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

+ **ARB.P. 410/2016**

AERCOMFORT PVT. LTD.

..... Petitioner

Through Mr Dinesh C. Pandey, Ms Jyoti Pandey,
Mr Tushar Sharma and Mr Rajeev Gurung,
Advocates.

versus

GENERAL MANAGER, NORTHERN RAILWAYS
& ORS.

..... Respondents

Through Ms Rashmi Malhotra and Ms Priyanka
Bharhoke, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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29.11.2016

1. The petitioner has filed the present petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that a sole arbitrator be appointed to adjudicate the disputes that have arisen between the parties.

2. It is stated that the petitioner was awarded a contract for the Work of Design, Supply, Installation, Testing & Commissioning of Building Management System for Air-conditioning system including the work of Electrification in Central Hospital building of Northern Railway at Chelmsford Road, New Delhi. The General Conditions of Contract (GCC) applicable for the said contract includes an arbitration clause, the relevant extract of which is set out below:-

“64(1)(i) – Demand for Arbitration – In the event of any dispute or difference between the parties hereto as to the

construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.”

3. Initially, efforts were made to resolve the disputes amicably; however, the parties could not resolve their disputes. The petitioner also sent communications calling upon the respondent to appoint an arbitrator but the respondent failed to do so. Finally, the petitioner sent a legal notice dated 26.11.2014 (subsequently corrected by a notice dated 28.11.2014 and 04.05.2016) calling upon the respondent to appoint a sole arbitrator. Since the respondent failed to appoint an arbitrator, the petitioner was constrained to file the present petition.

4. The respondent does not dispute the existence of the agreement or the arbitration clause. It is also not disputed that the parties have failed to resolve the disputes amicably and that an arbitrator is required to be appointed.

5. The learned counsel for the respondent has today handed over a letter dated 15.11.2016 addressed to the petitioner suggesting the names of four persons for appointment as an arbitrator. The petitioner has been called upon to suggest two names out of the panel as indicated by the respondent so that one of the said persons could be appointed as an arbitrator.

6. The learned counsel appearing for the petitioner submits that since the respondent had failed to appoint an arbitrator prior to the filing of the present petition, in terms of directions of the Supreme Court in **Datar Switchgears Ltd. v. Tata Finance Ltd. and another: (2000) 8 SCC 151**, the respondent has forfeited its right to appoint an arbitrator and this Court is now required to do so.

7. In view of the fact that the respondent had failed to act on the petitioner's request for appointment of a sole arbitrator prior to the petitioner moving this Court, there is much merit in the contention advanced by the petitioner that the respondent has forfeited his right to appoint an arbitrator. In ***Datar Switchgears*** (*supra*) the Supreme Court had held as under:

“18. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?

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.”

8. It is also seen that the names suggested by the respondent are serving officers of the respondent. This, in my view, would not be desirable. Notwithstanding that the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 may not be applicable to the arbitral proceedings commenced prior to 23.10.2015, this Court does not consider it expedient that any of the serving officers of the respondent be appointed as the sole arbitrator.

9. Accordingly, with the consent of parties, it is directed that an Arbitrator be appointed under the Rules of the Delhi International Arbitration Centre (DIAC). The representatives of the parties shall appear before the Co-ordinator, DIAC on 21.12.2016 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

10. The petition is disposed of.

VIBHU BAKHRU, J

NOVEMBER 29, 2016

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