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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 166/2011

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Judgment Delivered on: 02.02.2012

M/S FRIENDS PROJECTS P LTD

..... Petitioner

Through

Ms.Saumya Chakraborty and Ms.
Jayahree Narasimha, Advs.

versus

THE MANAGING DIRECTOR & ORS

..... Respondent

Through

Mr. M.M. Kalra & Mr. Kunal Kalra, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (ORAL)

1. This is a petition under Section 11 of the Arbitration and Conciliation Act seeking appointment of an independent Arbitrator to adjudicate upon disputes and differences, which have arisen between the parties. It is further submitted by counsel for the petitioner that respondent has failed to appoint an arbitrator despite a notice dated 2nd April, 2011 having been issued.
2. Learned counsel for the petitioner relies on Clause 9.0.1.1 to show that the disputes between the parties were to be resolved through Arbitration by following the procedure, as laid down. It is contended that the petitioner has followed the procedure by issuing a notice dated 13.01.2011, however, he did not received any reply within 30 days of receipt of the notice, which forced him to file the present petition on 23rd May, 2011.
3. The matter was listed on 27th May, 2011. Thereafter, on 7th July, 2011 at joint request, the matter was adjourned to 11th July, 2011 when counsel

for the respondent sought five weeks time to file reply and the matter was adjourned to 20th September, 2011. On that date counsel for the petitioner sought time to file rejoinder and the matter was adjourned to 30th November, 2011. On 30th November, 2011, at the request of learned counsel for the respondent, the matter was again adjourned for today.

4. Today learned counsel for the petitioner submits that since the respondent failed to appoint an arbitrator within 30 days, the respondent has lost its right for appointment of an arbitrator. He has relied upon the judgment of Supreme Court in **UOI Vs. Bharat Battery Manufacturing** reported as (2007) 7 SCC 684 in support of his plea. The relevant paragraph 12 reads as under:-

12. A three-Judge Bench of this Court in *Punj Lloyd Ltd. (appellant) v. Petronet MHB Ltd.* (2006) 2 SCC 638 considered the applicability of Section 11(6) petition and considered the facts which are similar to the facts of the present case and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in *Datar Switchgears Ltd. (appellant) v. Tata Finance Ltd. and Another* (2000) 8 SCC 151 wherein at page 158 (para 19) SCC, this Court held as under:

"19. So far as cases falling under Section 11(6) are concerned - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in

cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

(emphasis in original)

As already noticed, the respondent filed Section 11(6) petition on 30.3.2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15.5.2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator."

5. Counsel for the respondent has opposed this petition on the ground that by communication dated 9th June, 2011, the petitioner was informed about three names of arbitrators and as per the procedure, which is to be followed he was to select one of the arbitrator out of three names which were provided by the respondent. The respondent relies on **Indian Oil Corporation Ltd. and Ors. Vs. Raja Transport Private Limited**, reported as (2009) SCC 520, wherein the Court held that the court must endeavor to give effect to the appointment procedure prescribed in the arbitration clause.
6. He further submits unless the arbitrator sought to be appointed by the respondent is not independent, it is only then for the reasons to be

recorded by the Court that the Court can appoint an arbitrator of its own choice, whereas in this case the respondent has failed to point out that the three names, which have been suggested, are not fit persons to be appointed.

7. I have heard learned counsel for the parties and considered the rival contentions. The three judge bench of the Apex Court in the case of **Punjab Lloyd Ltd. Vs. Petronet MHB Ltd.** reported as 2006 2 SCC 638 has affirmed the view taken by the Apex Court in **Datar Switchgears Ltd. Vs. Tata Finance Ltd.** reported as 2000 8 SCC 155 para 19 which reads as under:-

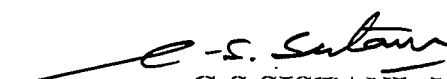
“19. So far as cases falling under Section 11(6) are concerned -- such as the one before us -- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.”

(emphasis in original)

8. Admittedly, the respondent failed to appoint an arbitrator within 30 days of notice dated 13.01.2011 and also before the petitioner could approach this Court. Thus the respondent has lost its right to appoint the Arbitrator. There is no quarrel with regard to the submissions made by the counsel for the respondent that the Court must endeavor to give effect to the

appointment procedure prescribed in the Arbitration Clause, however, since it is the respondent, who has failed to adhere to the procedure itself, the decision rendered by a Division Bench of the Supreme Court in the case of Indian Oil Corporation Ltd. (Supra), is not applicable to the facts of the present case and the decision rendered in the case of Punj Lloyd Ltd. (Supra) [three judges] is fully applicable to the facts of the present case. The respondent failed to take appropriate steps for appointment of an arbitrator within 30 days of receipt of the notice and upto the date of filing the present petition. Accordingly, the respondent has lost its right to appoint an arbitrator.

9. The learned counsel for the respondent was asked as to whether there is any requirement for appointment of any technical person, however, the counsel submitted that there is no such requirement and neither there is any such procedure which has been followed.
10. In the circumstances, Justice P.K. Bahri, former Judge of this Court (Cell No.9818542737), is appointed as Sole Arbitrator to adjudicate upon all disputes and differences including claims and counter claims arising between the parties. It is agreed between the parties that fee of the Arbitrator shall be borne by the parties equally as per the schedule maintained by Delhi High Court Arbitration Centre. The Arbitrator shall give prior notice to the parties before commencing the proceedings. Petition stands disposed of. Let a copy of this order be sent directly to learned Arbitrator. The arbitration proceedings be held under the aegis of Delhi High Court Arbitration Centre.
11. The petition stands disposed of.


G.S.SISTANI, J

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