

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

+ **ARB.P. 439/2014 & IA No. 17580/2014**

% Judgement reserved on: 30.10.2014
Judgement pronounced on: 13th November, 2014

DELHI INFRAMART PVT LTD

..... Petitioner

Through: Mr.Krishan Kumar and Mr.Rajeev
Sharma, Advocates.

versus

N.K. SINGHAL & ANR

..... Respondents

Through: Mr.Gaurab Banerjee, Sr. Advocate
alongwith Mr.Saurav Aggarwal,
Mr.Ashish Tiwari and Mr.Abhiit,
Advocates.

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The case of the petitioner, in brief, is that it is a company duly incorporated under the Companies Act, 1956 and entered into a Collaboration Agreement dated 22.10.2012 with the respondent. Under this agreement, the petitioner had agreed to re-develop and re-construct the property bearing No.B-28, Delhi Officers Co-operative House Building Society, Madhuban, Delhi-110092. The respondent had cheated the petitioner by dishonestly inducing him to enter into the said agreement, without having any intention to fulfil his obligations and commitments and

has caused wrongful loss to him and earned wrongful gain to himself. The respondent had failed to abide by the terms and conditions of the said agreement and failed to fulfil his commitments. Vide letter dated 05.08.2014, Justice S.N. Katriar (Retd.) has informed the petitioner that he has accepted to act as a sole Arbitrator in response to the letter dated 28.07.2014 of the respondent and the hearing would take place on 21.08.2014, at 2.00 PM at Milon Banerji Conference Room, Supreme Court of India, Tilak Marg, New Delhi. The petitioner, through his Advocate, vide his letter dated 11.08.2014, objected to the appointment of Justice S.N. Katriar (Retd.) as Arbitrator and intimated both Justice S.N. Katriar (Retd.) and the respondent that the reference entered by Justice S. N. Katriar (Retd.) is arbitrary, illegal and against the terms of the agreement and also called upon the respondent to withdraw the reference. The petitioner also called upon Justice S.N. Katriar (Retd.) to disclose in writing his relation with the respondent and not to act as Arbitrator since the petitioner had reasonable apprehension and justifiable doubt as to his integrity and independence. Despite receiving the said communication dated 11.08.2014, Justice S.N. Katriar (Retd.) and the respondent did not send any reply to the petitioner. It is submitted that the respondent has no power to appoint Justice S.N. Katriar

(Retd.) as sole Arbitrator, without the consent of the petitioner and as such his appointment is illegal and against the terms of the agreement. Since the respondent unilaterally appointed Justice S.N. Katriar (Retd.) and the said appointment has been accepted by Justice S.N. Katriar (Retd.), without the consent of the petitioner, there are reasonable apprehension and justifiable doubt as to his independence and impartiality and hence the present petition. It is prayed that an Arbitrator be appointed in terms of Collaboration Agreement dated 22.10.2012.

2. After the notice of the said petition was issued to the respondent, the respondent filed an application bearing No. 17580/2014 seeking dismissal of the petition. It is contended that the petitioner has concealed the material facts from the notice of this Court. It is further contended that the said Arbitrator had been appointed in terms of clause 40 of the Collaboration Agreement dated 22.10.2012 and that under the said clause, the respondents were empowered to appoint the sole Arbitrator and no consent of the petitioner was needed. It is further submitted that Justice S.N. Katriar (Retd.) was a retired Judge of Patna High Court, who has been appointed as a sole Arbitrator and his impartiality and integrity cannot be doubted. He was appointed as a sole Arbitrator vide letter dated 23.07.2014. It is also

submitted that a letter dated 28.07.2014 was also written to him seeking his acceptance. In the interregnum, the respondent filed a petition under Section 9 being OMP No. 854/2014 on 30.07.2014. Vide order dated 01.08.2014, the said petition was disposed of with a direction to the Arbitrator to treat the said petition under Section 9 as application under Section 17 of the Arbitration and Conciliation Act, 1996.

