

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Arbitration Case No.71 of 2015

Date of decision: October 09, 2017

M/s Thermex Limited

.....Petitioner

Vs.

Municipal Corporation, Chandigarh.

.....Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Ashok Aggarwal, Sr. Advocate with

Mr. Mayur Kanwar, Advocate for the petitioner.

Mr. V.K.Sachdeva, Advocate and Ms. Deepali Puri, Advocate
for the respondent.

Ajay Kumar Mittal,J.

1. The petitioner has filed the instant petition under Section 11(4), (5) and (6) of the Arbitration & Conciliation Act, 1996 (in short, "the Act") for appointment of an arbitrator for resolution of disputes with the respondent.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner is an engineering company. It has developed technology for efficient management of effluent discharged in the public sewerage system. The respondent floated a tender for up-gradation of existing sewerage treatment plant of 15 MGD capacity to 30 MDG at Diggian near Chandigarh to treat the incoming sewerage to the standard of BOD 30 mg./l by installing new units of 15 MGD on MBBR technology. The said tender was performance-run for six

months as per DBIT on lumpsum/turnkey basis alongwith operation and maintenance of 120 months after successful trial for 180 days. On 28.2.2007, the petitioner company was awarded the contract and agreement was executed between the parties. The respondent was represented through Executive Engineer. Clause 25-A of the agreement provided for arbitration in case of dispute. It was provided therein that all disputes would be referred to the sole arbitration of Superintending Engineer of the area concerned. However, Chief Engineer-in-charge shall have the authority to change of arbitrator on an application by either of the parties. After the award of the contract, the petitioner was entrusted with the operation and maintenance of the treatment plant which was directly interlinked with the sludge produced in as much as the sewerage treated by the plant upon treatment was segregated into treated water and sludge. Unless sludge was removed by the respondent and transported to the pits intended for storage of sludge, the plant could not operate. The scope of the work did not include handling of sludge, removal of sludge, supply of chemicals for treating the sewerage and providing watch and ward for the entire plant. On 27.5.2010, commissioning of the project was done on trial basis for 180 days which lapsed on 27.11.2010 and proved successful. Satisfied with the design supplied, the respondent issued a certificate on 29.11.2010 stating that the plant had been performing satisfactorily as per designed criteria and NIT conditions. Considering the performance, the Bank guarantee amounting to ₹1,74,90,000/- was also released. The period of maintenance and operation started w.e.f 28.11.2010 and was still under implementation. The price break up for operation and maintenance for 120 months worked out to ₹ 600 lacs approximately i.e. ₹ 5 lacs a month. Till September 2014, the respondent in discharge of its contractual obligation was continuously

removing the sludge by floating separate tenders/contracts. It also entered into contracts for supply of chemicals. On 18.9.2014, the petitioner called upon the Executive Engineer to provide tractor, trolley and manpower for disposal of the sludge. However, the Executive Engineer took the view that removal of sludge and its treatment with chemicals was within the scope of the work of the petitioner. The petitioner wrote to Executive Engineer on 22.9.2014 submitting its point wise reply to the letter dated 18.9.2014. On 29.9.2014, the Executive Engineer called upon the petitioner to clarify certain points which was done by it. Despite the aforesaid clarification on 18.11.2014, the Executive Engineer wrote to the petitioner that handling of sludge was deemed to be included in the contract. The petitioner on 21.11.2014 repudiated the alleged assertion of the Executive Engineer. On 3.12.2014, the petitioner sent a notice to the respondent saying that non disposal of sludge and grit was likely to cause serious environmental issues which were solely on account of failure of the respondent. On 5.12.2014, the respondent instead of discharging its obligations under the contract adopted coercive methods and threatened the petitioner with severe consequences including decision of Superintending Engineer-Arbitrator of contract qua blacklisting. Accordingly, the petitioner was constrained to file CWP No.26279 of 2014 seeking directions to the respondent to remove the sludge. On 22.12.2014, the court disposed of the said writ petition in view of the arbitration clause. The petitioner invoked the arbitration clause on 26.12.2014 and wrote to the Executive Engineer for settlement of issue by Engineer-in-Chief as a first step of dispute resolution mechanism in terms of Clause 25-A(iii). On 14.1.2015, in response to the aforesaid letter of the petitioner, the Executive Engineer called upon the petitioner in its office on 23.1.2015 for settlement of issues. A meeting was held on 23.1.2015 and the

