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

+ **Date of Decision: 01.09.2010**

% **ARB.P. 93/2010**

M/S CIVTECH ENGINEERS PVT LTD ..... Petitioner  
Through Sh. K. Sunil, Advocate

versus

M/S M.N SECURITIES (P) LTD & ANOTHER ..... Respondent  
Through Mr. Sumesh Dhawan & Ms. Vatsala  
Kak, Advocates for R-1  
Mr. Sudhir Nandrajog, Sr. Advocate  
with Mr. Rajesh Patnaik, Advocate  
for R-2

**CORAM:**  
**HON'BLE MR. JUSTICE VIPIN SANGHI**

1. Whether the Reporters of local papers may  
be allowed to see the judgment? : No
2. To be referred to Reporter or not? : Yes
3. Whether the judgment should be reported  
in the Digest? : Yes

**VIPIN SANGHI, J. (Oral)**

1. This petition has been preferred under Section 11 of the Arbitration and Conciliation Act, 1996 (the Act) to seek the appointment of an independent arbitrator. The petitioner entered into an agreement with respondent no. 1 M.N. Securities (P) Ltd.,

whereunder the petitioner agreed to carry out certain civil works for the said respondent. The agreement dated 05.11.2005 contains the arbitration clause which, so far as it is relevant, reads as follows: -

*" 50.1 All disputes and differences of any kind whatsoever arising out of or in connection with this Contract whether during the progress of the work or after their completion shall be referred in writing by the Contractor to the Owner's Representative, and the Owner shall within 10 days from receipt make and notify its decisions thereon in writing to the Contractor.*

*50.2 ... ..*

*50.3 Subject to the aforesaid in the even of any dispute or difference between the parties hereto as to the construction or operation of this Contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Owner of any certificate to which the Contractor may claim to be and entitled to or if the Owner fails to make a decision within the aforesaid time, then and in any such case, but except in any of the exempted matters referred to in the above clause, **the Contractor after 90 days of his presenting his final claim on the disputed matters, may demand in writing that the dispute or difference be referred to an settled by an arbitrator solely nominated by the Owner i.e. The Chairman, M.N. Securities(P) Ltd.** The award of the Arbitrator shall be final and binding on both the parties. The provision as per the Arbitration and Conciliation Act, 1996 shall apply to such arbitration. The arbitration venue shall be at New Delhi. The arbitrator shall determine the procedure for the arbitration. Costs of such arbitration shall be equally shared between the Owner and the Contractor.*

*50.4 ... .. " (emphasis supplied)*

2. The submission of the petitioner is that during the execution of the works, the contract was assigned by respondent no.1 to respondent no. 2 which incidentally is also a sister concern of respondent no.1. A communication dated 04.05.2006 was issued to the petitioner which, the respondents state, had been issued by respondent no.2, whereby the revised rates of the petitioner were accepted. This communication also contained stated the following:

*"It is further to inform you that any decision, correspondence, or any information regarding subject work will be intimated by Today homes and Infrastructure Pvt. Ltd. in future on behalf of M.N. Securities under same agreement executed on 05.11.2005, all terms and conditions will remain the same."*

3. The petitioner states that thereafter the petitioner had all its dealings with respondent no.2. All payments under the contract were also made to the petitioner by respondent No.2. The petitioner has placed on record some of the correspondences exchanged with respondent no. 2 with regard to its claim for payment of the final bill.

4. The petitioner vide communication dated 09.11.2009 addressed to respondent no.2 made a demand for its outstanding dues. Another reminder was sent to respondent no.2 on 21.12.2009.

5. Respondent no.2 vide communication dated 24.12.2009 refuted the claim of the petitioner. Eventually, the petitioner sent a

notice dated 08.02.2010 to respondent no.2.

6. In this notice, it was stated that the respondent no.1 had been taken over by respondent no. 2. Till March, 2006 the payments for the work done were made by the respondent no. 1. Thereafter, from April, 2006 onwards, the payments were being made by the respondent no. 2. The petitioner sought to invoke clause 50 of the General Conditions of Contract, as extracted above and sought the appointment of an arbitrator. Since no arbitrator was appointed, this petition has been preferred.

7. Upon issuance of notice, both the respondents have filed their respective reply. The stand taken by the respondent no.1, inter alia, is that the petitioner has not served a notice invoking arbitration on respondent no.1 and therefore, the present petition is not maintainable. The stand taken by the respondent no. 2 in its reply, inter alia, is that the petitioner had not complied with the conditions prescribed for invoking arbitration. It is also contended that the disputes raised by the petitioner are not arbitral.

8. Mr. Sudhir Nandrajog, Senior Advocate appearing for respondent no. 2 submits that the arbitration agreement is between the petitioner and the respondent no. 1. The respondent no. 2 had merely performed the contract on behalf of respondent no. 1. He submits that respondent no. 2 cannot be made a party to any

arbitration, since there is no arbitration agreement between the petitioner and respondent no. 2. He has placed reliance on the decision of this Court in ***Prasar Bharti vs. Maa Communication***, arbitration application No. 18/2005 decided on 08.02.2010.

9. The objection raised by respondent no. 1 that no notice of invocation has been issued to respondent no. 1, on the facts of this case, does not hold water for various reasons.

