

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.91 of 2017

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M/s Dwivedi & Sons Through Its Partner, namely Jitendra Prakash Dwivedi, son of Late Swaminath Dubey, Resident of Mohalla Dwivedi Colony, PS Siwan (Town), District Siwan

.... Petitioner/s

Versus

1. Bharat Petroleum Corporation Limited Through Its Chairman, Bharat Bhawan, 4 & 6 Currimbhoy Road, Ballard Estate, PO 688, Mumbai -1
2. Director (Marketing), Bharat Petroleum Corporation Limited, Bharat Bhawan, 4 & 6 Ballard Estate, Mumbai -1
3. Head (Retail) (East), Bharat Petroleum Corporation Limited, Bharat Bhawan, Plot No. 31, Prince Gulam Mohammad Shah Road, Golf Green, Post Box No. 16201 and 16204, Kolkata -700095
4. Territorial Manager (Retail), Bharat Petroleum Corporation Limited, Village Sherpur, Near Narayan Anant Station, NH 28, PO MIC, Bella PS & District Muzaffarpur
5. Deputy Manager, Sales & Engineering, Bharat Petroleum Corporation Limited, Village Sherpur, Near Narayan Anant Station, NH 28, PO MIC, Bella PS & District Muzaffarpur
6. DGM (Logistic), East, Bharat Petroleum Corporation, Eastern Regional Office,, Plot No. 31, KIT Scheme No. 118, Gulam Mohammad Shah Road, Golf Green, Kolkata

.... Opposite Party 1st set Respondent/s

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Appearance :

For the Petitioner/s : Mr. Kunal Tiwary
For the Respondent/s : Mr. Siddhartha Prasad
Mr. Om Prakash Kumar

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date: 30-08-2017

This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for constitution of an Arbitral Tribunal for resolution of the dispute between the parties.

Petitioner is a partnership firm, engaged in sale of petroleum products based on license granted. It seems that certain agreement was entered into between the petitioner and the



respondent-Bharat Petroleum Corporation Limited (hereinafter referred to as 'the Corporation') with regard to functioning of a retail petroleum outlet and based on some inspection and its routine sample test collected from the retail outlet on 26.06.2011 action has been taken against the petitioner. After issuance of a show-cause notice, license of the petitioner to deal with the outlet has been cancelled.

Petitioner challenged the same before this Court in CWJC No. 1493 of 2017 and taking note of the arbitration clause available in the agreement on 17.01.2017 the writ petition was disposed of directing the petitioner to take recourse to the remedy of arbitration provided under Clause 18(a) of the agreement in question available on record as Annexure-5 dated 28th March, 2014. Petitioner sought for constitution of an Arbitrary Tribunal and as per the agreement, the Director (Marketing) of the respondent-Corporation was the named Arbitrator and in his absence the Director was empowered under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act') to nominate a person to act as an Arbitrator. The arbitration clause further contemplates that the provision of the 1996 Act shall be applicable. It seems that when the petitioner sought for constitution of an Arbitral Tribunal and as the Director being an employee of



the Company under Section 12(5) of the 1996 Act was ineligible to be appointed as Arbitrator, he recommended for appointment of one retired District & Sessions Judge as an Arbitrator.

Petitioner contended that appointment of this Arbitrator is not sustainable in view of the law laid down by the Supreme Court in the case of **Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Ltd. [(2017) 4 SCC 665]** and sought for appointment of an independent Arbitrator or furnishing a panel of names so that the petitioner can select an Arbitrator. When this was not acceded to, this application has been filed for appointment of an independent Arbitrator in the matter.

Learned counsel for the petitioner referred to the provision of Section 12(5) of the 1996 Act and its interpretation in the case of **Delhi Metro Rail** (supra), particularly paragraphs-18 and 28 thereof, and argued that the Director (Marketing) cannot act as an Arbitrator now in view of the prohibition contained in Section 12(5) of the 1996 Act. He should follow the mandate of the principle laid down in paragraph-28 in the judgment of the **Delhi Metro Rail** (supra). Accordingly, learned counsel seeks constitution of an Arbitral Tribunal now by this Court.

Refuting the aforesaid, learned counsel for the respondent-Corporation submits that as an Arbitrator, namely, an



independent person, i.e., a retired District & Sessions Judge, one Shri Kanhaiya Prasad Verma, has been appointed as is evident from Annexured-10 dated 19th June, 2017, no further direction is required to be issued in this matter and in case the petitioner has any grievance with regard to the appointment of this Arbitrator, he should seek quashing of the mandate of the Arbitrator by taking recourse to the remedy available under Section 13 of the 1996 Act and for the said purpose invoking jurisdiction of this Court now under Section 11 of the 1996 Act is not permissible.

