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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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+ ARB.P. 7/2010

HAPPY ELECTRICALS

..... Petitioner

Through: Mr. S.S. Sastry, Advocate with
Mr. Rishi Manchanda, Advocate.

versus

CENTRAL PUBLIC WORKS
DEPARTMENT (CPWD)

..... Respondent

Through: Mr. Atul Nanda, Advocate with
Ms. Rameeza Hakeem, Mr. Gaurav
Gupta, Mr. Sumeer Sodhi, Mr. Malika
Gahlot, Ms. Sugandha and Mr. Sanjay
Bhardwaj, Advocates.

WITH

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+ ARB.P. 8/2010

HAPPY ELECTRICALS

..... Petitioner

Through: Mr. S.S. Sastry, Advocate with
Mr. Rishi Manchanda, Advocate.

versus

CENTRAL PUBLIC WORKS DEPARTMENT

..... Respondent

Through: Mr. Atul Nanda, Advocate with
Ms. Rameeza Hakeem, Mr. Gaurav
Gupta, Mr. Sumeer Sodhi, Mr. Malika
Gahlot, Ms. Sugandha and Mr. Sanjay
Bhardwaj, Advocates.

WITH

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ARB.P. 9/2010

M/S HAPPY ELECTRICALS

..... Petitioner

Through: Mr. S.S. Sastry, Advocate with
Mr. Rishi Manchanda, Advocate.

versus

CENTRAL PUBLIC WORKS DEPARTMENT Respondent

Through: Mr. Atul Nanda, Advocate with
Ms. Rameeza Hakeem, Mr. Gaurav
Gupta, Mr. Sumeer Sodhi, Mr. Malika
Gahlot, Ms. Sugandha and Mr. Sanjay
Bhardwaj, Advocates.

AND

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ARB.P. 10/2010

HAPPY ELECTRICALS

..... Petitioner

Through: Mr. S.S. Sastry, Advocate with
Mr. Rishi Manchanda, Advocate.

versus

CENTRAL PUBLIC WORKS
DEPARTMENT (CPWD)

..... Respondent

Through: Mr. Atul Nanda, Advocate with
Ms. Rameeza Hakeem, Mr. Gaurav
Gupta, Mr. Sumeer Sodhi, Mr. Malika
Gahlot, Ms. Sugandha and Mr. Sanjay
Bhardwaj, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

S

% ORDER
11.03.2010

Present petitions have been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") for appointment of an Arbitrator.

Mr. Atul Nanda, learned counsel for respondent states that respondent has, in the meantime, appointed Shri S.K. Singhal, Arbitrator, Ministry of Urban Development, New Delhi, as the sole Arbitrator to adjudicate upon all the disputes between the parties.

However, Mr. S.S. Sastry, learned counsel for petitioner states that respondent has lost the right to appoint an Arbitrator in view of judgment of the Supreme Court in the case of *Bharat Sanchar Nigam Ltd. and Anr. vs. Dhanurdhar Champatiray* reported in 2010(1) Arb. LR 280 (SC). He states that appointment of an Arbitrator is invalid because respondent has appointed the Arbitrator after the present petition had been filed.

I may mention that the arbitration clause in the present case specifically stipulates that no person other than a person appointed by

Chief Engineer would act as an Arbitrator. The said clause reads as under:

“*CLAUSE 25*”

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II) xxx xxx xxx

It is also a term of this contract that no person other than a person appointed by such Chief Engineer CPWD or the administrative head of the CPWD, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.....”

I am also of the opinion that the judgment of ***Bharat Sanchar Nigam Ltd.*** (Supra) does not advance the case of petitioner inasmuch as in the said judgment, Supreme Court set aside appointment of an independent Arbitrator by the High Court following its earlier three Judges Bench judgment in the case of ***Northern Railway Administration, Ministry of Railway vs. Patel Engineering Company Ltd.*** reported in ***2008 (3) Arb. LR 349 (SC)***. In fact, the relevant observations of the Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. and Anr.*** (Supra) are reproduced hereinbelow:

“2. These appeals by special leave have been filed against the orders dated 5th of January, 2005 in ARBP Nos. 11, 12, 17, 18 and 28 of 2005 passed by the High Court of Orissa whereby the High Court had appointed Sh. Bibhudhendra Mishra, a senior advocate of the Orissa High Court, as the sole arbitrator on the application of the respondent filed under Section 11(6) of the Arbitration and Conciliation Act, 1996.....

4. The said contract contained an arbitration clause in terms whereof the Chief Engineer, Telecommunication/Postal Department in-charge of the work at the time of dispute, or if there be no Chief Engineer, the Administrative Head of the said Telecommunication/Postal Department was to be appointed as a sole arbitrator. The said provision envisaged that in terms thereof no person other than the one appointed by such Chief Engineer or Administrative Head of the Telecommunication/Postal Department as aforesaid should act as arbitrator to decide the disputes referred to him.

