

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

+ ARB.P. 391/2015

% Date of Decision : 4th March, 2016

ZION PROMOTOERS &DEVELOPERS PVT LTD..... Petitioner

**Through: Mr. Atul Nanda, Sr. Adv. with
Ms. Rameeza Hakeem, Mr.
Gaurav Gupta and Mr. Rajat
Brar, Advs.**

versus

FERROUS INFRASTRUCTURE PVT LTD Respondent

**Through: Mr. Sacchin Puri, Ms. Monica
Chugh Manchanda and Mr.
Karan Bharadwaj, Advs.**

CORAM :-

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

ARB. P. 391/2015

1. The petitioner is seeking appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

2. **Brief Facts**

2.1. Vide agreement dated 10th March, 2008, the petitioner agreed to purchase rights in respect of 2,28,690 sq. feet of FSI from the respondent No.1 for a total consideration of Rs.16,46,56,800/-. Clause 41 of the agreement contains an arbitration agreement which is reproduced hereunder:

“41. In the event of any dispute whatsoever arising between the parties in any way connected with

this deal, the First Party shall refer the same to sole arbitration of a person to be appointed by the Managing Director of the first party and the decision of the arbitration shall be final and binding on both parties. The arbitration proceedings shall always be held in the city of New Delhi, India. The Arbitration & Conciliation Act, 1996 or any statutory amendments/ modifications shall govern the arbitration proceedings thereof for the time being in force. The High Court of Delhi and the Courts subordinate to it shall have jurisdiction in all matters arising out of or touching and concerning this allotment.”

- 2.2. Disputes arose between the parties whereupon respondent No.1, vide letter dated 03rd October, 2012, invoked the arbitration agreement by calling upon the Managing Director of respondent No.1 to appoint an arbitrator to adjudicate the disputes between the parties.
- 2.3. Vide letter dated 26th June, 2015, respondent No.1 reminded the Managing Director of respondent No.1 to appoint the arbitrator within one week failing which respondent No.1 shall approach the Court for appointment of an arbitrator. The relevant portion of the letter dated 26th June, 2015 is reproduced hereunder:

“This is with reference to the letter dated 03/10/2012 through which it was brought to your kind attention that the parties namely M/s Zion Promoters & Developers Pvt. Ltd. and M/s Ferrous Infrastructure Pvt. Ltd. had entered into an agreement dated 10/03/2008 (Hereinafter referred to as “Agreement”), pursuant to which certain disputes had arisen between the parties. The said disputes, inter-alia, included the recovery charges on account of common

work undertaken at Ferrous City, Sector-89, Faridabad, Haryana and also interest on account of the delayed payment.

That by the same letter dated 03/10/2012, we had invoked arbitration and had requested your good self to appoint an Arbitrator to adjudicate upon the disputes between the parties in pursuance of the arbitration clause as mentioned in clause 41 of the Agreement.

However, despite our request for an appointment of an Arbitrator the same has not been appointed till date. In view thereof you are requested to kindly appoint an arbitrator within one (1) week of the receipt of this letter, failing which we shall be at liberty to approach the Hon'ble Courts for the purpose of appointment of an Arbitrator."

(Emphasis Supplied)

- 2.4. On 15th July, 2015, the petitioner instituted this petition for appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act in which the notice was issued to the respondents on 20th July, 2015.
- 2.5. Vide letter dated 22nd July, 2015, the Managing Director of respondent No.1 appointed an arbitrator.
- 2.6. According to the petitioner, the appointment of the arbitrator by the Managing Director of respondent No.1, after the filing of this petition, is not valid. The petitioner, therefore, seeks appointment of an independent arbitrator by this Court.

3. **Submissions of the petitioner**

- 3.1. On 15th October, 2012, respondent No.1 invoked Clause 41 of the arbitration agreement dated 10th March, 2008 and requested its Managing Director to appoint a sole arbitrator. However, the Managing Director of respondent no.1 failed to appoint the arbitrator despite reminder dated 26th June, 2015 whereupon the petitioner filed this petition on 15th July, 2015. The alleged appointment of the arbitrator after the filing of this petition is not valid.
- 3.2. Clause 41 of the arbitration agreement empowers respondent No.1 alone to refer the disputes to a sole arbitrator to be appointed by the Managing Director of respondent No.1. The clause does not provide or allow the petitioner to make a request for appointment of an arbitrator.
- 3.3. The procedure under the agreement for appointment of an arbitrator has failed since respondent No.1 made a request to the appointing authority to appoint an arbitrator vide notice dated 03rd October, 2012 and the latter failed to do so, and, therefore, the petitioner has right to seek appointment of an arbitrator under Section 11(6)(a) as well as 11(6)(c).
- 3.4. Reliance is placed on ***Datar Switchgears Ltd. v. Tata Finance Ltd.*** (2000) 8 SCC 151, ***Punj Lloyd Ltd. v. Petronet MHB Ltd.*** (2006) 2 SCC 638, ***Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.*** (2007) 7 SCC 684, ***Deep Trading***

