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

+ ARB.P. 716/2016 & IA No.15567/2016

B.E. BILLIMORIA & CO. LTD.

..... Petitioner

Through: Mr Goutham Shivshankar, Advocate.

versus

BITES LIMITED & ANR.

..... Respondents

Through: Mr G. S. Chaturvedi, Advocate for R-1.

Mr Mukesh Kumar and Ms Bhavana,
Advocates for R-2/Pondicherry
University.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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31.01.2017

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act'), *inter alia*, praying that a sole arbitrator be appointed for adjudicating the disputes that have arisen between the parties in respect of an agreement dated 03.04.2012 (Agreement No. BITES/CP/TC/PQ/PU/Pondi/Auditorium/Civil Package).

2. Respondent no. 1's principal contention advanced in opposition to this petition is that the arbitration clause stands frustrated by virtue of the amendments to section 12 of the Act as introduced by the Arbitration and Conciliation (Amendment) Act, 2015.

3. Briefly stated, the relevant facts to address the aforesaid controversy

are as under:-

3.1 Respondent no. 2, Pondicherry University (hereafter referred to as 'PU') had engaged respondent no.1 (hereafter 'RITES') as its agent for "*Construction of Convention Centre having Auditorium of 2500 seating capacity and ancillary buildings for Pondicherry University at Puducherry*" (hereafter referred to as 'the works'). RITES floated a tender on behalf of PU, inviting bids for execution of the works. The petitioner submitted its bid for the aforesaid works, which was accepted and the parties had entered into the agreement dated 03.04.2012.

3.2 Admittedly, certain disputes have arisen in relation to the aforesaid agreement. The said agreement includes an arbitration clause.

3.3 In view of the disputes, the petitioner issued a notice dated 22.06.2016 invoking the arbitration clause. In response to the aforesaid notice, RITES sent a letter dated 28.07.2016 suggesting names of three persons to be appointed as an arbitrator. By a letter dated 29.08.2016, the petitioner rejected all the names as suggested by RITES as, according to the petitioner, the names of the persons suggested were not independent and were ineligible to be appointed as an arbitrator, by virtue of Section 12(5) of the Act. Thereafter, on 17.11.2016, the petitioner filed the present petition. Notice in the present petition was issued on 22.11.2016 and was accepted by the counsel appearing for RITES. Thereafter, on 24.11.2016, RITES sent a letter appointing Mr R. Rajamani, former Chief Commissioner of Railways Safety as a sole arbitrator to adjudicate the disputes between the parties.

3.4 RITES has filed its reply to the present petition and the learned counsel for PU states that it would adopt the aforesaid reply.

Submissions

4. Mr Chaturvedi, the learned counsel appearing for RITES did not dispute the existence of the arbitration clause. He, however, contended that with the amendments introduced by the Arbitration and Conciliation (Amendment) Act, 2015, the arbitration clause stood frustrated. He argued that the said clause expressly provides that one of the three serving officers (as suggested by the Appointing Authority) would be appointed as an arbitrator and since the same is no longer possible in view of the provisions of Section 12(5) of the Act, the arbitration clause was no longer binding and the petitioner ought to be relegated to other remedies.

5. He also drew the attention of this Court to the provisions in the arbitration clause that expressly mandates that no person other than the person appointed by the appointing authority should act as an arbitrator and if for any reason, the same is not possible then the matter shall not be referred to arbitration at all. He contended that although RITES had appointed an arbitrator, the same was also contrary to the provisions of the arbitration clause and was also invalid. He relied on the decision of the Supreme Court in the case of **Newton Engineering and Chemicals Limited v. Indian Oil Corporation Limited and Others**: (2013) 4 SCC 44 in support of his contention.

6. Mr Shivshankar, learned counsel for the petitioner countered the aforesaid submissions. First, he submitted that the reference to the part of

the arbitration clause which provides that if no person other than the person appointed by the appointing authority can act as an arbitrator for any reason then the matter shall not be referred to arbitration at all, is not applicable to arbitrations between private parties and RITES. He submitted that the said subparagraph was a part of paragraph 3 of Clause 25 of GCC (the arbitration clause), which was concerned only with the arbitration between two Public Enterprises or between a Public Enterprise and a Government Department. He submitted that since the present case related to disputes between a private enterprise and a central university, paragraph 3 of the arbitration clause was wholly inapplicable.

7. Secondly, he submitted that the decision of the Supreme Court in *Newton Engineering and Chemicals Limited* (*supra*) was also inapplicable to the facts of the present case as in the present case, RITES had forfeited its right to appoint an arbitrator because it had failed to do so prior to the petitioner moving this Court. He relied on the decision of the Supreme Court in *Deep Trading Company v. Indian Oil Corporation Limited and Others*: (2013) 4 SCC 35 in support of his contention.

Reasoning and Conclusion

8. At the outset, it is necessary to refer to Clause 25 of the General Conditions of Contract - the arbitration clause. The relevant extract of the same is set out below:

“CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

- 1) If the Contractor considers any work demanded of him to be outside the requirements of the Contract, or disputes any drawings, record or decision given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out the work, to be unacceptable, he shall promptly within 15 days request the Engineer-in-Charge in writing for written instruction or decision. Thereupon, the Engineer-in-Charge shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter.

If the Engineer-in-Charge fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the Contractor may, within 15 days of the receipt of the Engineer-in-Charge decision, appeal to the Appellate Authority specified in Schedule 'F' who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Appellate Authority shall give his decision within 30 days of receipt of Contractor's appeal. If the

Contractor is dissatisfied with the decision, the Contractor shall within a period of 30 days from receipt of the decision, give notice to the Appointing Authority specified in Schedule 'F' for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

- 2) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Appointing Authority. The selection of Arbitrator by the Appointing Authority will be governed by the fact whether the dispute is (i) 'between two Public Sector Enterprises or (ii) between a Public Sector Enterprise and a Government Department or (iii) Otherwise.

In case the dispute does not fall under item (i) or (ii) of this Para the Appointing Authority, shall appoint the sole Arbitrator. Within 30 days of receipt of notice from the Contractor to refer the dispute for Arbitration the Appointing Authority stipulated in Schedule F shall send to the Contractor a list of three serving officers of RITES of appropriate status depending on the total value of claim, who have not been connected with the work under the Contract. The Contractor shall, within 15 days of receipt of this list select and communicate to the Appointing Authority, the name of one officer from the list who shall then be appointed as the Sole Arbitrator. If the Contractor fails to communicate his selection of name within the stipulated period, the Appointing Authority shall without delay, select one officer from the list and appoint him as the Sole Arbitrator.

- 3) In case the dispute falls under item (i) or (ii) of Sub Para (2) above, the Appointing Authority shall refer the dispute for Arbitration by one of the Arbitrators in the

Department of Public Enterprises to be nominated by the nominated by the Secretary to the Govt. of India in charge of the Department of Public enterprises. The Arbitration & