

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

% Judgment delivered on: 18.07.2011

Arbitration Petition No. 27/2011 & IA No.7842/2011

SML ISUZU LIMITED

..... Petitioner

Through: Mr Meet Malhotra, Sr. Adv. with
Mr Mayank Mishra, Mr Ravi S.S.
Chauhan and Mr Ranjan Mukherjee,
Adv.

versus

DELHI METRO RAIL CORPORATION

..... Respondent

Through: Mr Shiv Kumar, Adv.

CORAM:-

HON'BLE MR JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J

1. The petitioner has filed the present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for constitution of Arbitral Tribunal.

2. The parties had agreed on a procedure for appointing the Arbitrators as contemplated by Section 11 (2) of the Act according to which the respondent was required to furnish to the petitioner a panel of five engineers out of which each party was required to choose one

arbitrator each and the two so chosen arbitrators were to choose the third arbitrator from the said list, who was to act as the Presiding Arbitrator. The said arbitration clause of the contract dated 16.06.2009 is reproduced as under:

“2600. Arbitration

2601. If conciliation fails, then such disputes or differences, whatsoever arising between the parties, arising out of touching or relating to manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to arbitration in accordance with the following provisions:

- i. Matters to be arbitrated upon shall be referred to a Sole Arbitrator where the total value of claims does not exceed Rs.1.5 million. Beyond the claim limit of Rs.1.5 million, there shall be three Arbitrators. For this purpose Employer will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers of Government Departments or of Public Undertakings;
- ii. For the dispute to be decided by a Sole Arbitrator, a list of three engineers taken from the aforesaid panel will be sent to the Contractor by the Employer for which the Contractor will choose one;
- iii. For the disputes to be decided by three Arbitrators, the employer will make out a list of five engineers from the aforesaid panel. The Contractor and Employer shall choose one Arbitrator each and the two so chosen shall choose the third Arbitrator from the said list who shall act as the presiding Arbitrator.”

3. The case of the petitioner is that the agreement dated 16.06.2009 was illegally terminated by the respondent and thereafter

petitioner earlier moved an application under Section 9 of the Arbitration and Conciliation Act, 1996 in this Court on 20.09.2010, being OMP No.554/2010. In the said proceedings, during the hearing on 18.10.2010, this Court directed the respondent to communicate the date, time and venue for conciliation meeting to the petitioner to enable them to take the decision for the said purpose. Subsequently, vide letter dated 26.10.2010 the respondent communicated to the petitioner that the said meeting shall take place on 25.11.2010. The conciliation meeting ended with no amicable resolution of the disputes between the parties and vide order dated 14.12.2005, the Court disposed of the petition under Section 9 of the Act. The operative portion of the said order reads as under:

“....In view of clause 2600 obtaining between the parties, Mr. Shiv Kumar says that he shall supply a panel of five qualified persons, in terms of the said clause to the petitioner within one week from today. On such an information being supplied, the petitioner shall choose his nominee-arbitrator, likewise the respondent would do the needful. As provided the two nominees will choose the third arbitrator. This exercise shall be completed no later than two weeks from today. After the constitution of the arbitral tribunal in accordance with clause 2600 of the agreement obtaining between the parties, the captioned petition will be moved by the petitioner before the arbitral tribunal either in the present form or in the modified form to bring it in conformity with the provisions of the Arbitration Act. The Arbitral Tribunal shall adjudicate upon the remaining reliefs, i.e. prayer clause (b) and (c) referred to in the captioned application”

4. It is submitted by the respondent that as per order dated 14.12.2010 the respondent had supplied to the petitioner a panel of five qualified engineers as per letter dated 21.12.2010 but petitioner failed and neglected to nominate any one out of the said panel as its Arbitrator.

5. According to the petitioner, there is not a single person who possesses the requisite qualification as provided in clause 2600 to adjudicate the present dispute pertaining to the matter. Therefore, the prayer of the petitioner is that the independent arbitrator be appointed by the Court.

6. It is also stated that the names were just repetition of the names which were given by the respondent prior to the passing of the order dated 03.12.2010 in the field of mechanical engineering nor had any professional experience as engineer in automobile industry therefore, they cannot be independent and impartial. The petitioner had communicated all the above to the respondent vide letter dated 24.12.2010. Similar is the position of another panel of arbitrators, the list of which was sent on 07.01.2011.

7. The learned counsel for the respondent has referred to the letter dated 21.01.2011 wherein the petitioner had agreed that the panel must be comprised of persons possessing mechanical/automobile engineering background and should be well versed with the law relating to breach of contract and damages and in view of the letter issued by the

petitioner on 21.01.2011, the respondent by last letter dated 02.05.2011 gave the names of persons who have experience of mechanical engineering since very long time. The educational qualification is also given.