3. Justice S.N. Katriar (Retd.) accepted the appointment vide his letter dated 05.08.2014 and informed the parties that preliminary hearing would be held on 21.08.2014. The respondent informed the petitioner as well as the Arbitrator vide letter dated 09.08.2014 about the order of this Court dated 01.08.2014 passed in OMP No. 854/2014. The petitioner wrote a letter dated 11.08.2014 to Justice S.N. Katriar (Retd.) objecting to his appointment which was received by him on 14.08.2014. It is submitted that the Arbitrator hold a hearing on 21.08.2014, wherein the petitioner appeared and pressed his objections made by it vide letter dated 11.08.2014. After making the submissions on said objections, the petitioner's counsel sought an adjournment in order to seek instructions from his client with respect to the contents of para 8 and the prayer portion of the said application and, thereafter, the matter was adjourned to 01.09.2014. Instead of attending the

proceedings before the Arbitrator on 01.09.2014, the petitioner filed the present petition on 21.08.2014 itself. It is submitted that petition is liable to be dismissed since the Arbitrator has been appointed as per the procedure prescribed under the arbitration agreement. It is further submitted that the petitioner has suppressed the material facts and the petition ought to be dismissed on this ground. It is further submitted that the Arbitrator, so appointed, is a retired High Court Judge, who has no connection with the respondent and whose impartiality cannot be doubted.

4. I have heard the arguments of learned counsel for both the parties. The petitioner, in support of his contentions, has relied upon **Indo Arya Logistics vs. Central Warehousing Corporation**, Arbitration Petition No.377 of 2012, decided on 15.04.2014 by this Court, **Indian Oil Corporation Ltd. and Ors. vs. Raja Transport Pvt. Ltd.** 2009(8)SCC520, **Dharma Prathishthanam vs. M/s Madhok Construction Pvt. Ltd.**, Appeal (Civil) No. 7140 of 2004, decided by Hon'ble Supreme Court on 02.11.2004, **Abdul Kadir Shamsuddin Bubere vs. Madhav Prabhakar Oak**, AIR 1962 SC 406 and **N. Radhakrishnan vs. Mastero Engineers and Ors.** 2010(1)SCC80.

5. The respondent has relied upon **Antrix Corporation Ltd. vs. Devas**

Multimedia P. Ltd. 2013(2) Arb. LR 226 (SC) and **Swiss Timing Limited vs. Organising Committee, Commonwealth Games, 2010, Delhi**, Arbitration Petition No. 34 of 2013, decided by Hon'ble Supreme Court on 28.5.2014.

6. I have heard both the parties at length and have also carefully gone through the case laws relied upon by both the parties. Few facts are important. The present petition was filed on 21.08.2014. On that date, the petitioner had also attended the arbitral proceedings before the Arbitrator Justice S.N. Katriar (Retd.). It is also important to observe here that the petitioner has not disclosed this fact in his petition and has also not filed the copy of the proceedings before the Arbitrator on 21.08.2014. However, the respondent has filed a copy of the proceeding dated 21.08.2014 before the Arbitrator. The proceedings dated 21.08.2014 clearly shows that the counsel for the petitioner herein and who was the respondent before the learned Arbitrator had attended the arbitral proceedings and pressed his application received by post by the Arbitrator on 14.08.2014, wherein he had objected to continuation of the Arbitral Tribunal. The order also clearly shows that it was the petitioner who had sought adjournment in order to seek instructions from the client in respect of contents of para 8 and the prayer portion of the said application. This fact has been concealed by the petitioner from the

knowledge of this Court. It is apparent that on the same date, the petitioner had presented the present petition. The petitioner has also not placed on record the copy of his letter dated 11.08.2014 by which he has challenged the authority of the Arbitrator. The copy has been filed by respondent. In para 8 of this letter, the petitioner has shown his reasonable apprehension and justifiable doubt as to the integrity and impartiality of the Arbitrator and made the prayer to him to withdraw from the reference and to disclose in writing his relation with the respondent herein and also asked him not to act as an Arbitrator and pass any order. On the same grounds, the petitioner has moved this Court, wherein his contention is that the Arbitrator has been appointed in violation of the terms of the Collaboration Agreement and the acceptance by the Arbitrator of his appointment, without his consent, creates reasonable apprehension as to the impartiality of the Arbitrator.

7. Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') empowers the Court to appoint an Arbitrator when under an agreed procedure for appointment of Arbitrator, either a party fails to act as required under that procedure or the parties or the two appointed arbitrators failed to reach an agreement expected of them under that procedure or where a person, including an institution, fails to

perform any function entrusted to him or it under that procedure. *Sine qua non* for invoking the jurisdiction of the Court under Section 11(6) of the Act thus is that the opposite party has failed to act as per the procedure prescribed under the contract for appointment of an Arbitrator.

8. The Supreme Court in the case of **Indian Oil Corporation Ltd.** (*supra*) has observed as under:-

“21. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an Arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section

11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) & (5), such a time bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time limit prescribed by the arbitration agreement, or in the absence of any prescribed time limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of Chief Justice or his designate exercising power under Sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that (i) a party failing to act as required under the agreed appointment procedure; or (ii) the parties (or the two appointed arbitrators), failing to reach an agreement expected of them under the agreed appointment procedure; or (iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

9. Clearly, therefore, the jurisdiction of this Court under Section 11(6) of the Act cannot be invoked if the opposite party had not failed to appoint the Arbitrator as per the agreed terms or has not failed to act as per the agreement. In the present case, clause 40 of the Collaboration Agreement deals with the prescribed procedure for appointment of the Arbitrator. The said clause is reproduced as under:-

“40.....However, in case there is any unsettled dispute between the parties, arising out of this agreement, then the same would be referred for arbitration **by a sole arbitrator nominated by the first party**. The seat of the Arbitrators shall be at Delhi and the proceedings shall be governed by the Arbitration and Conciliation Act, 1996. It is understood that despite any disputes between the parties, the Second Party shall not stop its work to await the outcome of the arbitration, unless in a case where the contract is terminated.”

(emphasis supplied)

10. As per the agreement, the first party is the respondent. Under the prescribed procedure in this clause for appointment of Arbitrator, the respondent is empowered to appoint a sole Arbitrator. The clause does not stipulate that before appointment of a sole Arbitrator, the consent of the

petitioner is required nor does it stipulate that before the Arbitrator gives his/her consent to such appointment, he/she is required to seek consent of the petitioner. Therefore, this clause empowers the respondent to appoint a sole Arbitrator, without the consent of the petitioner. The respondent had appointed the Arbitrator vide its letter dated 23.07.2014, wherein in para 18, the respondents have clearly stated as under:

“In view of the disputes between the parties, arising out of the collaboration agreement dated 22nd October, 2012, I appoint Honourable Justice S.K. Katriar, former judge Patna High Court, to act as the sole arbitrator in the matter. A separate letter is also being issued, in this regard.”

11. The first contention of the petitioner that the appointment of Justice S.N. Katriar (Retd.) as a sole Arbitrator is illegal because it has been done without his consent, thus no merit.