I have heard learned counsel for the parties at length and find that there is no dispute with regard to the factual aspects as are detailed hereinabove. However, the question would be as to whether this application is to be rejected only because an Arbitrator has been appointed. Clause 18(a) of the agreement in question is an arbitration agreement to settle disputes through arbitration. The Director (Marketing) of the respondent-Corporation is to act as Arbitrator. Admittedly, the Director (Marketing) being an officer of the Corporation and an interested person cannot act as independent Arbitrator and, therefore, by virtue of Section 12(5) of the 1996 Act and the prohibition created vide VIIIth Schedule therein and the law laid down by the Supreme Court in the case of **Delhi Metro Rail** (supra), the said sole



Arbitrator under law cannot discharge the duty of an Arbitrator. The arbitration clause further contemplates that the Director (Marketing) can appoint an Arbitrator to resolve the dispute and it is the case of the respondents vide Annexured-10 he has nominated one retired District & Sessions Judge of Patna to adjudicate the dispute. Question therefore now is as to whether this should be approved or further direction issued to be Director (Marketing) in the matter of appointment of an Arbitrator or an Arbitrator appointed by this Court or the application dismissed with liberty to the applicant to seek remedy under Section 13 of the 1996 Act.

Before going into the aforesaid aspect of the matter, certain principles laid down by the Supreme Court in the case of **Delhi Metro Rail** (supra) may be taken note of. While considering the question of empanelment of Arbitrators and appointment of Arbitrator in accordance with the arbitration agreement, particularly in Government Departments and Public Sectors and while interpreting the provisions of Section 12(5) of the 1996 Act, the Hon'ble Supreme Court has indicated that neutrality of the Arbitrator, namely, impartiality and independence of the Arbitrator is a necessary requirement to fulfill the object of the 1996 Act. It is also required to fulfill the object of introducing of Section 12 of the 1996 Act. It has also been reiterated that empanelment of



Arbitrators should be broad based and choice should be available to the opposite party to choose from the names of the Arbitrators. For the sake of convenience, consideration made by the Hon'ble Supreme Court in paragraphs-18 and 28 of the judgment in the case of **Delhi Metro Rail** (supra), which may be relevant for the case in hand, may be taken note of, which reads as follows:-

“18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provisions was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party



cannot insist on appointment of the arbitrator in terms of the arbitration agreement.”

“28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice



should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.”

It is clear from paragraph-18 as reproduced hereinabove, that the provisions of Section 12(5) has to be given effect to and any person whose relationship with the parties or the counsel or the subject matter of the dispute falls in the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an Arbitrator. That being so, the Director of the Company is ineligible to act as an Arbitrator. Further, in paragraph-28 of the judgment as reproduced hereinabove, the choice to be given to the opposite party to nominate a person is indicated. In this case, no choice was given and straightway a retired District & Sessions Judge was appointed. It is this act of the respondent-Company in the present case of appointing the Arbitrator which does not meet the requirement of law as laid down in the case of **Delhi Metro Rail** (supra), particularly the requirement contemplated in paragraph-28 thereof and, therefore, this Court has to exercise its jurisdiction and pass appropriate orders in the matter of appointment of Arbitrator. Once this Court is of the considered view that the provisions of law as laid down in



the case of **Delhi Metro Rail** (supra) have not been followed in appointing the Arbitrator, it is not necessary or appropriate to relegate the petitioner to recourse to the remedy under Section 13 of the 1996 Act. To that effect, the objection raised by the respondent-Corporation has to be and is accordingly rejected.

Now the question would be as to whether a direction should be issued to the respondent-Corporation to indicate to the applicant a list of empanelled arbitrators keeping in view the principles enumerated by the Supreme Court in paragraph-28 of the judgment rendered in the case of **Delhi Metro Rail** (supra), or this Court should straightway appoint an Arbitrator.

The case in hand pertains to cancellation of a petroleum outlet dealership. Questions of fact, law and technical issues are involved in this matter and, therefore, it would be more appropriate to direct the respondent-Corporation to follow the principles laid down in paragraph-28 of the judgment in the case of **Delhi Metro Rail** (supra), communicate to the petitioner a panel of at least 10 to 12 names and the petitioner given an opportunity to choose an Arbitrator from such names and thereafter the Company shall appoint such person as Arbitrator to proceed in the matter. This Court is of the considered opinion that to meet the ends of justice, this Court deems it appropriate to direct the respondent-



Corporation to communicate to the petitioner a panel of names from persons who can be appointed as Arbitrator. The panel should consist of at least 10 to 12 names and the petitioner is granted liberty to choose an Arbitrator from the said panel and on the same being done the respondent-Corporation shall appoint the said person as Arbitrator to adjudicate the dispute between the parties.

With the aforesaid, this application stands disposed of.

(Rajendra Menon, CJ)

mrl.

AFR/NAFR	NAFR
CAV DATE	N.A.
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