issues were discussed but no major consensus was reached. Accordingly, it was decided to refer the dispute to the arbitrator. No communication had been issued to the named arbitrator in the agreement namely the Superintending Engineer appointing him as the Arbitrator to enter reference. There was no letter on the record which showed any communication either to the Arbitrator or to the petitioner appointing the arbitrator or for that matter even referring the disputes to him. On 24.3.2015, the petitioner wrote to the Chief Engineer in charge to exercise his power for changing the arbitrator and requested him to appoint an independent arbitrator and not to refer the disputes to the Superintending Engineer being Controlling or dealing authority. The request was not to change an arbitrator already appointed but to appoint a neutral, independent, impartial arbitrator. On 27.3.2015, the arbitrator by referring to the meeting dated 23.1.2015 called upon the petitioner to file its claims before him for arbitration. Hence the instant petition before this Court by the petitioner.

3. A written statement has been filed on behalf of the respondent wherein it has been stated in the preliminary objections that the petition is liable to be dismissed as having become infructuous since the arbitrator already stands appointed in terms of Clause 25-A of the contract between the parties much before the filing of the present petition. As per Clause 25-A(v), the named arbitrator has already entered into reference on 27.3.2015 and thus this court has no jurisdiction to entertain the present petition. The petitioner can avail of other remedies for his removal and cannot approach this court for appointment of arbitrator.

4. Learned counsel for the petitioner submitted that the sole arbitrator named under the subject contract being directly involved with the

dispute in the instant contract would not be impartial or neutral thus failing to satisfy the test of impartiality and independence as mandated under the Act. Reference was made to various correspondence which had been forwarded by the Executive Engineer to the arbitrator appended as annexures to the petition to substantiate its assertion. Even a reasonable apprehension of bias or impartiality is sufficient to disqualify him from being appointed as an arbitrator. The very active participation of the Superintending Engineer and also request dated 24.3.2015 prior to so called date of entering of reference on 27.3.2015, was primarily for appointment of a neutral, independent and impartial arbitrator in place of named arbitrator and the same ought to be granted. Active and unhealthy participation of the arbitrator much prior to his appointment, disqualified him under Section 11(8) of the Act and therefore he could not claim that he was validly appointed under the Act. No intimation or communication in writing regarding appointment of arbitrator was delivered to the petitioner under Section 3(1) and (2) of the Act. Reliance was placed on judgments in *Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Limited*, (2008) 10 SCC 240, *Bipromasz Bipron Trading SA vs. Bharat Electronics Limited (BEL)*, (2012) 6 SCC 384 and *Denel (Proprietary) Limited vs. Ministry of Defence*, (2012) 2 SCC 759.

5. Learned counsel for the respondent submitted that the petition is not maintainable as it is premature in as much as the issue regarding objections for removal of arbitrator was pending. Jurisdiction under sections 11(4) and 11(6) of the Act was invoked under which appointment of new arbitrator has been sought. The challenge to the appointment of arbitrator was pending and therefore, there was no cause of action for appointment of