Company v. Indian Oil Corporation (2013) 4 SCC 35, *Antrix Corporation Ltd. vs. Devas Multimedia P. Ltd.* 2013 (7) SCALE 16, *Walter Bau AG, Legal Successor, of the Original Contrator, Dyckerhoff and Widmann A.G. v. Municipal Corporation of Greater Mumbai* (2015) 3 SCC 800, *M/s Sikka Promoters Pvt. Ltd. v. Municipal Corporation of Delhi* 184 (2011) DLT 667, *Kamal Oil Traders (Regd.) v. Indian Oil Corporation Ltd.* 200 (2013) DLT 24 (CN), *HCL Infosystems Ltd. v. Government of NCT of Delhi* order dated 14th May, 2013 in Arb. P. No.100/2013, *M/s Bikanerwala Foods Pvt. Ltd. v. Ministry of Textiles* dated 09th July, 2015 in Arb. P. 178/2015.

4. **Submissions of respondents**

- 4.1. The appointment of the arbitrator by Managing Director of respondent No.1 on 22nd July, 2015 is valid and cannot be objected to by the petitioner. Reliance is placed on *Union of India v. Premier Files Ltd.* (SC) 2009 (9) SCC 384, *Kurup Engineering Company Pvt. Ltd. v. Bharat Heavy Electricals Ltd.* 2005 (83) DRJ 493, *Vidyawati Constriction Co. v. Rail India Technical and Economic Services Ltd.* 2001 (59) DRJ 126 (DB) and *Chief Engineer (Western Zone), CPWD (Nagpur) v. Pandit Shankarrao Kulkarni* 2000 (4) MHLJ 267.
- 4.2. The petitioner has neither invoked the arbitration agreement nor raised any dispute. The petitioner at best has a case for counter claim. The petitioner has no cause of action and, therefore, does

not have a locus standi to seek appointment of an arbitrator. Reliance is placed on *Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.* 2009 (8) SCC 520.

- 4.3. Under Section 11(6) of the Arbitration and Conciliation Act, only an aggrieved party can approach the Court. Reliance is placed on *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra).
- 4.4. The petitioner's claim is barred by limitation. Reliance is placed on *State of Goa v. Praveen Enterprises* (2012) 12 SCC 581.

5. **Response of the petitioner to the judgments relied upon the by respondents**

- 5.1. There is a clear distinction in the scope of Sections 11(5) and 11(6) of the Arbitration and Conciliation Act. In *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra) (paras 5 to 7), the Supreme Court observed that Section 11(5) can be invoked where one party has failed to appoint an arbitrator despite notice to appoint. However, there is no requirement of notice in Section 11(6) which provides for failure of procedure/mechanism for appointment meaning thereby that a party can invoke Section 11(6) even if no notice has been given. In *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra), no notice for appointment of arbitrator was given, yet the Court upheld the appointment of arbitrator. The present case is covered by Section 11(6)(c) and not under Section 11(5).
- 5.2. *Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.* (supra) relied upon by respondent No.1 is not applicable to the

present case and is clearly distinguishable on the following grounds:

- (i) In ***Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.*** (supra), the petitioner therein had initially filed a civil suit in which the civil Court directed the parties to arbitration and the application under Section 11(6) was filed thereafter.
- (ii) In ***Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.*** (supra), none of the parties had referred the matter to appointing authority/institution whereas in the present case, the disputes have already been referred to the arbitration by respondent No.1.
- (iii) In ***Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.*** (supra), the arbitrator had already been identified and, therefore, the Court found no need to ask the other party to act in accordance with the agreed procedure.
- (iv) ***Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.*** (supra) recognised the distinction between Section 11(5) and 11(6) in para 48 of the judgment, which is reproduced hereunder:

“(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 of his designate in cases falling under sub-sections (4) and (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 the 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.”

(v) ***Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd.***

(supra) does not support the respondents as the judgment does not hold that invocation of arbitration by giving a notice is mandatory for filing a petition under Section 11(6) of the Arbitration and Conciliation Act.