5. The respondent, by letters, requested the Chief Engineer (Civil) for appointment of an arbitrator to adjudicate the disputes between the parties in terms of Clause 25 of the respective agreements. According to the respondent, letters were received by the Chief Engineer of the appellant no.1 on different dates. The appellants having failed to respond to the letters of respondent requiring them to appoint an arbitrator and to appoint an arbitrator in response to such letters within the stipulated period in accordance with Clause 25 of the respective agreements, the respondent was constrained to file petitions under Section 11(6) of the Act for appointment of an

arbitrator. However, according to the case made out by the appellants, on 9th of March, 2005, Chief Engineer (Civil), BSNL had already appointed Sri Gurbaux Singh, Principal Chief Engineer (Arbitration), BSNL vide its office letter No. 69-41(05)/CE(c)/BBSR/205. By the impugned order, the High Court allowed application under Section 11(6) of the Act, and appointed one Sri Bibhudhendra Mishra in place of departmental nominee Sir Gurbaux Singh who was appointed by Chief Engineer (Civil), BSNL of appellant no.1.

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9. Similarly, in the case of **Ace Pipeline Contracts Private Limited vs. Bharat Petroleum Corporation Limited**, (2007) 5 SCC 304 = 2007 SCACTC 203 (SC)=2007(2) Arb. LR 49 (SC), this court went to observe that (para 6, p.55 of Arb.LR):

“But in sub-section (6), where the procedure has already been agreed upon by the parties, as in the present case, and in that event, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may, in that event, request the Chief Justice or a person or an institution designated by him to take necessary measures, unless the agreement on the appointment procedure provides other means for appointment of arbitrator. Therefore, so far as the period of thirty days is concerned, it is not mentioned in

sub-section (6). The period of limitation is only provided under sub-sections (4) and (5) of Section 11. As such, as per the statute, the period of limitation of thirty days cannot be invoked under sub-section (6) of Section 11 of the Act.”

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On a perusal of the above quoted observations of this court made in **Ace Pipeline Contracts Private Limited**, the reasons advanced in the orders passed by the High Court must be found to be a correct interpretation of the aforesaid provision and so far as the period of 30 days with regard to Section 11(6) is concerned, there is no doubt at all that thirty days limitation cannot be invoked as mandatory period under Section 11(6) of the Act. But a somewhat different view was expressed in a latter decision of this court in the case of **Union of India vs. Bharat Battery Manufacturing Co. Pvt. Ltd.**, (2007) 7 SCC 684= 2007 SCACTC 437 (SC)=2007(3) Arb. LR 282 (SC). In view of the difference of opinion of the two coordinate benches of this court, the matter was referred to a Three Judge Bench in the case of Northern Railway Administration, Ministry of Railway vs. Patel Engineering Company Ltd., (2008) 10 SCC 240=2008 SCACTC 480 (SC)=2008(3) Arb. LR 349 (SC), in which the decision in Ace Pipeline Contracts Pvt. Ltd. was also referred to. Arijit Pasayat, J. (as His Lordship then was), heading the Three Judge Bench of this court, after considering the scope and object of the Act particularly Section 11 of the Act, concluded the following (paras 1 and 13, p.354 of Arb. LR):

“A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the

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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.

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In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above."

10. In the aforesaid decision in the case of Northern Railway Administration, Arijit Pasayat, J.

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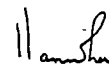
(as His Lordship then was), found that the High Court in the said case did not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other conditions necessary to secure the appointment of an independent and impartial arbitrator. In the aforesaid decision, this court also concluded that since the requirement of sub-section (8) of Section 11 was not at all dealt with by the High Court in its order, the appointment of an arbitrator without dealing with sub-section (8) of Section 11 of the Act became vulnerable and accordingly, such appointment was set aside. Similar is the position in this case. In this case also, before appointing an arbitrator under Section 11(6) of the Act, the High Court had failed to take into consideration the effect of Section 11(8) of the Act as was done in **Northern Railway Administration**.

11. In view of the discussions made hereinabove and particularly in view of the principles laid down by this Court in **Northern Railway Administration**, we set aside the impugned order and remand the case back to the High Court for fresh decision of the application under Section 11(6) of the Act and while considering the application afresh, the High Court is directed to take into consideration the aforesaid decision of this Court.

(emphasis supplied)

In view of the aforesaid judgment and Clause 25 of the Agreement, I am of the opinion that procedure, qualifications and other considerations stipulated in the agreement for appointment of an

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independent and impartial Arbitrator have been followed while appointing Mr. S.K. Singhal as the Arbitrator. Even if there was some delay in appointment of an Arbitrator by the respondent, I hereby, in exercise of powers under Section 11 of the Act, 1996, appoint Shri S.K. Singhal, Arbitrator, Ministry of Urban Development, New Delhi, as the sole Arbitrator to adjudicate upon all the dispute between the parties. With the aforesaid observations, present petitions stand disposed of.


MANMOHAN, J

MARCH 11, 2010

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