arbitrator on 8.4.2015. The arbitrator stood appointed on 26.12.2014 and 23.1.2015 and not on 27.3.2015 when he issued the notice. Both the parties had specific knowledge on 23.1.2015 that Superintending Engineer would be the arbitrator and no objection was taken. Thus, the petitioner has invoked the jurisdiction of Hon'ble the Chief Justice under Section 11 of the Act without any cause of action in its favour and none of the eventualities prescribed in section 11(6) of the Act are existing in the present case. Reliance was placed on judgments in ***Iron & Steel Co. Limited vs. Tiwari Roadlines***, (2007) 5 SCC 703, ***Indian Oil Corporation Limited vs. Raja Transport Private Limited***, (2009) 8 SCC 520, ***the Secretary to the Government Transport Dept, Madras vs. Munuswamy Mudaliar and others***, AIR 1988 SC 2232, ***National Highways Authority of India and another vs. Bumihway DDB Limited and others***, (2006) 10 SCC 763, and ***Metro Builders (Orissa) Pvs. Limited vs. Indian Oil Corporation Limited***, Arb. P.No.144 of 2010 (Del.).

6. I have heard learned counsel for the parties.

7. On the basis of contentions of learned counsel for the parties, the following broad issues would arise for consideration:-

i) Whether in the facts and circumstances of the case, invoking of jurisdiction of the Chief Justice or his designate under Section 11(6) of the Act for appointing the arbitrator is valid and legal?

ii) Whether the Superintending Engineer as the named arbitrator would be neutral and impartial while adjudicating the disputes between the parties, who is directly involved in all the correspondence related to the dispute?

8. Taking up first issue, reference is made to Clause 25A of the agreement No.73, Annexure P.1, which deals with Disputes and Arbitration.

The relevant sub clauses of it read thus:-

“Clause 25-A : Disputes and arbitration

- (i) xxxxxxxxxxxx
- (ii) Whether before its commencement or during the progress of work or after the termination, abandonment or breach of the contract, it shall, in the first instance, be referred for settlement to the EIC of the work and he shall within a period of sixty days after being requested in writing by the contractor to do so, convey his decision to the contractor. Such decision in respect of every matter so referred shall subject to arbitration as hereinafter provided, be final and binding upon the contractor. In case the work is already in progress, the contractor shall proceed with the execution of the work on receipt of the decision of the engineer in charge as aforesaid with all due diligence, whether any of the parties requires arbitration as hereinafter provided or not.
- (iii) If the engineer in charge has conveyed his decision to the contractor and no claim for arbitration has been filed by the contractor within a period of sixty days from the receipt of the letter communicating the decision, the said decision shall be final and binding upon the contractor and will not be a subject matter of arbitration at all.
- (iv) If the Engineer-in-Charge fails to convey his decision within a period of sixty days after being requested as aforesaid the contractor may within further sixty days of the expiry of the final sixty days from the date on which the said request was made by the contractor

refer the dispute for arbitration as hereinafter provided.

- (v) All disputes or differences in respect of which the decision is not final and conclusive shall, at the request of either party made in a communication sent through registered A.D. post, be referred to the sole arbitration of the Superintending Engineer or the circle concerned in the Municipal Corporation Chandigarh (Public Health/building and Roads) Branch acting as such at the time of reference unless debarred from acting as an arbitrator by an order of the government, in which event the Chief Engineer shall appoint any other technical officer not below the rank of Superintending Engineer to act as an arbitrator on receipt of a request from either party.
- (vi) Chief Engineer in charge of works shall have the authority to change of arbitrator on an application by either the contractor or the Engineer in charge requesting change of arbitrator giving reasons thereof either before the start of the arbitration proceedings or during the course of such proceedings. The arbitration proceedings would stand suspended as soon as an application for change of Arbitrator is filed before the Chief engineer and a notice thereof is given by the applicant to the Arbitrator. The Chief Engineer after hearing both the parties may pass a speaking order rejecting the application or accepting to change the Arbitrator simultaneously, appointing a technical officer not below the rank of a Superintending Engineer as Arbitrator under the contract. The new Arbitrator so appointed may enter upon the reference afresh or he may continue the hearings from the point these were suspended before the previous arbitrator.
- (vii) to (xiv) .xxxxxxxxxxxxxxxxxx

xv) The arbitrator shall be deemed to have entered on the reference on the day, he issues notices to the parties fixing the first date of hearing. The arbitrator may, from time to time, with the consent of the parties enlarge the initial time for making and publishing the award.

