

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

% **Order delivered on: 6th April, 2016**

+ **Arb. P. No.485/2015**

DOOT DEVELOPERS PVT LTD. (JV) BENGAL SILVER SPRING
PROJECTS LIMITED Petitioner

Through Mr.Arvind Minocha, Adv.

versus

UNION OF INDIA Respondent
Through Mr.Anurag Ahluwalia, CGSC with
Ms.Srishti Banerjee, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (ORAL)

I.A. No.4374/2016 (for condonation of delay, by respondent)

The abovementioned application has been filed by the respondent for condonation of delay of 108 days in filing the counter affidavit. The prayer is not opposed by the learned counsel appearing on behalf of the petitioner. The same is accordingly allowed and the delay is condoned.

The application is disposed of.

Arb. P. No.485/2015

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of an independent sole Arbitrator.

2. Brief facts of the petition are that on 19th October, 2010, the petitioner was awarded the work of construction of dwelling units for officers and jawans and the letter of acceptance was issued accepting the tender for the lump-sum of Rs.224,97,25,555.89. However, the respondent failed in its various obligations, thus preventing the petitioner from achieving proper progress of work. On 29th January, 2013, the respondent cancelled the contract with effect from 31st January, 2013. The petitioner filed the petition under Section 9 of the Act which was disposed of by this Court by order dated 9th July, 2013 directing that the same be treated as a petition under Section 17 of the Act. The Arbitrator entered upon the reference on 12th December, 2013. The petitioner filed its statement of claim on 14th March, 2014 whereas the respondent filed its defence statement and counter-claim on 28th March, 2015. However, later on, on 19th June, 2015, the Arbitrator tendered his resignation due to his busy schedule of cases. The petitioner requested the appointing authority to fill up the vacancy. But, the said authority has failed to do so till the filing of the present petition, thus, forfeiting its right. Hence, the present petition has been filed by the petitioner.

3. Learned counsel for the respondent does not deny the facts of the matter, as mentioned above except the contention of the learned counsel for the respondent is that as per the agreement, it is for the respondent to appoint the sole Arbitrator to adjudicate the disputes between the parties in view of the existing arbitration clause. He argues that no doubt, despite of receipt of notice and till the filing of the present petition, the respondent has not appointed the Arbitrator, however, he submitted that as it is mandated in the

arbitration clause, the Arbitrator has to be appointed by the respondent under any circumstances/condition. No other argument is addressed by the respondent with regard to the appointment of Arbitrator.

4. Reliance is placed upon the following judgments:-

- (i) ***M/s. Deep Trading Company v. M/s. Indian Oil Corporation and Ors.***, AIR 2013 SC 1479, para 23 which reads as under:-

“23. We are afraid that what has been stated above has no application to the present fact situation. In *Newton Engg. [Newton Engg. & Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44]*, this Court was not concerned with the question of forfeiture of right of the Corporation for appointment of an arbitrator. No such argument was raised in that case. The question raised in *Newton Engg. [Newton Engg. & Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44]* was entirely different. 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.”

- (ii) ***North Eastern Railway and Ors. v. Tripple Engineering Works***, 2014(3) Arb. LR 327 (SC), paras 5 to 8 which read as under:-

“5. The “classical notion” that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short “the Act”) must

appoint the arbitrator as per the contract between the parties saw a significant erosion in *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* [*ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304] wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.* [*Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684] wherein following a three-Judge Bench decision in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* [*Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638] it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious. The apparent dichotomy in *ACE Pipeline* [*ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304] and *Bharat Battery Mfg. Co. (P) Ltd.* [*Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684] was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn. v. Patel Engg. Co. Ltd.* [*Northern Railway Admn. v. Patel Engg. Co. Ltd.*, (2008) 10 SCC 240] wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression “to take the necessary measure” appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.* [(2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (*Indian Oil case* [(2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] , SCC p. 537)

“(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.”

6. The above discussion will not be complete without reference to the view of this Court expressed in *Union of India v. Singh Builders Syndicate* [*Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not been concluded for over a decade, making a mockery of the process. In fact, in para 25 of the Report in *Singh Builders Syndicate* [*Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

7. A pronouncement of late in *Deep Trading Co. v. Indian Oil Corpn.* [(2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] followed the legal position laid down in *Punj Lloyd Ltd.* [*Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638] which in turn had followed a two-Judge Bench decision in *Datar Switchgears Ltd. v. Tata Finance Ltd.* [(2000) 8 SCC 151] The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in *Deep Trading Co.* [(2013) 4 SCC

35 : (2013) 2 SCC (Civ) 449] subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in *Northern Railway Admn. v. Patel Engg. Co. Ltd.*, (2008) 10 SCC 240] not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.

8. In the present case Clauses 64(3)(a)(ii) and (iii) of the general conditions of contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be Railway Officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6), in an appropriate case to depart therefrom. In *Singh Builders Syndicate v. Union of India* [Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of the process. In the present case, admittedly the award in respect of disputes and differences arising out of Contract No. CAO/CON/722 is yet to be passed. Though the appellant Railways has in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said contract has been finalised, no material, whatsoever, has been laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and differences arising out of Contract No. CAO/CON/738 has not even commenced. A period of nearly two decades has elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts. The situation is distressing, and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein. In a situation where the procedure and process under the Act has been rendered futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged in the light of the several decisions noticed by

us. We are, therefore, of the view that no infirmity, much less any illegality or failure of justice, can be said to be occasioned by the order passed by the High Court so as to warrant any interference. We, therefore, unhesitatingly dismiss this appeal filed by the appellant Railways. However, in the facts of the case we do not deem it appropriate to burden the appellant with any costs.”

5. I do not agree with the learned counsel for the respondent, as this Court felt that in view of circumstances explained, the issue in hand has to be considered as per settled law and not as per the vague clause of the agreement which is against the judgments delivered by the Supreme Court. It is the admitted position that the respondent failed to appoint the Arbitrator despite of the receipt of the notice. Thus, the contention of the respondent cannot be accepted.

6. In view of the above settled law as well as the facts and circumstances of this case, the prayer made in the petition is allowed. Mr. Justice Anil Dev Singh, Former Chief Justice of Rajasthan High Court (R/o F-10 Geetanjali Enclave, New Delhi-110017, Mob. 9810060203) is appointed as sole Arbitrator to adjudicate the disputes arising out of the agreement in question between the parties as mentioned in the present petition. The parties are also allowed to file their respective claims and counter-claims before the Arbitrator.

7. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be paid in terms of the schedule of Arbitration and Conciliation (Amendment) Act, 2015. The

parties to appear before the Arbitrator on 2nd May, 2016 at 5 p.m. for directions.

8. The petition is accordingly disposed of.

9. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

(MANMOHAN SINGH)
JUDGE

APRIL 06, 2016

