

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

% *Order delivered on: April 15, 2014*

+ **Arb. P. No.377/2012 & I.A. No.21982/2012**

M/S INDO ARYA LOGISTICS Petitioner
Through Mr.Asheesh Jain, Adv.

versus

CENTRAL WAREHOUSING CORPORATION Respondent
Through Mr.K.K.Tyagi, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) for appointment of an Arbitrator to adjudicate the disputes between the parties.

2. Brief facts for the purpose of adjudication of the petition are that the parties to the petition, i.e. the petitioner and respondent entered into an agreement dated 20th December, 2006 which contains the arbitration clause. The same reads as under:-

“16. ARBITRATION:- Any difference or dispute what-so-ever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Agreement or the validity on the breach thereof shall be settled by Arbitration in accordance with the rules of arbitration of ICA through an Arbitrator appointed by the Managing Director, CWC and the award made in pursuance

thereof shall be binding on the Parties. The venue of the arbitration shall be at New Delhi.”

3. After the agreement was entered into, an incident of fire occurred on 18th December, 2008 in one of the warehouses given by the respondent to the petitioner under the said agreement. The respondent after the said incident on 31st December, 2008 addressed a letter to the petitioner calling upon him to make good the alleged damage caused to the warehouse as stipulated in Clause 11 of the agreement. The petitioner on 20th January, 2009 issued a letter to the respondent specifically denying its liability towards the causes and consequences of fire in the warehouse. The petitioner sent another letter dated 22nd January, 2009 to the respondent again denying its liability towards the consequences of fire and denying its responsibility to make good any loss which may have been caused by the fire in the warehouse of the respondent. On 24th January, 2009, the respondent sent a letter to the petitioner calling upon the petitioner to get the warehouse repaired and stating that the petitioner would also be responsible to pay the storage charges irrespective of whether the warehouse was used or not after the incident of fire has occurred. The said letter was replied by the petitioner through its letter dated 26th February, 2009 who again denied its liability towards any of the claims of the respondent. Thereafter, the respondent issued a legal notice dated 29th May, 2009 to the petitioner in which all the claims made by the respondent in its earlier communications were reiterated and the receipt of the petitioner's letters dated 22nd January, 2009 and 26th February, 2009 was duly admitted by the respondent. The respondent issued second legal notice dated 5th September, 2009 served upon the petitioner in which also all the claims earlier made by the respondent were repeated.

4. Admittedly, the respondent after a gap of about one year and 10 months addressed another letter to the petitioner raising a claim of Rs.69,80,229/- towards the amount spent on the repairs of the warehouse and damage occurred on 18th December, 2008 (day of incident). The respondent further reserved its right to claim storage charges up to 12th November, 2009.

5. Mr.Asheesh Jain, learned counsel for the petitioner states that on 6th March, 2012, the Managing Director of the respondent in disregard to the statutory provisions of the arbitration agreement and without any formal initiation/invocation of the arbitration as provided in the Act and Rules of ICA governing any arbitration appointed one of its former employee, Mr.R.K.Gupta as sole Arbitrator. The respondent also issued another order appointing its Authorized Representative for the purpose of arbitration proceedings to be conducted before the sole Arbitrator appointed by the Managing Director and the respondent issued a corrigendum dated 13th June, 2012 raising its claim from Rs.69,80,229/- to Rs.1,18,46,036/- without giving any explanation in this regard.

6. The submission of Mr.Jain is that the said appointment is null and void ab-initio, as it was not preceded by any invocation of the arbitration, thus, the said individual is disqualified from acting as an Arbitrator. Even otherwise, he is a former employee of the respondent and currently drawing financial remuneration from the respondent in consultative capacity. The prayer has been made in the present petition that the appointment of Mr.R.K.Gupta as Arbitrator to adjudicate the dispute between the parties is null and void ab-initio, as the appointing authority has failed to act in accordance with the procedure prescribed under the law. Therefore, the

prayer is made under Section 11(6) of the Act for appointment of an impartial arbitrator to adjudicate upon the disputes between the parties.

7. Learned counsel for the respondent, on the other hand, states that the petition is liable to be dismissed, as Mr.R.K.Gupta is an independent Arbitrator who is duly appointed by the designated authority, namely, Managing Director of the respondent in terms of Clause 16 of the agreement. The allegation of the petitioner, that the said Arbitrator is disqualified for acting as Arbitrator being a former employee of the respondent, is completely misleading. However, it is not denied that he worked with the respondent as Joint Manager (Engineering) and left the respondent-Corporation way-back in the year 1984 and joined the Cement Corporation of India. He worked there on a very senior position. Even, there is no iota of evidence on record to suggest that the Arbitrator in any manner would not be an impartial person. On the other hand, he has huge experience. As far as the issuance of corrigendum dated 13th June, 2012 is concerned, counsel submits that within their right, they have maintained their claims. The justification in this regard is given in para 6 of the preliminary objections of the reply filed by the respondent to the application.

8. During the course of the arguments, Mr.Jain, learned counsel for the petitioner has also stated that the claims sought by the respondent even otherwise are time barred, as the correspondence exchanged between December, 2008 and January, 2009 would demonstrate that there was a specific denial on the part of the petitioner with regard to causing any damage in the warehouse from the petitioner's side. He submits that despite of specific denial in January, 2009, the Managing Director of the respondent

appointed the Arbitrator only on 6th March, 2012 i.e. after expiry of three years.