9. A perusal of the above provisions of Clause 25A of the agreement No.73 shows that it provides a detailed mechanism for appointment of an arbitrator in case of any dispute between the parties. Sub clause (ii) lays down that at the first instance whether before the commencement or during the progress of the work or after the termination of the contract or relating to breach of the contract, every dispute shall be referred for settlement to EIC (Engineer in Chief) of the work. Sub clause (ii) further lays down that EIC shall convey his decision within a period of 60 days from the date of request in writing by the contractor. The decision of the EIC shall be final and binding upon the contractor subject to arbitration. Upon receipt of the decision, the contractor shall proceed with the execution of the work whether any of the parties chooses the arbitration or not. Sub clause (iii) provides that if no claim for arbitration is filed within 60 days from the date of decision, then such decision shall be final and binding upon the contractor and shall not be subject matter of arbitration. Under Sub clause (iv), in case EIC fails to convey his decision within 60 days, then the contractor may refer the dispute for arbitration within further 60 days. Sub clause (v) stipulates that at the request of either party made in a communication sent through registered AD post, all disputes in respect of which the decision is not final and conclusive shall be referred to sole arbitration of the Superintending Engineer of the circle concerned in the Municipal Corporation Chandigarh. If the Superintending Engineer of the circle concerned in the Municipal Corporation, Chandigarh is debarred from

acting as an arbitrator by an order of the Government, then the Chief Engineer shall appoint any other Technical officer not below the rank of Superintending Engineer to act as an arbitrator. Sub clause (vi) relates to the procedure for change of arbitrator at the request of either party giving reasons for seeking such change either before the commencement of proceedings or during the course of such proceedings. The Chief Engineer is authorised to change the arbitrator after hearing both the parties and by passing a speaking order rejecting the application or accepting the application to change the arbitrator. As soon as application for change of arbitrator is filed before the Chief Engineer and notice thereof is given by the applicant to the arbitrator, then arbitration proceedings would stand suspended. According to Sub clause (xv), the arbitrator shall be deemed to have entered on the reference on the day he issues notices to the parties fixing the first date of hearing. The period for making and publishing the award may be enlarged from time to time by the arbitrator with the consent of the parties.

10. Adverting to relevant statutory provisions, it would be expedient to refer to Sections 3, 11 and 21 of the Act which read thus:-

“3. Receipt of written communications (1) Unless otherwise agreed by the parties –

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business,

habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communication in respect of proceedings of any judicial authority.

11. Appointment of arbitrators. —

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(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 Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief

Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the “Chief Justice of India”.

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.”

21. Commencement of arbitral proceedings – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

11. Section 3 of the Act provides that any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and if none of the places referred above can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or by any other means. Section 3(2) of the Act specifically provides that it would be deemed to be received only on the day it is delivered. Sub section (2) of Section 11 of the Act provides that subject to sub section (6) thereof, the parties are free to agree on a procedure for

appointing the arbitrator. A bare reading of Section 11(6) of the Act shows that where an appointment procedure has been agreed upon by the parties in a contract, then a party may request the Chief Justice to appoint the arbitrator only in the three prescribed eventualities i.e. a) a party has failed to act to appoint the arbitrator as per the agreed procedure; b) the parties or the two appointed arbitrators have failed to reach an agreement for appointment of arbitrator; and c) a person including an institution fails to perform any function entrusted to him or it under that procedure. However, Section 21 of the Act stipulates that unless to the contrary, the arbitral proceedings in respect of a particular dispute would commence on the date on which the request for reference of dispute to the arbitrator is received by the respondents.

