

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

% Judgment reserved on: 02.08.2013
Judgment delivered on: 07.08.2013

+ **ARB.P. 147/2013**

KIDDE INDIA LTD. Petitioner

Vs

BHARAT HEAVY ELECTRICALS LTD. Respondent

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioner: Mr. Chandan Kumar, Advocate.
For the Respondent: Mr. J.C. Seth, Advocate.

**CORAM :-
HON'BLE MR. JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 11 of the Arbitration & Conciliation Act, 1996 (in short the Act) by which direction is sought of this court to appoint a sole arbitrator who should proceed to deal with the matter from the stage at which the arbitration proceedings had reached with the earlier arbitrator. The earlier arbitrator declined to continue with the arbitration proceedings, pursuant to the proceedings held on 21.11.2012, wherein he communicated his decision to that effect.

2. The respondent, however, resists the prayer made on the ground that under the terms of the arbitration agreement, which is incorporated in clause

31 of the General Conditions of the Contract (in short GCC) applicable qua the parties, fresh appointment has been made on 06.05.2013.

3. In order to adjudicate upon the present petition and the rival contentions, raised by the parties, the following brief facts, which are largely admitted, need to be noticed.

3.1 The petitioner, pursuant to a tender floated by the respondent on 18.02.1986, for provision of fire protection systems to be installed at Rajghat, filed its bid. The petitioner was declared successful and a telex of intent was issued in its favour on 30.09.1986. Consequent thereto, a purchase order was issued in favour of the petitioner on 18.02.1987. This purchase order was issued on behalf of the respondent by Manager (Purchase). Pertinently, by reference, the special conditions of the contract, as well as GCC, were incorporated into the contract obtaining between the parties.

3.2 It may be relevant to note that the purchase order was issued in the name of Vijay Fire Protection Systems Pvt. Ltd., which is how the petitioner was known earlier. In between the petitioner, apparently, changed its name to Vijay Industries and Projects Ltd. There is no dispute raised before me that the petitioner, is not the entity to whom the contract in issue, was awarded.

3.3 Since disputes arose as between the parties, a demand was made by the petitioner vide letter dated 15.01.2004 for appointment of an arbitrator in terms of clause 31 of the GCC. The petitioner sought recovery of a sum of Rs. 44,73,079.79/-.

3.4 In consonance with the request made, vide communication dated 10.11.2009, the General Manager (PG-1), Project Engineering Management, Bharat Heavy Electricals Ltd. having its office at PPEI Building, HRD &

ESI Complex, Sector – 16A, Plot No. 25, Noida – 201301, referred the disputes and differences obtaining between the parties to one Mr. A.K. Chakraborty.

3.5 On 21.11.2012, Mr. A.K. Chakraborty decided to withdraw from the arbitration proceedings. Apparently, as per the averments made in the petition, the proceedings, at this stage, are poised at the stage of cross-examination of the petitioner's (i.e., the claimant) witness.

3.6 Apparently, since the respondent, did not show expedition in appointing a new arbitrator in place of Mr. A.K. Chakraborty, the petitioner shot off a legal notice dated 29.01.2013. This legal notice, according to the petitioner, was received by the respondent on 30.01.2013. Pertinently, there is no dispute raised by the respondent before me as regards receipt of the aforementioned notice. By the said notice, the petitioner conveyed to the respondent that on 21.11.2012 when Mr. A.K. Chakraborty decided to withdraw from the proceedings "cross-examination of witnesses of both the parties had concluded", and thereafter, the respondent had chosen not to appoint a substitute arbitrator, despite the mandate of the provisions of Section 15(2) of the Act. Accordingly, a demand was made qua the respondent that it should appoint a substitute arbitrator within a week of the receipt of this notice, failing which, it would lose its right to appoint an arbitrator, and that, the petitioner would move the court for appointment of an arbitrator.

