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

+ **ARB.P. 597/2016**

DR. R.N. GUPTA TECHNICAL EDUCATION
SOCIETY

..... Petitioner

Through: Mr Aseem Mehrotra, Advocate.

Versus

INTEC CAPITAL LTD.

..... Respondent

Through: Mr Shivam Batra with Mr Vikas
Walia, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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20.10.2016

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act') for appointment of an Arbitrator.
2. Admittedly, certain disputes have arisen between the parties in relation to the "Composite Agreement for Loan and Guarantee" dated 31.03.2010. The said agreement contains an arbitration clause which is set out below:-

"All disputes, differences and/or claim arising out of these presents or in any way touching or concerning the same of as to constructions, meaning or effect hereof or as to the right and liabilities of the parties hereunder shall be settled by arbitration to be held in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole arbitration the be nominated by the INTEC CAPITAL LTD. In the event of death, refusal, neglect, inability or incapability of a person so

appointed to act as an arbitrator, the INTEC CAPITAL LTD. may appoint a new arbitrator. The arbitrator shall not be required to give any reasons for the award and the award of the arbitrator shall be final and binding on all parties concerned. The arbitration proceedings shall be held in Delhi.”

3. In terms of the aforesaid arbitration clause, the respondent company is entitled to nominate an arbitrator and accordingly, the respondent company had nominated Mr Bhupesh Narula, Advocate as an Arbitrator to adjudicate the disputes that had arisen between the parties.

4. It is not disputed that Mr Bhupesh Narula had appeared for sister concerns of the respondent company and was associated with that group. Despite being aware of the said position, the respondent company had, nonetheless appointed Mr Narula as the sole Arbitrator. On being so pointed out, said Arbitrator had recused as an Arbitrator. The respondent had, thereafter appointed Mr Arjun Pant, Advocate as a Sole Arbitrator to adjudicate the disputes between the parties.

5. It is stated that Mr Pant had also been appointed by the respondent in other matters. Mr Pant also recused himself from the matter and by an email dated 24.07.2016 called upon the parties to collect the arbitral record. Apparently, the arbitral record was not collected and on 09.08.2016, Mr Pant once again sent an email calling the parties to fix a convenient place for collection of the record. Thereafter, again on 10.09.2016, a similar request was made by Mr Pant. The record has not been collected as yet.

6. In the aforesaid circumstances, the petitioner filed the present petition on 17.09.2016 and notice in this petition was directed to be issued on 22.09.2016. In response to the aforesaid petition, no reply has been filed by

the respondent, however, the learned counsel appearing for the respondent states that the present petition has become infructuous as the respondent has appointed one Mr Virender Rawat, Advocate as an Arbitrator. The learned counsel for the respondent has handed over a letter dated 31.07.2016 whereby Mr Virender Rawat, Advocate has been appointed as an Arbitrator. It is further stated that Mr Virender Rawat had accepted his appointment by a letter dated 25.08.2016.

7. The learned counsel appearing for the petitioner submits that the petitioner is completely unaware of any such appointment. He further states that the petitioner has not received any communication either from the respondent or from Mr. Rawat regarding his appointment as an Arbitrator. He contends that copies of the letters handed over today are an afterthought and have been made only after the present petition has been filed.

8. He submits that neither the letter dated 31.07.2016 nor Mr Rawat's letter dated 25.08.2016 were marked to the petitioner. He further submits that the arbitral record has also not been collected and, therefore, the question of the Arbitrator proceeding further also does not arise.

9. A perusal of the letter dated 31.07.2016 indicates that the respondent has not marked a copy of the letter to the petitioner. The said letter indicates that it was sent by hand so there is obviously no independent evidence by way of postal receipts to indicate as to when the said letter was sent.

10. The learned counsel for the respondent earnestly contends that in terms of the arbitration clause as well as Section 15 of the Act, the respondent is entitled to fill the vacancy caused by recusal of the sole arbitrator. He further urges that merely because the letters have not been

marked to the petitioner would not be fatal to the respondent's right to appoint an Arbitrator

11. There is no denying the fact that in terms of the arbitration clause, the respondent is entitled to appoint a Sole Arbitrator and since a vacancy had arisen by the recusal of the Arbitrator so appointed, the respondent had the right to nominate another person to act as an arbitrator in terms of Section 15 of the Act. However, the contention that it was not necessary for the respondent to have marked a copy of the letter addressed to Mr Virender Rawat appointing him as an Arbitrator to the petitioner, is clearly unsustainable. Merely, because a party has the right to appoint an arbitrator does not mean that the party can do so without any reference or information to the other party.

12. It is further seen that a copy of the letter appointing the sole arbitrator earlier was marked to the petitioner. The conduct of the respondent in these proceedings is, *prima facie*, not above board. There is no plausible reason as to why the letter of appointment of an arbitrator dated 31.07.2016 and the letter of being proposed Arbitrator accepting the appointment had not been marked to the petitioner. There is no reason to have kept the petitioner in dark. More than two and a half months have passed since the respondent claims to have appointed the sole arbitrator and admittedly, even as of date, no communication informing the petitioner that an arbitrator has been appointed has been sent either by the respondent or the arbitrator.

13. The contention of the learned counsel for the respondent that the letter appointing an Arbitrator and his acceptance need not be marked or informed to the petitioner has only to be stated to be rejected.

14. The efficacy of an arbitration as a dispute resolution mechanism is founded on Independence of the Arbitral Tribunal. In the present case, it *prima facie*, appears that it is the respondent's endeavour to appoint Arbitrators, who are otherwise associated with the respondent.

15. In the facts of the present case, the contention advanced by the learned counsel for the petitioner that the letter dated 31.07.2016 appears to be antedated is merited. Curiously, Mr Rawat's letter dated 25.08.2016 accepting his appointment as an Arbitrator has also not been marked to the petitioner. Mr Rawat has also not taken any steps thereafter to either schedule a preliminary hearing or communicate with the parties as to how he intends to proceed further.

16. In the aforesaid circumstances, the petitioner's contention that the respondent had not appointed the Arbitrator within a period of 30 days of the earlier Arbitrator declining to continue to act as an Arbitrator must be accepted.

17. Accordingly, 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 11.11.2016 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

18. The petition is disposed of.

VIBHU BAKHRU, J

OCTOBER 20, 2016
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