12. Examining the factual matrix herein, admittedly, the respondent floated a tender for upgradation of existing sewerage treatment plant of 15 MGD to 30 MGD near Chandigarh to treat the incoming sewerage by installing new units on MBBR technology. On 28.02.2007, contract was awarded to the petitioner company and agreement was executed between the parties. Clause 25-A provided for arbitration, in case of dispute. It further provided that all disputes would be referred to the sole arbitration of Superintending Engineer of the area concerned. The Chief Engineer-in-charge had been empowered to change the arbitrator on an application by either of the parties. As per the contract, the petitioner was entrusted with the operation and maintenance of the treatment plant which was directly interlinked with the sludge produced. On 18.09.2014, the petitioner requested the Executive Engineer to provide tractor/trolley and manpower for disposal of the sludge. The Executive Engineer informed the petitioner that removal of sludge and its treatment with chemicals was within the scope

of the work of the petitioner. On that basis, certain disputes arose between the parties. Aggrieved thereby, the petitioner filed Civil Writ Petition No.26279 of 2014 in this Court. The said writ petition was disposed of on 22.12.2014, in view of arbitration clause in the agreement. On 26.12.2014, the petitioner by invoking the arbitration clause wrote to the Executive Engineer for settlement of issues as a first step of dispute resolution mechanism in terms of Clause 25-A(ii). On 14.01.2015, the petitioner was called by the Executive Engineer in his office on 23.01.2015 for settlement of issues but no decision was taken. Accordingly, it was decided to refer the dispute to the arbitrator. No communication or letter had been issued to the named Arbitrator in the agreement, namely the Superintending Engineer appointing him as the arbitrator to enter reference. On 24.03.2015, the petitioner approached the Chief Engineer-in-charge for appointing an impartial and independent arbitrator in place of the named arbitrator, i.e., the Superintending Engineer being the controlling or dealing authority.

13. As per sub clause (v) of Clause 25-A, the disputes or differences in respect of which no decision was final at the request of either party were to be referred to arbitration of the circle concerned made in a communication sent through registered A.D. post. No document had been placed on record by the Respondent Corporation adhering to the requirements of the said clause for referring the disputes for arbitration vide communication sent through registered A.D. The Superintending Engineer merely referred to the letter dated 26.12.2014, minutes of the meeting held on 23.01.2015 and called upon the petitioner to file its claim. The minutes of the proceedings held on 23.01.2015 would not satisfy the legal requirement of appointing an arbitrator as envisaged under the Act/Agreement. The minutes of 23.1.2015 only stipulates that it was decided

to refer the dispute to the sole arbitrator under Clause No.25A of the tender agreement.

14. Commencement of arbitration proceedings either on 26.12.2014 or on 23.01.2015 in terms of Section 21 of the Act cannot be said to have taken place as in pursuance to letter of the petitioner dated 26.12.2014, the Executive Engineer had called the petitioner in his office on 23.1.2015 for discussion to resolve the dispute and as per minutes of meeting dated 23.01.2015, the dispute remaining unresolved, it was agreed to refer the dispute to the arbitrator under Clause 25A of the Agreement. Thereafter, no reference was ever made to the arbitrator in terms thereof till 24.3.2015 i.e. when the petitioner had asked for appointing an independent and impartial arbitrator by changing the named arbitrator. The only document which was placed on record by the Respondent Corporation was the file noting dated 06.02.2015 stating that all the documents and contract documents be submitted to the Circle officer for deciding the pending issues. This showed that the arbitrator was yet to be appointed. Further, the said document dated 06.02.2015 had not been even referred to by the Superintending Engineer in his letter dated 27.03.2015. The Apex Court in ***Bipromasz Bipron Trading SA,'s case (supra)*** held that in the absence of proper service of letter appointing arbitrator, the appointment is not valid in eyes of law and the Court can always exercise its powers under Section 11 of the Act and appoint an arbitrator. Thus, in the present case, there was failure on the part of the Respondent Corporation to adhere to the arbitration agreement. As observed earlier, the petitioner had addressed a communication on 24.3.2015 for appointing an impartial and independent arbitrator by changing the named arbitrator and, thereafter on 27.3.2015, the Superintending Engineer, i.e. the named arbitrator had sought to proceed further which was sufficient

for the petitioner to invoke the jurisdiction of this Court under Section 11(6) of the Act by treating its request contained in letter dated 24.3.2015 as impliedly rejected. However, it would be essential to notice that aforesaid apprehension was translated into an order dated 13.5.2015 (Annexure R.3) when formally the request was declined. In such circumstances, the petition filed on 8.4.2015 cannot be held to be premature or not maintainable before this Court.