8. The names of the persons, their qualification as well as work experience are as under:

S. No.	Name of Arbitrators	Educational Qualification	Work Experience
1.	Mr. Anil Madan, Retired Director (Technical) RITES. Flat No.701 Tower 6, Uniworld Gardens, Sohna Road, Sector 47, Gurgaon- 122018 E-mail madanani@gmail.com Mobile +919871664433	B.E. (Mechanical Engg.)- AMIE (A) & (B)	Joined Indian Railways through Indian Railways Service of Mechanical Engineers in 1972. From 1972 to 1993 served with Indian Railways as class-I officer on various senior position in Mechanical Engineering field. From 1993 to 2009 served with M/s RITES as Director/Technical.
2.	Mr. Jaswinder Marwaha, Retired ED/RITES, Flat No.2A, Aravali View, Rail Vihar, Sector 56, Gurgaon-122003, Mobile-+919810397892	Degree in Mechanical Engineering from Institute of Mechanical Engineering, U.K.	Joined Indian Railways through Indian Railways Service of Mechanical Engineers in 1972. From 1972 to 2004 served with Indian Railways as class-I officer on various senior position in field of Mechanical Engineering field. From 2004 to 2008 worked with M/s RITES as Executive Director in the field of Mechanical Engineering.
3.	Mr. N.P. Singh, Retired Sr. Ex. Dir Mech Engg 1425A, B-1 Vasant Kunj, New Delhil-110070. E-mail npsingh1943@gmail.com Mobile 9818778371	BE (Mech.)	Joined Indian Railways through Indian Railways Service of Mechanical Engineers in 1967. From 1967 to 2003 served with Indian Railways as class-I officer on various senior position in the field of Mechanical Engineering.

4.	Mr. S.M. Bhardwaj, Retired General Manager Diesel Locomotive Works (DLW) E-25, Jangpura Extension, New Delhi, E-mail smbhardwaj@gmail.com Mobile +919650663081	Degree in Mechanical Engineering from Institute of Mechanical Engineers, London.	Joined Indian Railways through Indian Railways Service of Mechanical Engineers in 1971. From 1971 to 2009 served with Indian Railways as class-I officer in the field of Mechanical Engineering. Retired as General manager, Diesel Locomotive Works, Varanasi.
5.	Mr. R.K. JAIN Retired GM/DLW B-708, Rail Vihar, Sector 15-II, Gurgaon-122001 E-mail rkjain39@yahoo.com Tele : 2300771 Mobile 9818452795	Chartered Mechanical Engineer from London	Joined Indian Railways through Indian Railways Service of Mechanical Engineers in 1961. From 1961 to 1997 served with Indian Railways as class-I officer on various senior position in the field of Mechanical Engineering. Retired as General manager, Diesel Locomotive Works, Varanasi.

9. When the parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. The court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it, when the party has not disputed the arbitration clause, normally it is bound by it and the procedure laid down under the said clause.

10. It is settled law that the court must ensure that the procedure provided for is exhausted through. It is not mandatory for the Chief Justice or any institution designated by him to appoint the named arbitrator(s), however, no doubt, due regard has to be given to the qualification prescribed by the agreement. In the present case, the

respondent provided the third list on 02.05.2011 in view of the letter sent by the petitioner on 21.01.2011 which is fully satisfactory as per the requirement of petitioner. In case, the petitioner still has any disagreement, then it would be taken that it is not willing to abide by the arbitration agreement.

11. Since there is an agreed procedure for the appointment of arbitrator, the same can be appointed only in accordance with the said procedure and this Court can grant indulgence in the appointment only if any of the contingencies laid down under Sub-Section 6 have arisen. In the present case no such contingency has ever arisen and as such there are no grounds for deviating from the agreed procedure and this Court also can appoint the arbitrator only as per the said agreed procedure.

12. The last list of panel of arbitrators has the names of the persons who are qualified with degrees obtained and have vast experience. Thus, under these circumstances, further plea of the petitioner cannot be accepted. The petitioner is directed to choose the panel of arbitrators from the list supplied by the respondent vide its letter dated 02.05.2011 and inform the respondent within the period of 30 days. In case of failure, the respondent is at liberty to appoint a panel of arbitrators and communicate to the petitioner. The present petition as well as the pending application stand disposed of with these directions. No costs.

MANMOHAN SINGH, J

JULY 18, 2011/jk