9. Having considered the rival submissions of the parties, I am of the view that there is a force in the submissions of the learned counsel for the petitioner and the prayer made in the present petition is liable to be allowed. The reasons for the same are given as under:-

- (i) In case the arbitration clause is read in a meaningful manner, no doubt, the rights are given to the Managing Director of the respondent to appoint an Arbitrator but the arbitration clause clearly indicates that in case of any breach or dispute, it shall be settled by arbitration in accordance with the Rules of Arbitration of Indian Council of Arbitration (ICA) through an Arbitrator appointed by the Managing Director of the respondent. The requisite Rules 5, 9 & 15 read as under:

“Rule 5

Wherever the Parties have provided or agreed for arbitration by the Indian Council of Arbitration or for arbitration under the Rules of Arbitration of the Council, these rules or any amendment thereof, in the form obtaining at the time the dispute is referred to arbitration of the Council, shall apply.

Rule 9

A Panel of Arbitrators shall be appointed by the Committee from amongst persons who are qualified and possesses knowledge and experience in their respective field of profession and arbitration law & procedure and are willing to serve as arbitrators generally or in specific fields and who are from time to time recommended by the members of the Council or any other person or organisation.

All the members of the Panel will carry equal status and parties will not have any right to challenge the appointment of the arbitrator on the ground that its nominee arbitrator has higher status than the Presiding Arbitrator.

Rule 15

(i) Any Party wishing to commence arbitration proceedings under these rules (Claimant) shall give a notice of request for arbitration to the Registrar of ICA and to the Respondent.

(ii) The notice of request (application) for arbitration to the Registrar shall be accompanied by:-

(a) the names and full addresses of the parties to the dispute.

(b) statement of the claim and facts supporting the claim, points at issue and relief or remedies sought with other details of the claimant's case.

(c) original or duly certified copies of the arbitration agreement, any contract or agreement out of or in connection with which the dispute has arisen and such other documents and information relevant or relied upon.

(d) Registration Fee of Rs.10,000/- for claims up to Rs. One Crore and Rs.20,000/- for claims more than Rs. One Crore.

(e) The Arbitration shall be deemed to have commenced on the day the application for arbitration, registration fee and statement of claim are received in the office of the Council.”

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.

- (ii) The other aspect of the matter is that admittedly, in January, 2009 the petitioner specifically denied its liability of the damage, if any, caused to the respondent. However, the appointment of the Arbitrator was made by the respondent after the expiry of more than three years. There is no justification given by the respondent for the said purpose.
- (iii) In the case of ***Denel (Proprietary) Limited vs. Ministry of Defence***, (2012) 2 Supreme Court Cases 759 , para 24, it has been observed by the Supreme Court that normally, the Court shall make the appointment in terms of the agreed procedure but the Court may deviate from the same after recording reasons for the same. The Court in paras 24 & 26 of the said judgment laid down the principles of law which read as under:-

“24. It must also be remembered that even while exercising the jurisdiction under Section 11(6), the Court is required to have due regard to the provisions contained in Section 11(8) of the Act. The aforesaid section provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the Court shall have due regard to other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Keeping in view the aforesaid provision, this Court in *Indian Oil Corpn. Ltd.*, whilst emphasizing that normally the Court shall make the appointment in terms of the agreed

procedure has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same. In para 45 of the aforesaid judgment, it is observed as follows:-

“45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. *But as clarified by Northern Railway Admn., where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act.* In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons.”

(emphasis supplied)

25. x x x x x x

26. Similarly, applying the test laid down in *Indian Oil Corpn. Ltd.* this Court in *Denel (Proprietary) Ltd.* also observed that the Managing Director, Bharat Electronics Ltd., which is a government company, is bound by the directions/instructions issued by his superior authority. The Court also observed that according to the pleaded case of the respondents, though it was liable to pay the amount due under the purchase order, it was not in a position to supply the dues only because of the direction issued by the Ministry of Defence, Government of India. Therefore, the Court concluded that the Managing Director may not be in a position to independently decide the dispute between

the parties. Consequently, the Court proceeded to appoint an independent arbitrator.”

- (iv) In the present case, as mentioned earlier, the respondent was fully aware in January, 2009 that the petitioner has denied its claim. Despite of the same, the respondent has spent more than three years. However, the respondent has not taken any serious steps to appoint a sole Arbitrator in terms of the arbitration clause of the agreement. There is also complete gap of about one year and 10 months after issuing the second legal notice served upon the petitioner which was issued on 5th September, 2009 and again after a complete silence of about one year and 10 months, the respondent addressed a letter to the petitioner raising a claim of Rs.69,80,229/-. Therefore, despite of awareness by the petitioner, apparently the Arbitrator was appointed after the period of three years from the date of denial. The issue of limitation, in my view, is also to be considered by the sole Arbitrator, being a legal issue. It is also appropriate to refer the matter to the Arbitrator who has a legal background.

10. The respondent has admitted that the Arbitrator is the ex-employee of the respondent, however, considering the facts and circumstances of the case, I am of the view that it would be appropriate if a neutral arbitrator be appointed. The prayer of the present petition is accordingly allowed. The appointment of Mr.R.K.Gupta as the sole Arbitrator in terms of the letter dated 6th March, 2012 is terminated. The arbitration proceedings shall now be conducted under the aegis of the Delhi High Court Arbitration Centre who will appoint a sole Arbitrator in the matter. The fee of the Arbitrator shall also be paid as per the Rules maintained thereunder. The learned sole

Arbitrator shall start the proceedings from the stage left by Mr.R.K. Gupta. The respondent shall collect the entire record from him in a sealed cover and hand over the same to the newly appointed sole Arbitrator who shall commence the proceedings after valid service to both the parties.

11. The parties shall appear before the Secretary, Delhi High Court Arbitration Centre, on 13th May, 2014.

12. Copies of this order be given *dasti* to the learned counsel for both the parties and a copy of the same be also communicated to the Secretary, Delhi High Court Arbitration Centre forthwith.

(MANMOHAN SINGH)
JUDGE

APRIL 15, 2014