15. Adverting to second issue with regard to appointment of an independent and impartial arbitrator, in ***Denel (Proprietary) Limited's*** case (supra), the Apex Court opined that in normal circumstances while exercising jurisdiction under Section 11(6) of the Act, the court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator. The court is also required to have due regard to the provisions contained in Section 11(8) of the Act which provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the court shall have due regard to other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. The relevant observations made by the Apex Court read thus:-

“21. It is true that in normal circumstances while exercising jurisdiction under [Section 11\(6\)](#), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator.

22. A Three Judge Bench of this Court in the case of ***Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited***, considered the scope and ambit of [Section 11\(6\)](#) of the Act, as divergent views were taken in two decisions of this Court in ***Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corpn. Ltd.*** and ***Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd.*** (supra). Upon consideration of the relevant provisions it was inter-alia observed as follows:-

"A bare reading of the scheme of [Section 11](#) shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations."

23. Keeping in view the observations made above, I have examined the facts pleaded in this case. I am of the opinion that in the peculiar facts and circumstances of this case, it would be necessary and advisable to appoint an independent arbitrator. In this case, the contract is with Ministry of Defence. The arbitrator Mr. Satyanarayana has been nominated by DGOF, who is bound to accept the directions issued by the Union of India. Mr. Satyanarayana is an employee within the same organization. The attitude of the respondents towards the proceeding is not indicative of an impartial approach. In fact, the mandate of the earlier arbitrator was terminated on the material produced before the Court, which indicated that the arbitrator was biased in favour of the Union of India. In the present case also, Mr. Naphade has made a reference to various notices issued by the arbitrator, none of which were received by

the petitioner within time. Therefore, the petitioner was effectively denied the opportunity to present his case before the Sole Arbitrator. Therefore, the apprehensions of the petitioner cannot be said to be without any basis.

24. It must also be remembered that even while exercising the jurisdiction under [Section 11\(6\)](#), the Court is required to have due regard to the provisions contained in [Section 11\(8\)](#) of the Act. The aforesaid section provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the Court shall have due regard to other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Keeping in view the aforesaid provision, this Court in the case of ***Indian Oil Corporation Limited*** (supra), whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same. In paragraph 45 of the aforesaid judgment, it is observed as follows:-

"45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by Northern Railway Admn.¹⁰, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with [Section 11\(8\)](#) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named

Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons." (emphasis supplied)

16. In ***Bipromasz Bipron Trading SA, 's case (supra)***, it was held by the Supreme Court that Chief Justice or designate has power to appoint a person other than named arbitrator where facts indicate that named arbitrator is not likely to be impartial. After elaborately discussing the case law on the subject, it was concluded thus:-

“40. In view of the aforesaid observations, it would not be possible to reject the petition merely on the ground that this Court would have no power to make an appointment of an arbitrator other than the Chairman-cum-Managing Director or his designate. This Court would have the power to appoint a person other than the named arbitrator, upon examination of the relevant facts, which would tend to indicate that the named arbitrator is not likely to be impartial. In this case, the petitioner had clearly pleaded that the named arbitrator is a direct subordinate of the CMD and employee of the respondent. CMD is the controlling authority of all the employees, who have been dealing with the subject matter in the present dispute and also controlling authority of the named arbitrator. Apprehending that the CMD, who had been dealing with the entire contract would not act impartially as an arbitrator, the petitioner had issued a notice on 20th May, 2011. In this notice, it was pointed out that while the entire process of the performance of the contract was going on, the CMD had issued a letter on 5th June, 2009 to the petitioner stating that as per the company's directives, all pending supplies as on that date were “put on hold”. After the aforesaid communication, no communication was issued to the petitioner for supply of the goods as per the Purchase Order dated 3rd December, 2009. Even subsequently, there were difficulties

when a further lot of 24 units were supplied. The detailed submissions made by the petitioner have been noticed in the earlier part of the judgment.