3.7 There is no dispute that the respondent paid no immediate heed to the demand of the petitioner.

4. Consequently, the petitioner instituted the captioned petition in this court, on 04.04.2013. The petition, came up before court for hearing for the first time, on 10.04.2013. Notably, respondent was represented on the said

date by Mr. J.C. Seth, Advocate. As deduced from the reply filed by the respondent, apparently, oral submissions were made with regard to the territorial jurisdiction of this court in the light of the fact that the memo of parties referred to the respondent's Noida office. Though, there is no reference to any such submission of the respondent in the proceedings of this court, held on 10.04.2013, the petitioner was given time to file an amended memo of parties. The petitioner, did the needful and filed, an amended memo of parties, with the registry of this court on 11.04.2013. Significantly, the amended memo of parties alludes to the fact that the respondent's registered office, is located, in New Delhi. This fact, once again, has not been disputed before me by the respondent.

5. Admittedly, the respondent vide communication dated 06.05.2013, informed the petitioner as regards the appointment of Mr. V. Pandhi, retired executive director of the respondent, as a substitute arbitrator in place of Mr. A.K. Chakraborty. Importantly, the appointment has been made by General Manager (PG-1 & III), having his office at PPEI Building, HRD & ESI Complex, Sector – 16A, Plot No. 25, Noida – 201301.

6. Given the aforesaid facts, both counsel for the petitioner Mr. Chandan Kumar, and counsel for the respondent Mr J.C. Seth, have made their respective submissions, largely in conformity with the pleadings, filed by them.

7. Mr. Chandan Kumar submitted that since, the notice for appointment of substituted arbitrator was issued on 29.01.2013, and the respondent had failed to comply with the request made, within a reasonable time, and at least not before the institution of the present petition, it had lost its right to appoint a substitute arbitrator.

8. On the other hand, Mr. J.C. Seth submitted that the request for appointment was directed to the wrong office of the respondent, which has, at least two dozen offices, all over India, and therefore, the notice of 29.01.2013, would not have any legal significance, in the court seeking to arrive at a conclusion as to whether or not the respondent, had acted in the matter of appointment of an arbitrator, within a reasonable period of time.

8.1 Mr. Seth submitted that after the amended memo of parties was filed by the petitioner on 11.04.2013, the respondent acted with reasonable expedition by appointing the substitute arbitrator on 06.05.2013. Mr. Seth submitted that the power to appoint a substitute arbitrator in terms of clause 31 of the GCC vested in the respondent, which could not be taken away in the manner suggested by the petitioner.

REASONS

9. Having heard the learned counsels for the parties and perused the record, what clearly emerges from the facts and circumstances delineated above, is as follows:

9.1 Pursuant to Mr. A.K. Chakraborty withdrawing from the proceedings on 21.11.2012, the petitioner issued a notice on 29.01.2013, after waiting for a period of over two months, for the respondent to move in the matter of appointment of a substitute arbitrator.

9.2 Even after receiving the petitioner's legal notice dated 29.01.2013, the respondent did not take steps as required both under clause 31 of the GCC as well as Section 15 of the Act, for appointment of a substitute arbitrator.

9.3 Admittedly, the petitioner instituted the captioned petition with the registry of this court, on 04.04.2013. The petition was moved in court on 10.04.2013. Even by this date, the respondent had not appointed a substitute arbitrator. Though the petitioner took time to file an amended

memo of parties, which it did on 11.04.2013, the respondent waited for nearly three weeks before appointing Mr. V. Pandhi as the substitute arbitrator. The fact that the respondent was represented at the hearing held on 10.04.2013, cannot be disputed.

10. In these circumstances, the argument advanced by Mr. J.C. Seth, that the time taken for appointment of the arbitrator is to be reckoned from 11.04.2013, cannot be accepted for more than one reason.

