

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

% Judgment Reserved on: 29th April, 2013
Judgment Pronounced on: 31st May, 2013

+ **ARB.P. 395/2012**

RELIANCE BROADCAST NETWORK LTD. Petitioner
Through: Mr. Rajiv Nayar, Sr.Adv. with
Mr. Ajay Bhargava, Mr. Kunal
Tandon & Mr. V.Gupta, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. Respondent
Through: Mr. Tarun Johri, Advocate

+ **ARB.P. 359/2012**

RELIANCE BROADCAST NETWORK LTD. Petitioner
Through: Mr. Rajiv Nayar, Sr.Adv. with
Mr. Ajay Bhargava, Mr. Kunal
Tandon & Mr. V.Gupta, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. Respondent
Through: Mr. Tarun Johri, Advocate

+ **ARB.P. 393/2012**

RELIANCE BROADCAST NETWORK LTD. Petitioner
Through: Mr. Rajiv Nayar, Sr.Adv. with
Mr. Ajay Bhargava, Mr. Kunal
Tandon & Mr. V.Gupta, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. Respondent
Through: Mr. Tarun Johri, Advocate

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ARB.P. 394/2012

RELIANCE BROADCAST NETWORK LTD. Petitioner

Through: Mr. Rajiv Nayar, Sr.Adv. with
Mr. Ajay Bhargava, Mr. Kunal
Tandon & Mr. V.Gupta, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. Respondent

Through: Mr. Tarun Johri, Advocate

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ARB.P. 440/2012

RELIANCE BROADCAST NETWORK LTD. Petitioner

Through: Mr. Rajiv Nayar, Sr.Adv. with
Mr. Ajay Bhargava, Mr. Kunal
Tandon & Mr. V.Gupta, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. Respondent

Through: Mr. Tarun Johri, Advocate

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ARB.P. 441/2012

RELIANCE BROADCAST NETWORK LTD. Petitioner

Through: Mr. Rajiv Nayar, Sr.Adv. with
Mr. Ajay Bhargava, Mr. Kunal
Tandon & Mr. V.Gupta, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. Respondent

Through: Mr. Tarun Johri, Advocate

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this common order, I propose to decide six petitions filed by the petitioner under Section 11(5) read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) seeking prayer of appointment of an independent arbitrator in connection with the licence agreement between the parties.
2. It is not in dispute that three different arbitrators have already been appointed by the respondent for adjudication in regard to the similar dispute.
3. The requisite details are mentioned below as under for the purpose of convenience:

Petition No.	License Agreement	Notice of invocation	Date of appointment of arbitrator	Date of filing
Arb.P.No.359 of 2012	04.02.2011, clause 29	03.09.2012	13.09.2012 Mr.Satish Kumar Vij, Retd. Member Engineering, Ministry of Railways	20.09.2012
Arb.P.No.393 of 2012	29.07.2010, clause 25	12.09.2012	28.09.2012 Mr.Budh Prakash, Retd. General Manager, IRSE	16.10.2012
Arb.P.No.394 of 2012	25.10.2010 & 20.10.2011, clause 29	13.09.2012	28.09.2012 Mr.Budh Prakash, Retd. General Manager, IRSE	16.10.2012
Arb.P.No.395 of 2012	25.10.2007, clause 28	12.09.2012	28.09.2012 Mr.Budh Prakash, Retd. General Manager,	16.10.2012

			IRSE	
Arb.P.No.440 of 2012	06.04.2011, clause 28	12.10.2012	01.11.2012 Mr.Budh Prakash, Retd. General Manager, IRSE	19.11.2012
Arb.P.No.441 of 2012	10.10.2010, clause 2.7 (Under this clause, the GM/O was the appointing authority)	09.10.2012	02.11.2012 Mr.Anirudh Kumar Jain, former Additional Member (Electrical) Railway Board	19.11.2012

4. As the facts in all the petitions are same except the dates of licence agreement, notice of invocation, dates of appointment and filing of the petitions. Relevant facts mentioned below are taken from Arb.P.No.395/2012 and the order passed would apply in other petitions.