41. Keeping in view the aforesaid facts, I am of the opinion that it would not be unreasonable for the petitioner to entertain the plea that the arbitrator appointed by the respondent would not be impartial. The CMD itself would not be able to act independently and impartially being amenable to the directions issued by the Ministry of Defence. In similar circumstances, this Court in the case of ***Denel (Proprietary) Limited Vs. Bharat Electronics Limited & Anr.*** (supra), this Court observed as follows:-

“21. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the Company against whom the dispute is raised (the respondents). In addition to that, the said Managing Director of Bharat Electronics Ltd. which is a “government company”, is also bound by the direction/instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the purchase orders, it is not in a position to settle the dues only because of the directions issued by the Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties.”

42. In my opinion, the facts in the present case are similar and, therefore, a similar course needs to be adopted.”

17. According to the Apex Court in ***Northern Railway Administration's case (supra)***, appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must but while making the appointment, the twin requirements of sub section (8) of section 11 have to

be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. The relevant observations read thus:-

“10. The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures" (underlined for emphasis). This expression has to read alongwith requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

11. A bare reading of the scheme of [Section 11](#) shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

12. The expression 'due regard' means that proper attention to several circumstances have been focussed. The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

13. In all these cases at hand the High Court does not appear to have focussed on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of

the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of [Section 11](#) have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.”

18. This has been recognized by the legislative mandate expressed by way of amendment incorporated in the Act. The Parliament in order to give effect to consistent view taken by the Courts on the need for fair and impartial arbitrator had amended the Act by Arbitration and Conciliation (Amendment) Act, 2015 (in short, “the amended Act”) effective from 23.10.2015. As per amended Section 11(8) of the Act, the Supreme Court or as the case may be, the High Court or the person or institution designated by such court, before appointing an arbitrator shall seek a disclosure in writing from the prospective arbitrator in terms of sub section (1) of Section 12 and have due regard to the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Further, in order to avoid parties choosing their own employees as arbitrators, the Act has expressly barred such appointment and has made it a disqualification. Section 12(5) of the amended Act provides that even if there existed any prior agreement to the contrary where the relationship of any person with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. Exception has been carved out where the parties may waive the applicability of this sub section by an express agreement in writing subsequent to dispute having arisen between

them. In other words, Section 12(5) of the Amended Act has made it clear that persons coming under Seventh Schedule are not eligible for appointment as arbitrators. It specifically bars appointing employees of one of the disputing parties as arbitrator notwithstanding the contractual clause permitting the same. Entry 1 in the Seventh Schedule which is relevant is as under:-

“The Seventh Schedule”

[see Section 12(5)]

ARBITRATOR’S RELATIONSHIP WITH THE APRTIES OR COUNSEL

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2 to 19. XXXXXXXXXXXX

Explanation 1 to 3 xxxxxxxxxxxxxxxx”

19. In the present case, the named arbitrator, i.e., Superintending Engineer cannot be held to be unbiased and would act independently. A perusal of Annexures P.3, P.5, P.7 and Annexure P.10 clearly shows that all correspondence from the Executive Engineer, MCPH, Division No.4, Chandigarh to the petitioner was also endorsed to the Superintending Engineer, MCPH, Circle, Chandigarh i.e., the named arbitrator with reference to his office letters on the subject. While exercising jurisdiction under Section 11(6) of the Act, the Chief Justice or his designate is to ensure that the arbitrator so appointed is independent and impartial. Under the circumstances, the apprehension of the petitioner that the named arbitrator, i.e. Superintending Engineer would not act impartially and independently is not unfounded. The material placed before the Court by the petitioner would indicate that it would be reasonable to entertain the belief that the named arbitrator in the agreement would not act independently and impartially. That being so, this court in exercise of powers conferred under Section 11(6)

of the Act is empowered to nominate an arbitrator for adjudication of lis between the parties.