10. Firstly, the facts of this case are peculiar as it was the respondent no. 2 who was dealing with the petitioner in relation to the contract in question. All dealings after the issuance of the letter dated 04.05.2006 took place between the petitioner on the one hand and respondents on the other hand. Respondent no.2 could have either acted as the agent of respondent no.1 in its dealings with the petitioner, or as an assignee of the contract between the petitioner and respondent no.1. If the submission of the respondents, that respondent no.2 was only acting for and on behalf of respondent no.1 is to be accepted, it would follow that respondent no.2 acted as the agent of respondent no.1. Notice to agent is notice to principal, provided it is given in the course of business transacted by the agent for the principal. (See section 229 of the Contract Act). The notice invoking arbitration issued to respondent no.2 was given in the course of business transaction by the petitioner with the respondents. Therefore, it would *"have the same legal consequences as if it had*

*been given to or obtained by the principal", i.e. respondent no.1.*

Therefore, as between the petitioner and respondent no.1, the said notice stands served on respondent no.1. Consequently, the petitioner cannot be faulted for invoking the arbitration agreement by writing to respondent no. 2 and not to respondent no. 1. Even, when the notice dated 08.02.2010 was issued, the respondent no. 2 did not respond back to say that it had no power to appoint the arbitrator, and the notice should be issued to the respondent no. 1. Consequently, reliance placed on the decision in ***Maa Communication*** (supra), prima facie, appears to be misplaced at this stage, in the peculiar facts of the present case. It cannot be said in the facts of this case, at this stage, whether or not the contract stood assigned by respondent no.1 to respondent no.2. Consequently, it cannot be said whether the power to appoint the arbitrator stood assigned to respondent no. 2 or not. The meaning and effect of the communication dated 04.05.2006 issued by respondents, on the agreement dated 05.11.2005, in the light of their subsequent conduct would be a matter determinable by an arbitral tribunal constituted by resort to clause 50 of the said agreement. Consequently, whether the said decision in ***Maa Communication*** (supra) has relevance, would also depend on the effect of the communication dated 04.05.2006 and the conduct of the parties.

11. Secondly, notice of this petition had been issued by the Court on 23.03.2010 returnable on 17.11.2010. Respondent no. 1 was served with the notice on 07.04.2010. By this petition, the petitioner has sought the appointment of an arbitrator. Even if the submission of respondent no. 1 that it was not earlier served with the notice of invocation were to be accepted for the sake of argument, at least upon receipt of notice issued by the court in this petition, the respondent no.1 served with a notice evincing the intention of the petitioner to invoke the arbitration agreement, as aforesaid. It has been held by this Court in **Anand Kumar Jain v. Union of India**, 1984 RLR 438 and **Bhartiya Construction Co. v Delhi Development Authority**, 2009 (2) Arb. Law Reporter 182, and various other decisions that the service of notice of a petition under Section 20 of the Arbitration Act, 1940 tantamounts to a notice invoking arbitration. In my view, the same ratio would apply to a case falling under the Act.

12. No doubt, if the notice of invocation of arbitration is not issued to the appointing authority, calling upon him to appoint the arbitrator, then a petition filed under Section 11(6) would not be maintainable, and the same would be rejected at the threshold by the Chief Justice or his nominee. However, if in a given situation, a petition under Section 11(6) has been entertained and notice of the petition issued to the respondent/appointing authority on the basis of averments made in the petition, the appointing authority would be obliged to take cognizance

of the petition, treat is as a notice invoking arbitration, and to perform his duty to appoint the arbitrator.

13. In such a case, if, despite the issuance of the Court notice on a petition under Section 11(6), the appointing authority fails to constitute the arbitral tribunal, and by the time the petition under section 11(6) is taken up for consideration by the Chief Justice or his nominee the time reserved under the agreement for the purpose of appointment, or a reasonable time (in other cases) has expired, the right to make the appointment would stand forfeited and the Court would appoint the arbitrator.

14. Consequently, even if the stand of respondent no. 1, as aforesaid, were to be accepted, respondent no.1 was not precluded from making the appointment of an arbitrator within a reasonable time of the receipt of the court notice. However, this has not been done by respondent No.1. From the date of receipt of the court notice, till today more than four months have passed. Respondent no. 1, however, has failed to appoint the arbitrator. In my view, the right of making the appointment of the arbitrator which may have vested in respondent no.1, therefore, stands forfeited (see ***Datar Switchgear Ltd. v. Tata Finance Ltd.*** (2000) 8 SCC 151). The respondent no. 1 could have appointed an arbitrator and still maintained that prior to the issuance of the court notice, it had not been served with the notice invoking arbitration, and therefore, respondent no.1 has appointed the

arbitrator on receipt of the court notice.

15. Consequently, I allow this petition as the existence of disputes under the agreement dated 05.11.2005 is not even denied. I appoint Mr. Justice S.N. Kapoor (retired) Judge of this Court as the sole arbitrator to adjudicate the claims and counter-claims of the parties. It shall be open to the respondent no. 2 to raise its objection, as aforesaid, before the arbitral tribunal. No observation made by me in this order shall affect the merits of the case of any of the parties.

16. The arbitrator is entitled to fix his fees subject to maximum of Rs. 2.50 lacs to be shared equally by the parties, apart from all other expense. The learned arbitrator is requested to render his award as expeditiously as possible.

17. A copy of this order be communicated to learned arbitrator by the Registry.

**SEPTEMBER 01, 2010**  
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**VIPIN SANGHI, J**