5.3. ***State of Goa v. Praveen Enterprises*** (supra) relied upon by respondent No.1 is also distinguishable from the facts of the present case as no reference was made by the parties to the appointing authority i.e. Chief Engineer, CPWD whereas in the present case, the reference has already been made but the

appointing authority failed to act for almost three years. Secondly, in *State of Goa v. Praveen Enterprises* (supra), the respondents to the arbitration neither raised the counter claims in Section 11(6) application nor they were referred to the arbitration by the referring Court. The High Court, therefore, held that the arbitrator had no jurisdiction to entertain such fresh counter claims. The observations of the Court in paras 15, 19 and 41 do not support the case of the respondents.

5.4. Section 11(6) empowers a “party” to approach the Court for appointment of an arbitrator. The ‘party’ is defined in Section 2(1)(h) of the Act as “a party to an arbitration agreement”. Hence, any party to the agreement can file application under Section 11(6) provided any of the three circumstances mentioned in Clauses (a), (b) or (c) has taken place.

5.5. In *Antrix Corporation Ltd. vs. Devas Multimedia P. Ltd.* (supra), the Supreme Court observed that once an arbitration agreement has been invoked by a party, the arbitration agreement cannot be invoked for the second time by the second party. The Supreme Court further held that where the parties fail to act in terms of procedure agreed upon between them, the provisions of sub-Section (6) may be invoked by any of the parties. Relevant portion of the said judgment is reproduced hereunder: -

“31. 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.....”

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.....”

(Emphasis supplied)

- 5.6. In ***Union of India v. Premier Files Ltd.*** (supra) relied upon by respondent No.1 has no application to the present case. In that case, the arbitrator appointed by the appointing authority resigned whereupon the appointing authority appointed another arbitrator. In the meantime, the respondent filed an application under Section 11(6) which was rejected on the ground of maintainability.
- 5.7. In ***Kurup Engineering Company Pvt. Ltd. v. Bharat Heavy Electricals Ltd.*** (supra) relied upon by the respondent No.1, the mandate of the arbitrator was terminated under Section 14(2) on account of failure to act whereupon a substitute arbitrator was appointed under Section 15(2). This judgment has no application to the present case.
- 5.8. In ***Vidyawati Constriction Co. v. Rail India Technical and Economic Services Ltd.*** (supra), the application under Section 11(6) was dismissed as infructuous on the ground that respondent had already appointed an arbitrator. The appellant challenged the order dismissing the application under Section

11(6) which was dismissed as Section 37 does not provide for an appeal.

- 5.9. In *Chief Engineer (Western Zone), CPWD (Nagpur) v. Pandit Shankarrao Kulkarni* (supra), the order appointing an arbitrator under Section 11(6) was challenged by a writ petition and it has no application to the facts of the present case.

6. **Findings**

- 6.1. Section 11(6)(c) of the Arbitration and Conciliation Act empowers this Court to appoint an arbitrator if an institution fails to appoint an arbitrator. Section 11(6) is reproduced hereunder: -

“Section 11-Appointment of arbitrators

(6) Where, under an appointment procedure agreed upon by the parties-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

- 6.2. In *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra), the appellant filed an application under Section 11 for appointment

of the arbitrator before the High Court on the ground of failure of respondent No.1 to appoint an arbitrator within 30 days of the notice. Respondent No.1 appointed an arbitrator after the expiry of 30 days of the notice period but before the filing of the application for appointment of the arbitrator. The question arose with respect to the validity of the appointment made by respondent No.1. The Supreme Court considered the distinction between Sections 11(5) and 11(6) of the Arbitration and Conciliation Act and observed that if the person or institution entrusted with the appointment of an arbitrator fails to discharge such a function, the aggrieved party can approach the Court for appointment of an arbitrator. The Supreme Court observed that though no time limit has been prescribed in Section 11(6), the appointment should be made within 30 days.

The Supreme Court then considered the question whether, in a case falling under Section 11(6), the opposite party can appoint an arbitrator after the expiry of thirty days from the date of demand. The Court held that in cases arising under Section 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but such an appointment has to be made before the first party makes application under Section 11 seeking appointment of an arbitrator. If no appointment has been made by the opposite party till the application under Section 11(6) has been made, the right of the opposite party to make

appointment ceases and is forfeited. Relevant portion of the said judgment is reproduced hereunder:

“6. Sub-section (5) of Section 11 can be invoked by a party who has requested the other party to appoint an arbitrator and the latter fails to make any appointment within thirty days from the receipt of the notice. Admittedly, in the instant case, the appellant has not issued any notice to the 1st respondent seeking appointment of an arbitrator. An application under sub-section (6) of Section 11 can be filed when there is a failure of the procedure for appointment of an arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an arbitrator refuses to appoint the arbitrator or where two appointed arbitrators fail to appoint the third arbitrator. If the appointment of an arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of an arbitrator.

