

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

Date of decision: February 26, 2016

+ ARB.P. 24/2016
CREATIVE GROUP

..... Petitioner
Through: Ms.Sadiqua Fatima, Adv.

versus

THE AIRPORTS AUTHORITY OF INDIA

..... Respondent
Through: Ms.Anjana Gosain, Adv.

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.(Oral)

1. This is a petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator. The notice on the same was issued to the respondent on January 11, 2016 when Mr. Digvijay Rai, Advocate appeared for the respondent and sought time to file reply to the petition, after which an IA 1449/2016 has been filed by the petitioner, consisting of four annexures wherein a reference has been made to a letter dated January 15, 2016 of the respondent appointing Sh. Krishna Kant (Retd.) ADG, CPWD as a Sole Arbitrator. A response was given by the petitioner to the said appointment on January 20, 2016 wherein the petitioner's stand is that the respondent having failed to appoint an Arbitrator within a period of 30 days from the notice dated

October 29, 2015 issued by the petitioner, the respondent has forfeited its right to appoint an Arbitrator and the appointment now made by the respondent is non-est in the eye of law.

2. Learned counsel for the petitioner would contend that despite having issued the reply dated January 20, 2016, the Arbitrator appointed by the respondent issued a letter dated January 20, 2016 wherein the venue of arbitration proceedings, details pertaining to the payment of advance fee and the correspondence address of the Arbitrator was informed. The petitioner replied to the Arbitrator on January 25, 2016, wherein it denied to accept the appointment made thereof and the commencement of arbitration proceedings. She relied upon the judgment of the Supreme Court in the case of *Datar Switchgears Ltd. vs. Tata Finance Ltd & Anr. (2000) 8 SCC 151*.

3. On the other hand, learned counsel for the respondent would justify the appointment of Mr. Krishna Kant as an Arbitrator, who according to her is an independent Arbitrator, not connected with the Airports Authority of India but a retired ADG of the CPWD. She would state, that the matter being technical as it relates to civil work, done at Goa Airport, the appointment is justified.

4. Having heard the learned counsel for the parties, suffice to state, it is not the case of the respondent that it had appointed the Arbitrator

within 30 days of the issuance of notice dated October 29, 2015. It is also not its case that before the petitioner had approached the Court on December 22, 2015, the arbitrator was appointed. The respondent has appointed the Arbitrator after the notice was received by the respondent in the case on January 11, 2016. The Supreme Court in the case of ***Datar Switchgears Ltd. (supra)*** in paras 18 and 19, has 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.”

5. In the case in hand, I note the arbitration clause in the agreement reads as under:-

“12.1 In the event of any dispute, difference or question arising out of or concerning the Agreement for the execution of work herein specified which cannot be settled mutually, the same shall be referred to the sole Arbitrator appointed by the Member (Planning), Airports Authority of India. The Arbitration proceedings will be governed by the provision contained in the Indian Arbitration Act 1996. The decision of Arbitration shall be final and binding for both the parties. Even if any dispute, difference or question arises out of or concerning this Agreement and whether the same has been referred to Arbitration, the Consultant shall continue to perform his duties and this agreement with due diligence and the AAI will make the payment to the consultant to the extent incorporated in the Agreement.

12.2 Action to appoint an Arbitrator shall be taken within one month from the date of communication made in writing by any party to the Member (Planning), Airports Authority of India stating that a dispute has arisen and that the matter be referred to arbitration in accordance with this Agreement along with the list of quantified dispute to be referred for arbitration.

12.3 In all cases where the total amount of all the claims in dispute is Rs.75,000/- (Rupees Seventy five thousand only) and above, the arbitrator shall give reasons for the award.

12.4 Subject as aforesaid the provisions of the Arbitration and Conciliation Act 1996 or any statutory modification or reenactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

12.5 In terms of the contract that if the consultant does not make

any demand for arbitration in respect of any claims(s) in writing within 90 days of receiving the intimation from the AAJ that the final bill is ready for payment, the claim of the consultant will be deemed to have been waived and absolutely barred and AAI shall be discharged and released of all liabilities under the contract in respect of these claims.”

6. The arbitration clause does not postulate any special qualifications of the Arbitrator, who has to be appointed under the Agreement. The aforesaid ratio in the case of ***Datar Switchgears (supra)***, has been reiterated by the Supreme Court in the case reported as ***(2013) 4 SCC 35 Deep Trading Company vs. Indian Oil Corporation and others***, wherein in para 19, the Supreme Court has held as under:-

“19. If we apply the legal position expounded 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). We answer the above questions accordingly.”

7. From the facts noted above, the Arbitrator having been appointed by the respondent after the petition was filed under Section 11(6) of the

Act, keeping in view the ratio of the judgment of the Supreme Court in *Datar Switchgears Ltd. (supra) and Deep Trading Company (supra)*, the respondent having not appointed the Arbitrator despite being called upon by the petitioner vide notice dated October 29, 2015 and not acceding to the request till the filing of the petition and only on January 15, 2016 when the notice was received by the counsel for the respondent, such appointment by the respondent after the forfeiture of its right, is of no consequence and the appointment so made by the respondent of Mr. Krishna Kant (Retd.) ADG, CPWD as a Sole Arbitrator need to be set aside. I order accordingly.

8. I appoint Justice V.S. Aggarwal, (Mobile No.9891175550) retired Judge of this Court as the Sole Arbitrator who would conduct the proceedings under the aegis of the Delhi International Arbitration Centre (DAC) and the Rules made there under. The fee of the learned Arbitrator shall be shared equally by the parties.

9. The petition is allowed in the aforesaid terms. No costs.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 26, 2016/AK