitioner in the Court today pursuant to a note dated 2.3.2010 of the respondent. The names of these Arbitrators are Sh. B.S. Giridhar, DGM (LPG)-DSO, Sh. D.K. Sharma, DGM (Consumer)-DSO and Sh. Gopal Krishan, DGM (Finance)-DSO. The relief therefore for removal of Mr. Mishra has become infructuous.

3. The counsel for the petitioner has verified the aforesaid three names, out of which one has to be appointed as an Arbitrator, however, the counsel for the petitioner persists in his prayer on instructions that an independent Arbitrator be appointed and the Arbitrator be not appointed in

terms of the Arbitration Clause. The Arbitration Clause in this case reads as under:

“9.0.0.0 ARBITRATION

9.0.1.0 Subject to the provisions of Clause 6.7.1.0 and 6.7.2.0 hereof, any dispute or dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his Final Bill in accordance with the provision of Clause 6.6.3.0 hereof and/or arising out of any amount claim by the Owner (whether or not the amount claimed by the Owner or any part thereof shall have been deducted from the Final Bill of the Contractor or any amount paid by the Owner to the contractor in respect of the work) shall be referred to arbitration by the Sole Arbitration selected by the Contractor from a panel of three persons nominated by the general manager.”

4. It is clear that arbitration, in terms of the subject arbitration clause, has to be by an Arbitrator from a panel of three persons nominated by the General Manager of the respondent. As already noted above, the petitioner has been given the three names nominated by the General Manager but the petitioner states that a sole and independent Arbitrator be appointed by this Court. It is argued that the respondent has lost the right to appoint the Arbitrator on its failure to comply with the notices sent by the petitioner.

5. The counsel for the petitioner relies upon the judgment of the Supreme Court reported as *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited (2008) 10 SCC 240* and para 14 thereof to contend that the Arbitrator must be an independent and impartial person. I may at this stage refer to the decision of

the Supreme Court in the case of *Yashwith Construction Private Limited Vs. Simplex Concrete Piles India Limited 2006 (6) SCC 204* which lays down that even after an existing Arbitrator is removed, the appointment of the Arbitrator has to be in terms of the existing procedure prescribed in the agreement. Therefore, even if Mr. S.S. Mishra is removed, the Arbitrator will have to be in terms of the Clause 9.0.1.0 of the Agreement and as per which the Arbitrator has to be one of the three persons nominated by the General Manager of the respondent.

6. The Supreme Court recently in the judgment reported as *Indian Oil Corporation Ltd. & Ors. Vs. M/s Raja Transport (P) Ltd. JT 2009 (11) SC 450* has held that merely because the appointing authority does not appoint the Arbitrator within the period stated in the notice seeking appointment of an Arbitrator, this would not mean that the Court has the power to appoint the Arbitrator but the Arbitrator will have to be appointed in terms of the agreed clause. The Supreme Court has made it abundantly clear that the Arbitrator to be appointed has necessarily to be only in terms of the agreed Arbitration Clause and not a person de hors the Agreement. Para 21 of the aforesaid judgment, lays down the ratio, and the same reads as under:

“In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days

from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 *shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.*

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

7. Sub-para (vi) of the aforesaid para 21 of the judgment of the Supreme Court in the case of ***Indian Oil Corporation's case (supra)*** makes it crystal clear that the Courts should endeavour to give effect to the appointment procedure prescribed in the arbitration clause, meaning thereby, the Court should not appoint an independent Arbitrator.

8. In view of the judgment of the Supreme Court of ***Indian Oil Corporation's case*** and in which judgment the earlier decisions have been considered and explained including the judgment of ***Northern Railway's case***, I am unable to agree with the counsel for the petitioner that this Court is empowered to appoint an independent Arbitrator against the terms of the agreed Arbitration Clause. Even the ***Northern Railway's case*** requires the Court to take into account the qualifications required by the agreement.

9. In view of the above discussion and the situation that a fresh panel of three names of the arbitrators has been suggested by the respondent to the petitioner, the present petition cannot be allowed for appointment of an independent Arbitrator. Since the respondent itself has terminated the appointment of Mr. S.S. Mishra, the petition for removal of Mr. S.S. Mishra is infructuous to this extent. So far as the relief for appointment of an independent Arbitrator, the petition stands dismissed and the respondent is held entitled to act for appointment of the Arbitrator in terms of the agreed Arbitration Clause. However, the petitioner is at liberty to select any one of the three names suggested for being appointed as an Arbitrator within a

period of two weeks from today failing which the respondent may appoint any one person out of the aforesaid three persons as an Arbitrator to determine all the disputes/differences/claims/counter claims as arising out between the parties and which are the subject matter of the present petition. The prayer for appointment of an Arbitrator by the Court is rejected with costs of Rs.50,000/- in terms of para 37 of the judgment of the Supreme Court in the case of *Salem Advocate Bar Association Vs. Union of India* (2005) 6 SCC 344.

10. With the aforesaid observations, the petition stands disposed of.

VALMIKI J.MEHTA, J

March 05, 2010

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