12. The second contention of the petitioner for appointment of an Arbitrator by this Court in place of Justice S.N. Katriar (Retd.) is that he has a reasonable apprehension and justifiable doubt as to the independence and impartiality of Justice S.N. Katriar (Retd.) since he had accepted the appointment without the consent of the petitioner. Learned counsel for the respondent has contended that this Court has no jurisdiction to replace an Arbitrator who has been appointed as per the terms of the agreement and,

therefore, the petition is liable to be dismissed. Admittedly, the petitioner has invoked Section 12 of the Act by asking the Arbitrator to disclose in writing his relation with the respondent and also informing him about his apprehension and doubt as to his integrity and impartiality vide his letter dated 11.08.2014 which was received by the learned Arbitrator on 14.08.2014 and on which he held a hearing on 21.08.2014 and suspended his findings only because the petitioner sought an adjournment. The question that arises before this Court is whether this Court under Section 11(6) of the Act can set aside the appointment of an Arbitrator, who has been appointed in terms of the agreed procedure and substitute another Arbitrator. The answer to this question is in negative. In catena of judgments, the Court has held that once an Arbitrator is appointed by the parties, following the procedure agreed upon by them, the Court has no jurisdiction to change the Arbitrator.

13. The petitioner has relied upon the findings in the case of **Indo Arya Logistics** (*supra*) and has stated that in that case, the Court, while in exercise of power under Section 11(6) of the Act, had set aside the appointment of Mr. R.K. Gupta as sole Arbitrator and ordered for the appointment of a neutral Arbitrator. It is argued on behalf of the learned counsel for the

respondent that it was so done in that case because the Court had reached to the conclusion that while appointing Mr R.K. Gupta as a sole Arbitrator, the procedure for appointment of the Arbitrator had not been duly followed. Moreover, Mr R.K. Gupta was the former employee of the respondent. The argument of the learned counsel for the respondent finds support from the findings of this Court in **Indo Arya Logistics** (*supra*). The Court has in para 9 ruled as under:-

“9(i).....In case the said Rules are read, it is clear that under the ICA Rules of Arbitration, there is a prescribed procedure for appointment of the Arbitrator. Admittedly, the respondent while appointing Mr.R.K.Gupta as sole Arbitrator on 6th March, 2012 has not complied with the procedure, particularly, Rule 15 of the ICA Rules to appoint the Arbitrator and the provision of the Act. No intimation of any nature was given by the respondent as admitted by the counsel. Therefore, it is apparent that the said procedure has not been adhered to by the respondent who has appointed the Arbitrator by passing the order through Managing Director.”

14. The petitioner has also relied upon the findings of Supreme Court in the case of **Indian Oil Corporation Ltd. and Ors.** (*supra*) in support of his contentions. In that case, in para 8 of its judgment, the Court has observed as under:-

“8. The said order of the Chief Justice is challenged by the appellant. On the rival contentions urged by the

parties, the following questions arise for our consideration:

(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an arbitrator, he will not act independently or impartially?

(ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?

(iii) Whether respondent herein had taken necessary steps for appointment of arbitrator in terms of the agreement, and the appellant had failed to act in terms of the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?”

15. In answer to question No.1, the Supreme Court has clearly held that even if the appointed Arbitrator is an employee of one of the parties, it cannot *per se* be a bar to his acting as an Arbitrator and further held that the learned Chief Justice was not justified in his assumption of bias. Although the findings are relied upon by the petitioner, but it certainly does not help the petitioner in any way. In the present case, Justice S.N. Katriar (Retd.), who has been appointed as an Arbitrator by the respondent, is not an employee of the respondent, but is a retired Judge of Patna High Court. The Supreme Court set aside the order of the Chief Justice by which the Arbitrator was appointed on the ground that there was no justification for

appointing an independent Arbitrator. The findings in this case are of no help to the petitioner.

16. The petitioner has also relied upon findings in **Dharma Prathishthanam** (*supra*) and **Abdul Kadir Shamsuddin Bubere** (*supra*).

The facts in above case are entirely different from the case before me. In that case, the provisions of Section 20 of Arbitration Act, 1940 was under challenge, while present case is entirely on different footing.

