

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

% *Judgment pronounced on: 27th January, 2016*

+ **Arb. P. No.517/2015 & I.A. No.21189/2015**

SELMEC ENGINEERING CONSTRUCTION Petitioner
Through Mr.Anand Bali, Adv. with
Mr.Vikram Singh, Adv.

versus

DSC LIMITED, THROUGH ITS MD Respondent
Through Mr.Ashish Dholakia, Adv. with
Mr.Gautam Bajaj & Mr.D.Kishore
Kumar, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.
2. The case of the petitioner is that on 9th February, 2009, the respondent approached the petitioner for construction of an elevated road over Barapulla Nalla project New Delhi allotted by Delhi PWD to join as a Sub-Contractor on terms and conditions specified in the subsequent agreements dated 9th February, 2009, 9th July, 2009, 20th March, 2010, 23rd March, 2010 and 6th June, 2011 and all the works have been completed by the petitioner well within the time frame and up to the satisfaction of the respondent. A running payment system was adopted by both the parties and accordingly petitioner used to submit his bills under a running and continuous

system of accounting, but the respondent never cleared his dues in total, but always paid in a lump-sum less amount, out of the total dues without any explanation and information of it; and that too after much pursuance and follow-ups; the same is apparently clear by viewing the payment pattern through Ledger statement which has been filed along with the petition.

3. It is stated in the petition that the respondent has made his last payment to the petitioner on 23rd May, 2015 through cheque No.537738 dated 19th May, 2015 drawn on SBI for a sum of Rs.4,00,000/-, leaving an unpaid balance of Rs.1,46,99,188/- due for payment. The respondent issued a Completion Certificate dated 20th April, 2012 in favour of the petitioner, which is for the total amount of the Rs.500.93 Lac and is self-explanatory that the petitioner has done a successful completion of the agreed total work of Rs.500.93 Lac as per the agreements between the two parties.

4. It is further submitted that since 23rd May, 2012, the petitioner had approached the respondent many times in person, by telephone and through e-mail and letters but the respondent always ignored his requests for payment and finally refused to pay the same. Therefore, left with no option, the petitioner on 20th April, 2015 sent a letter to the respondent to appoint an Arbitrator as per the Clauses 17 and 20 of the agreements. It is also stated that by reply dated 2nd May, 2015, the respondent denied all the balance payments and suggested for an amicable settlement between the parties which the petitioner accepted and requested the respondent to fix a date of meeting for the amicable settlement.

5. On 2nd June, 2015, the petitioner agreed to settle the dispute in an amicable manner. The respondent fixed the date of 20th July,

2015 at 11.00 a.m. for the meeting to settle the disputes amicably. However, on 3rd July, 2015, the respondent informed that its Managing Director was abroad and the meeting would be fixed only after his arrival. On 29th July, 2015 the petitioner again wrote an email to the respondent whereby a suggestion was made that in case the respondent was unable to fix up a date for amicable settlement, they should appoint a sole Arbitrator to settle the dispute. As per the petitioner, the respondent in its reply dated 31st July, 2015 raised a false plea about the illness of its Managing Director and made excuses to linger on the subject. The respondent also failed to appoint the sole Arbitrator. Therefore, the petitioner had no option but to file the present petition for appointment of a sole Arbitrator.

6. In reply to the petition, the respondent has referred Clauses 17 and 20 of the Agreements in question which envisage a multitier dispute resolution mechanism involving the following three mandatory steps:

(i) *"Any dispute arising out of the work shall be settled amicably with DSCL"*. The first step casts a mandatory obligation on the parties to make genuine efforts in settling the disputes amicably. The use of the word "shall" in the arbitration clause makes it clear that this step is mandatory and that it cannot be subverted before moving on to the second step prescribed for settlement of disputes.

(ii) *"In case the dispute is not settled, sole arbitrator to be appointed with mutual consent of DSCL and Sub Contractor, shall settle the dispute."* The second step clearly provides that where the amicable settlement of disputes between the parties is not possible or fails then only thereafter the same shall be decided/settled by a sole arbitrator, appointed with the mutual consent of the Petitioner and Respondent herein.

(iii) "However, in case sole arbitrator is not appointed by mutual consent, DSCL will appoint the arbitrator, which shall be binding on the sub-contractor." Finally, where the parties fail to agree on the sole arbitrator then the same will be appointed by DSCL i.e. the Respondent in the present case, which appointment shall be binding on the sub-contractor i.e. the Petitioner in the present case.

7. It is an undisputed fact that there is a dispute between the parties which is arbitrable under the Arbitration and Conciliation Act, 1996. The notice has also been received by the respondent. The contention of the respondent is that the present petition has become infructuous as the respondent has already appointed the sole Arbitrator on 5th September, 2015 in accordance with the 'Settlement of Dispute' Clause contained in Clauses 17 & 20 of the Work Orders dated 9th February, 2009, 9th July, 2009, 20th March, 2010, 23rd March, 2010 and 6th June, 2011.

8. There is a force in the submission of the learned counsel for the respondent, as the present petition was filed in the Registry on 14th September, 2015 along with brief list of dates and events dated 12th September, 2015 and on the date of filing of petition, it was the admitted position that the Arbitrator was appointed on 5th September, 2015. In the case of **Datar Switchgears Ltd. v. Tata Finance Ltd. and another**, (2000) 8 Supreme Court Cases 151, paras 18 and 19 wherein it was 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.”

9. The respondent had appointed the sole Arbitrator on 5th September, 2015 to adjudicate the dispute between the parties. Once the sole Arbitrator has already been appointed before filing of the present petition, therefore, in view of the decision of the Supreme Court in the case of ***Datar Switchgears Ltd.*** (supra), the present petition is not maintainable. The same is accordingly dismissed. The pending application also stand disposed of.

(MANMOHAN SINGH)
JUDGE

JANUARY 27, 2016