5. The above mentioned petition, being Arb.P.No.395/2012, has been filed for appointment of independent sole arbitrator in connection with the Licence Agreement dated 25th October, 2007 which was entered between the parties for advertisements rights inside 10 underground stations in Line 2 of Phase 1, Delhi Metro (Vishvavidyalaya to Central Secretariat Metro Stations).

6. Disputes and differences have arisen between the parties under the said Licence Agreement.

7. By letter dated 12th September 2012, the petitioner invoked arbitration.

8. In the letter invoking arbitration, it was pointed out that Clause 28 of the General Conditions being part of the Tender was void as it is vague and

uncertain, thus there was no appointing authority under Clause 28.1. The parties therefore had to agree to an arbitrator within 30 days failing which necessarily the arbitrator would have to be appointed under Section 11 of the Act.

9. The petitioner alleges that in view of the nature of the disputes being primarily one of construction of the contract and as to whether clauses apply or did not apply to the particular facts of the case, sought for the appointment of a retired Judge of this Court or the Supreme Court of India. Certain suggested names have been provided by the petitioner in this regard. It is also submitted that Clause 28.1 was unconscionable being violative of Articles 14 and 21 of the Constitution of India.

10. It is argued by the petitioner's counsel that respondent has wrongly issued a letter dated 28th September, 2012 not any Director being appointing Sh.Budh Prakash, retired General Manager, IRSE, North Railway, Allahabad, but stating that as per the approval of the competent authority, he had been appointed as the sole arbitrator. In fact, the arbitrator ought to have been nominated by the Director of the respondent. Therefore, his appointment is not in accordance with Clause 28.1 of the Licence Agreement.

11. Despite of appointment made by the respondent of Sh.Budh Prakash, retired General Manager, the petitioner after 30 days has invoked the arbitration asking for an independent arbitrator to be agreed by the parties in its notice as the petitioner was unable to agree to the Arbitrator appointed by the respondent. Therefore, the present petition has been filed by the petitioner.

12. The arbitration clause contained in the Licence Agreement read with

the General Terms and Conditions i.e. Clauses 28.1 and 28.2, reads as under:

“28.1 Arbitration Procedures

If the efforts, to resolve all or any of the disputes through conciliation fail, then such disputes shall be referred within 30 days to a Sole Arbitrator who would be nominated by Director, Delhi Metro Rail Corporation. The venue of such arbitration shall be at Delhi/New Delhi. The award of the Sole Arbitrator shall be binding on all parties. The tenderer have no objection if the sole arbitration (sic) so appointed is an employee of DMRC.

28.2 Rules governing Arbitration Proceedings

The Arbitration Proceedings shall be governed by Indian Arbitration and Conciliation Act, 1996, as amended from time to time including provisions in force at the time the reference is made.”

13. The main argument of the petitioner is that clause 28.1 is void and unenforceable being vague and uncertain on the following reasons:

- i) Clause provides that the sole arbitrator would be appointed by the Director.
- ii) No particular director has been identified who would be an appointing authority as per clause 28.1.
- iii) Clause does not provide that the sole arbitrator would be nominated by “any director”
- iv) The respondent ought to have made an express and clear clause as to who would the appointing authority by the reference to the designation of the Director. In other words, the prime requirement of independence and impartiality in the scheme of the Act must be considered by the officer appointing the

Arbitrator.

- v) Since there being no provision in the contract for an appointing authority, in accordance with Clause 28.2 on the failure of the two parties to reach an agreement on the sole arbitrator, it is only for the Court to appoint an Arbitrator under Section 11(5) of the Act.

14. It is also argued that the letter for appointment, which was issued by the respondent is signed by Joint General Manager, Marketing, does not satisfy the requirements of Clause 28.1 of the agreement as the appointment was to be made by any Director of the respondent who was the appointing authority.

