

\$~5

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

+ ARB.P. 380/2017

SHRI HARI PRAKASH SHARMA Petitioner

Through: Mr. S W Haider, Advocate

versus

UNION OF INDIA Respondent

Through: Mr. Om Prakash, Advocate
Mr. Satish Bhati for Mr. J K Singh
Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

%

13.10.2017

1. This petition is filed under Section 11 of the Arbitration and Conciliation Act seeking appointment of a sole arbitrator. The case of the petitioner is that he was awarded the work on 28.09.2012 for “provision of washable apron for platform line no.1 at ROK and other allied works in connection with replacement of work out bridge under ADEN/ROK”.
2. It is the case of the petitioner that despite several requests, the material was not made available. The petitioner requested for closure of the contract on 30.08.2016. On 9.4.2017, the petitioner is sought to have invoked the arbitration clause being Clause 64 of the General Condition of the contract. On 3.5.2017, the respondent is said to have sent a reply for waiver under Section 12 (5) of the Arbitration and Conciliation Act.
3. Hence, the present petition.
4. This matter came up on 29.5.2017, when the learned counsel for the

respondent entered appearance and accepted notice. He was given six weeks time to file a reply. Despite lapse of nearly 4½ months, no reply has been filed. In my opinion, there are no reasons to give another opportunity to file a reply, as sought by him.

5. Learned counsel for the respondent in their communication dated 7.5.2017, have admitted the Arbitration Clause stating/requesting the petitioner to concur to certain modifications in Clause 64 of the General Conditions of the contract and for appointment of arbitrator/arbitral Tribunal consisting of railways gazetted officers by waiver of Clause 12 (5) of the Arbitration Act. The communication also states that if the petitioner agrees to waiver in terms of Clause 12 (5) of the Arbitration Act, the process of appointment of the sole arbitrator/arbitral Tribunal shall be commenced.

6. It is manifest from the above communication that the respondents do not deny the existence of the Arbitration Clause. They do not deny receipt of the notice dated 09.04.2017 invoking the Arbitration Clause.

7. A perusal of Clause 64(3)(a)(ii) of the General Conditions of Contract show that a procedure is prescribed for appointment of the arbitral Tribunal. The railways/respondent are to send a panel of three gazetted officers not below the JA grade as arbitrators to the petitioners, of which the petitioner may chose any two for appointment as the petitioner's nominee, one of these two will be selected by the General Manager as the petitioner's nominee. Balance number of arbitrators from the panel or from outside, are to be appointed as arbitrators including the presiding arbitrator. One of these arbitrators appointed shall be from the accounts department.

8. In view of the above facts, it is manifest that the respondent has failed to take steps to appoint the arbitrator despite receipt of the notice invoking

the arbitration clause. In view of the judgment of the Supreme Court in the case of *Datar Switchgears Ltd. vs. Tata Finance Ltd.*, (2000) 8 SCC 151, the respondent has lost its right to nominate the arbitral tribunal in terms of the arbitration agreement. Further in any case, as per the arbitration clause, the respondent is to appoint at least one or two serving officers of the railway as part of the arbitral tribunal. This is clearly also contrary to Section 12(5) read with Seventh Schedule of the Act.

9. It is accordingly manifest that this court has to take steps to appoint the arbitrator.

10. It is ordered that the arbitration proceedings shall take place under the aegis of the Delhi International Arbitration Centre (DIAC). The DIAC shall nominate an arbitrator who is technically qualified to adjudicate the disputes between the parties as per its rule from the panel of arbitrators of the DIAC. A copy of this order be sent to the DIAC.

11. The petition is accordingly disposed of.

JAYANT NATH, J.

OCTOBER 13, 2017/P