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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 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(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.”

(Emphasis supplied)

6.3. In *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.*, the appellant failed to appoint an arbitrator within 30 days from the date of receipt of notice from the respondent whereupon the respondent filed an application under Section 11(6) before the High Court. The appellant appointed an arbitrator after filing of the application under Section 11(6). The Supreme Court, following *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra), held the appointment of an arbitrator after the filing of the petition under Section 11(6) of the Arbitration and Conciliation Act to be without jurisdiction. The relevant portion of the said judgment is reproduced hereunder: -

“12. the respondent filed Section 11(6) petition on 30-3-2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15-5-2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.

13. We are, therefore, of the view that the order of appointment of Dr. Gita Rawat by the appellant as a sole arbitrator dated 15-5-2006 was passed without jurisdiction. Once Section 11(6) petition is filed by one party seeking appointment of an arbitrator, the other party cannot resurrect the clause of the agreement dealing with the appointment of the arbitrator, in this case Clause 24 of the agreement.” (Emphasis supplied)

6.4. In ***Deep Trading Company v. Indian Oil Corporation***, (2013) 4 SCC 35, Indian Oil Corporation appointed an arbitrator after the filing of the application under Section 11(6). The Supreme Court confirming ***Datar Switchgears Ltd. v. Tata Finance Ltd.*** (supra) held that Indian Oil Corporation forfeited its right to appoint the arbitrator upon filing of the petition under Section 11(6) and, therefore, the appointment of the arbitrator during the pendency of the proceedings was of no consequence. Relevant portion of the said judgment is hereunder:-

“19. If we apply the legal position exposited by this Court in Datar Switchgears to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 09.08.2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6).”

22. In the present case, the Corporation has failed to act as required under the procedure agreed upon by the parties in Clause 29 and despite the demand by the dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made under Section 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of

the matter, the Chief Justice ought to have exercised his jurisdiction under Section 11(6) in the matter for appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of the proceedings under Section 11(6) was of no consequence.” (Emphasis supplied)

- 6.5. In the present case, respondent No.1 validly invoked the arbitration agreement on 3rd October, 2012 by requesting the Managing Director of respondent No.1 to appoint an arbitrator. However, the Managing Director of respondent No.1 did not appoint the arbitrator whereupon respondent No.1 issued a reminder dated 26th June, 2015 calling upon its Managing Director to appoint the arbitrator within one week failing which respondent No.1 shall approach the Court for appointment of the arbitrator. The Managing Director of respondent No.1 still did not appoint the arbitrator till the filing of the present petition on 15th July, 2015. On 20th July, 2015, this Court issued the notice to respondent No.1. After the filing of this petition, the Managing Director of respondent No.1 appointed an arbitrator on 22nd July, 2015.
- 6.6. The right to appoint an arbitrator by the Managing Director of respondent No.1 ceased upon filing of this petition under Section 11(6) of the Arbitration and Conciliation Act on 15th July, 2016. Applying the principles laid down by Supreme Court in *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra), *Union of India v. Bharat Battery* (supra) and *Deep Trading Company v. Indian Oil Corporation* (supra), it is held that the

appointment of the arbitrator by the Managing Director of respondent No.1 after the filing of this petition is not valid.

- 6.7. There is no merit in respondent No.1's objection to the locus of the petitioner as any "party" as defined in Section 2(h) of the Act can approach the Court for appointment of the arbitrator upon failure of the procedure for appointment of the arbitrator. The judgments referred to and relied upon by respondent No.1 are clearly distinguishable from the present case for the reasons mentioned in para 5 above.
- 6.8. The objection of limitation raised by respondent no.1 shall be considered by the learned arbitrator and it is not necessary for this Court at the present stage to finally decide this question.

Conclusion

7. The petition is allowed and Justice Dr. M.K. Sharma (Retd.) is appointed as the sole arbitrator to adjudicate the disputes between the parties including their claims and counter-claims.
8. The arbitration shall take place under the aegis of Delhi International Arbitration Centre ('DAC').
9. The learned arbitrator shall ensure the compliance of the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration.
10. Copy of this order be sent to the learned Arbitrator as well as the Coordinator, DAC.

J.R. MIDHA, J.

MARCH 04, 2016
dk/rsk/ak