15. It is also pleaded that even if it is presumed that Clause 28.1 is not void, the appointment of the arbitrator is itself void as the arbitrator named in the letter is disqualified to act due to lack of independence and impartiality as Sh.Budh Prakash is a former employee of the Indian Railways, which is part of Government of India, which is the 50% shareholder of respondent. The arbitrator has a pecuniary relationship with the Government of India as he is drawing pension as a former employee of the Government of India. Once the person is no longer an employee of the Government of India, the benefit of the ratio of judgments whereby employee arbitrators have been upheld does not apply as their independence is taken to be by virtue of their high posts held in the Government. It is also submitted by the petitioner that the claims of the petitioner in six matter are about ₹50 crores against the respondent who has counter claims of the similar amount against the petitioner. Therefore, the petitioner has rightly raised the apprehension that the arbitrator appointed could be biased being

former employee of the majority shareholder who has a pecuniary relationship. Various decisions have been referred by the petitioner during the course of the arguments. The petitioner has filed the written submissions.

16. The petitioner has also challenged the validity of the terms of the agreement entered into between the parties on the ground that an arbitrator having expertise in law is to be appointed to adjudicate the disputes. There are no technical disputes involved which would require any expertise on those terms. The arbitrators appointed by the respondent do not have any legal knowledge and would not be competent to adjudicate the legal disputes between the parties. Therefore, such appointment was made with mala fide intention. The plea has also been raised by the learned counsel for the petitioner that in the six matters, three different arbitrators have been appointed by the respondent for a similar dispute regarding the construction of the contract. This may lead to contradictory findings and will also contribute to multiplicity of the proceedings.

17. The issue about employee/officer or former employee in different department which is part of large corporations being nominated as Arbitrators has been dealt with and discussed by the Supreme Court in the various matters which are referred as under:-

(a) **Indian Oil Corporation v. Raja Transport (P) Ltd.**
(2009) 8 SCC 520:

“The process of arbitration is a binding and voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the Arbitrator will be one of its senior

officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named Arbitrator contained in the arbitration clause.

“It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the Arbitrator, are neither void nor unenforceable.”

“There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named arbitrator body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory

corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

(b) Department of Telecommunications v. Gujarat Co-operative Milk Marketing Federation Limited, 2010 (10) SCC 86 –

The Apex Court has held that the fact that the named Arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. The Hon'ble Supreme Court has observed that although there can be a justifiable apprehension about the independence or impartiality of an employee Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named Arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

(c) Secretary To Government, Telecom Department, Madras v. Munuswamy Mudaliar and Anr. – AIR 1988 SC 2232 –

The Apex Court has held that although reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator however, there must be reasonable apprehension of that predisposition. The reasonable

apprehension must be based on cogent materials. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct.

(d) **Union of India v. Singh Builders Syndicate (2009)**
(Supra)

The Apex Court while dealing with a situation of an arbitration clause mandating the nomination of employee arbitrators, held that the process as contemplated under the Arbitration clause has to be adhered to (para 13, 14) as closely as possible and it was only in an exceptional circumstance (see paras 4 to 9, 18 and 19) that the Court would intervene.

18. In the present case, it has been alleged by the petitioner on the basis of mere apprehensions as the respondent has appointed the senior official who was the former employee of Indian Railways and also is not connected with the department concerned with the contract. The said apprehension cannot be said to be one which should persuade this court to appoint a fresh arbitrator. Further, there is no cogent evidence/material produced by the petitioner showing his biasness.

19. It has also been emphasized by the Supreme Court from time to time that the court must respect to the agreed procedure of appointment of the arbitrator prior to stepping into the process of the appointment of the arbitrator under section 11(6). (Kindly see **Indian Iron & Steel Co Ltd vs Tiwari Roadlines**, (2007) 5 SCC 703, **India Household and Healthcare Ltd vs LG Household and Healthcare Ltd**, (2007) 5 SCC 510.

20. From the above, it is clear that the court may intervene to take measures for appointment of the arbitrator only when the party fails to act as required under the procedure, or fail to reach an agreement expected out of

them under that procedure or a person fails to perform the function.

21. A reading of Section 11(8) further reveals that while exercising jurisdiction invested under Section 11(6), the court can take due regard. The consideration under Section 11(8) shall become relevant only upon satisfaction of the provisions under Section 11(6). This is relevant due to the reason that if the eventualities existing under Section 11(6) are not satisfied, the court shall not even proceed further as the said Section 11(8) shall not come into play. It is only when the court's jurisdiction is exercised, (by way of presence of the eventualities under Section 11(6) the court can have due regard for the purposes of the sub-section (8).