17. The petitioner has also relied on the findings in the case of **N. Radhakrishnan** (*supra*). Learned counsel for the respondent has submitted that this case has been declared *per incurium* by the Supreme Court in its judgment **Swiss Timing Limited** (*supra*), wherein in para 21, the Supreme Court has clearly held “*Therefore, in my opinion, the judgment in **N. Radhakrishnan** (*supra*) does not lay down the correct law and cannot be relied upon*”. Findings in **Swiss Timing Limited** (*supra*) were given in 2013, yet the petitioner has relied upon it, by concealing that the judgment has been declared *per incurium*. The petitioner has made an attempt to misguide this Court by relying upon a judgment which has been *per incurium*. This conduct of the petitioner is depreciable.

18. The respondent, on the other hand, has relied upon on the findings in

the case of *Antrix Corporation Ltd. vs. Devas Multimedia P. Ltd.* 2013(2) Arb.LR 226 (SC). The findings of this case are squarely applicable to the facts of this case. The issue before the Court in that case was, in terms of an arbitration agreement, where an Arbitrator has already been appointed, the other party to the dispute could be entitled to proceed in terms of Section 11(6) of the Act and the Court has given its finding as under:-

“31. The matter is not as complex as it seems and in our view, once the Arbitration Agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an Arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. **In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one Arbitrator already appointed in exercise of the arbitration agreement.** It may be noted that in case of Gesellschaft Fur Biotechnologische Forschun GMBH Vs. Koprana Laboratories Ltd. & Anr. [(2004) 13 SCC 630], a learned Single Judge

of the Bombay High Court, while hearing an appeal under Section 8 of the 1996 Act, directed the claims/disputes of the parties to be referred to the sole arbitration of a retired Chief Justice with the venue at Bombay, despite the fact that under the Arbitration Agreement it had been indicated that any disputes, controversy or claim arising out of or in relation to the Agreement, would be settled by arbitration in accordance with the Rules of Conciliation of the International Chamber of Commerce, Paris, with the venue of arbitration in Bombay, Maharashtra, India. This Court held that when there was a deviation from the methodology for appointment of an Arbitrator, it was incumbent on the part of the Chief Justice to assign reasons for such departure.

32. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-Section (6) may be invoked by any of the parties. Where in terms of the Agreement, the arbitration clause has already been invoked by one of the parties thereto under the I.C.C. Rules, the provisions of sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

33. The law is well settled that where an Arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an arbitrator is not maintainable. Once the power has been exercised under the Arbitration Agreement, there is no power

left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In Som Datt Builders Pvt. Ltd. Vs. State of Punjab [2006 (3) RAJ 144 (P&H)] (DB), the Division Bench of the Punjab & Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the disputes between the parties to the Arbitration Agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction.”

(Emphasis supplied)

19. From the above discussion, it is clear that once the Arbitrator has been appointed following the procedure agreed upon by the parties, the jurisdiction of the Court under Section 11(6) cannot be invoked. The appointment of an Arbitrator on the ground that he is biased or otherwise cannot be challenged under Section 11(6) of the Act and the remedy available to the petitioner is under Section 13 of the Act which deals with the procedure to challenge the appointment of an Arbitrator. In the present case, the petitioner has already invoked Section 13 of the Act and has challenged the appointment of the Arbitrator vide its letter dated 11.08.2014. This fact, however, has been concealed by the petitioner from the notice of this Court. The petitioner has also concealed the order of the Arbitrator

dated 21.08.2014. The petitioner has also tried to misguide the Court by citing the case law, which has been declared *per incurium*. The Court was aghast when after coming to know that findings in **N. Radhakrishnan** (*supra*) has been declared *per incurium* by the subsequent judgment of the Supreme Court, no apology was offered by the learned counsel, but he continued relying on the findings of the said case.

20. In view of these facts, while dismissing the present petition, I impose a cost of Rs. 50,000/- upon the petitioner, to be deposited with Delhi High Court Staff Welfare Fund within four weeks and receipt be placed on record.

DEEPA SHARMA
(JUDGE)

NOVEMBER 13, 2014
BG