20. In all fairness, I proceed to examine the judgments relied upon by the learned counsel for the respondent Corporation. In ***Iron & Steel Co. Limited's*** case (supra), it was observed by the Apex Court that if the parties have agreed on a procedure for appointing the arbitrator or arbitrators as contemplated by sub section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken straightaway. There is no quarrel with the proposition of law. However, it may be noticed that in the present case, the respondent corporation had failed to act under the appointment procedure as envisaged under the agreement and thus, the petitioner sought appointment of an arbitrator under Section 11(6) of the Act. The petitioner invoked the arbitration clause under the agreement requesting the Executive Engineer on 26.12.2014 for settlement of the issues by the Engineer in Chief as a first step of resolving the dispute between the parties as provided under Clause 25A(ii) of the arbitration clause. In response thereto, the Executive Engineer called upon the petitioner in its office on 23.1.2015 for settlement of issues. Since no consensus could be reached between the parties, it was decided to refer the dispute to arbitration. However, no formal communication was ever sent to the petitioner appointing the named arbitrator in the agreement. Even if it was taken that the named arbitrator stood appointed on 23.1.2015, still, since the petitioner feared that Superintending Engineer named as the arbitrator in the agreement would not be neutral or impartial in adjudicating the dispute between the parties, the petitioner requested the Chief Engineer in charge to exercise his power for changing the arbitrator.

21. In ***National Highways Authority of India's*** case (supra), it was observed by the Apex Court that under Section 11(6) of the Act, the court has jurisdiction to make the appointment only when the person including an institution fails to perform any function entrusted to it under that procedure. In the present case, the named arbitrator never commenced the arbitration proceedings by issuance of any notice prior to 24.3.2015 i.e. the date when the petitioner invoked Clause 25A(vi) of the agreement for the appointment of impartial and independent arbitrator by changing the named arbitrator.

22. In ***M/s Metro Builders(Orissa) Pvt. Ltd.***'s case (supra), it was observed by the Delhi High Court that the court may intervene to take measures for appointment of the arbitrator only when the party fails to act as required under the procedure or fails to reach an agreement expected out of them under that procedure or a person fails to perform the function. The position in the present case is different. As noticed herein before, the named arbitrator never commenced the proceedings before 24.3.2015, i.e. when the petitioner resorted to Clause 25A(vi) of the agreement.

23. In ***Indian Oil Corporation Limited's*** case (supra), no doubt, it was held by the Apex court that if the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement but it was further recorded that where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the

Act. In the present case, the named arbitrator was directly involved in the disputes between the parties. Thus, he could not be held to be an independent and impartial arbitrator.

24. In *Munusway Mudaliar's* case (supra), it was held by the Apex Court that unless there is an allegation against the named arbitrator either against his honesty or capacity or malafide or interest in the subject matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court. The proposition of law is unexceptional. However, in the present case, the named arbitrator being fully and directly involved in the disputes between the parties, the respondent cannot derive any advantage from the said decision. It is, thus, concluded that the pronouncements relied upon by the respondent do not come to its rescue.

25. In view of the above, the petition is allowed. I hereby appoint Justice S.N.Aggarwal, retired Judge of this Court, resident of House No.1458, Sector 40-B, Chandigarh as the sole arbitrator, to adjudicate the disputes that have arisen between the parties, on such terms and conditions as the learned sole arbitrator deems fit and proper. Undoubtedly, the learned sole arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

26. The Registry is directed to communicate this order to the sole arbitrator forthwith to enable him to enter upon the reference and decide the matter as expeditiously as possible.

October 09, 2017

'gs'

Whether reportable
Whether speaking order

(Ajay Kumar Mittal)
Judge

Yes
Yes