10.1 Firstly, the notice to appoint a substitute arbitrator was issued to the respondent as far back as on 29.01.2013. The said notice was addressed to General Manager (PG-1) having his office at Noida in the State of U.P. This is the very authority which appointed Mr. A.K. Chakraborty, the earlier arbitrator; a fact which is clearly deducible on a bare perusal of letter dated 10.11.2009. Therefore, the argument of Mr. J.C. Seth that the notice dated 29.01.2013 will not have any legal efficacy in view of the fact that it was directed to an authority not empowered to appoint an arbitrator, is completely untenable. This is more so, in view of the fact that the appointment of Mr. V. Pandhi has also been made by General Manager having his office at the same place, i.e., Noida in the State of U.P. except that he seems to hold a larger portfolio as, the appointing authority is given the designation of General Manager (PG I & III), whereas the General Manager, which issued the appointment letter qua Mr. A.K. Chakraborty was General Manager (PG-I). If this contention is accepted, then in my view, the expedition of the respondent in the matter qua appointment of a substitute arbitrator would have to be reckoned from 29.01.2013. Admittedly, till the date of institution of the present petition, that is, on 04.04.2013, the respondent had not appointed Mr. V. Pandhi, as the substitute arbitrator.

11. Therefore, the fact that an amended memo of parties was filed on 11.04.2013, would not take away the right of the petitioner in law to insist that respondent had lost its right to appoint a substitute arbitrator, in terms of Clause 31 of the GCC. The amended memo of parties, in my view, only establishes the fact that this court always had jurisdiction in the matter as the respondent's registered office is undisputedly, located within the territorial jurisdiction of this court. Moreover, significantly, while clause 31 of the GCC confers the power of appointment of an arbitrator on the General Manager of the respondent, it does not refer to any particular region, as was sought to be suggested by Mr. J.C. Seth, in the course of his arguments.

12. Mr. J.C. Seth in the course of his arguments, referred to two judgments of the Supreme Court in the case of *Ace Pipeline Contracts Pvt. Ltd. vs Bharat Petroleum Corporation Ltd. 2007 (2) Arb. LR 49 (SC)* and *The Indian Iron & Steel Co. Ltd. vs Tiwari Road Lines 2007 (2) Arb. LR 270 (SC)*. In my view, none of these judgments apply to the facts obtaining in the present case. It is not the argument of the petitioner that the respondent did not have the power to appoint a substitute arbitrator, under the terms of the arbitration agreement obtaining between them. The argument of the petitioner is that, the respondent, not having acted with expedition, and not having appointed an arbitrator, before the petitioner had filed an application, and moved this court, lost its right to appoint a substitute arbitrator.

12.1 It is, accordingly also not the submission of the petitioner that the agreement between parties is not required to be given due importance. The judgment of the Supreme Court, as a matter of fact, in *Ace Pipelines Contracts* case, reiterates the view taken by that court in *Datar Switchgears Ltd. vs Tata Finance Ltd, & Anr. (2000)8 SCC 151*.

12.2 As a matter of fact, at this juncture I would like to advert to the following observations of the Supreme Court in *Datar Swithchgears Ltd.* case, which emphasise the point that while under Section 11(6) of the Act the time limit of 30 days for appointment of an arbitrator by an authority, which is required to make the appointment, is not applicable, the appointing authority does lose its right of appointment if, it does not, make the appointment prior to the date on which the court is moved by the aggrieved party, under Section 11(6) of the Act.

“...19. So far as cases failing 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....”

13. For the reasons given above, the petition is allowed. Accordingly, Mr. M.S. Sabharwal, Additional District and Sessions Judge (retd.) (Mob. 9711119304) is appointed as an arbitrator in the matter. Since both parties are in agreement that the arbitrator should proceed from the stage at which

the proceedings are positioned presently, Mr. M.S. Sabharwal is requested to proceed from the stage at which Mr. A.K. Chakraborty, withdrew from the proceedings. It is ordered accordingly. Arbitration proceedings will be governed by the rules and fee schedule fixed by the Delhi International Arbitration Centre (DIAC). For this purpose, parties and their counsels shall appear before the DIAC on 30.08.2013 at 4.00 p.m.

14. Petition is, accordingly, disposed of. Parties shall, however, bear their own costs.

RAJIV SHAKDHER, J.

AUGUST 07, 2013

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