22. Clause 28(1) stipulates that the sole arbitrator would be nominated by Director of respondent and tenderer i.e. petitioner would have no objection if he appoints an employee of the respondent as an arbitrator. The sole arbitrator has been appointed by the respondent in the terms of the relevant provision of the agreement executed between the parties. There is no material on record which may qualify the act of the arbitrator as partial and call for the invocation of jurisdiction of this Court.

23. The objection of the petitioner about his appointment is without any force that since the letter of appointment was issued by Joint General Manager, therefore, the arbitrator has not been appointed strictly in terms of clause 28 of the agreement. It is admitted position that the appointment has been made by the respondent itself and in the said letter dated 28th September, 2012 issued to the arbitrator, it is clearly mentioned that his appoint is as per the approval of the competent authority as per terms of the clause 28. The extract of the said letter reads as under:

“Ref: Licence Agreement executed between M/s Reliance

Media World Ltd. (Now M/s Reliance Broadcast Network Ltd.)
on 25.10.2007.

Sir,

As per the approval of the competent authority in the above referred matter in terms of the Clause 28 of the Conciliation and Arbitration of the agreement you have been appointed as the Sole Arbitrator to resolve the disputes after examination of claims and counter claims of the respective parties.

You are requested to enter into the reference by issuing notice to the parties. Copy of the License Agreement executed with M/s Reliance Broadcast Network Ltd. is enclosed for your reference.

Thanking you

Yours faithfully

(R.M. Krishnan)

Jt.General Manager/Marketing)” (emphasis added)

24. The terms agreed between the parties for the appointment of arbitrator in the present case are under clause 28 cannot be changed or to be allowed to be overlooked by this Court as it was an agreed procedure between the parties and the Court should normally give effect to the said terms and conditions of the arbitration agreement.

25. It is also the admitted position that the respondent has appointed the arbitrator within 30 days from the date of receipt of the notice issued by the petitioner. Thus, the petitioner cannot raise the plea that there is a failure on the part of the respondent for the purpose of appointment procedure agreed between the parties. It is settled law that the jurisdiction of this Court under Section 11 of the Act can be invoked by a party in the event of failure of a party under the agreement for appointment of arbitrator for adjudication of dispute between the parties. None of the judgments referred by the petitioner in support of its case are applicable to the facts and circumstances

of the present case between the parties. The said judgments have been passed as per their own facts and circumstances which do not help the case of the petitioner.

26. The petitioner in the present case has, no doubt, made an allegation of bias or partiality of the sole arbitrator appointed by the respondent in terms of the procedure agreed between the parties. It is not denied by the petitioner that the arbitrator is neither working with the respondent nor is a direct subordinate of the appointing authority as already mentioned that the petitioner has failed to place any material on record to show any sort of reasonable apprehension that the arbitrator appointed by the respondent is not likely to act independently or impartially which may call for the invocation of jurisdiction of this court despite of due procedure applied by the respondent at the time of appointment of arbitrator.

27. The appointment procedure can be deviated by the Court exercising its powers under Section 11 of the Act, in case the appointment procedure under the agreement has not been followed. The same has been followed in the present case. Therefore, the prayer made in the petitions cannot be allowed.

28. From the entire gamut of the matter, it is clear that in fact there is no failure of the appointment procedure agreed between the parties for appointment of arbitrator which would have empowered or entitled the petitioner to institute the above mentioned petition under Section 11 of the act when the respondent has appointed the sole arbitrator for adjudication of the dispute between the parties within the statutory period of 30 days. The petition is therefore liable to be dismissed.

29. The five connected petitions, being Arb.P.No.359/2012,

Arb.P.No.393/2012, Arb.P.No.394/2012, Arb.P.No.440/2012 and
Arb.P.No.441/2012, which have common facts are also dismissed.

(MANMOHAN SINGH)
JUDGE

MAY 31, 2013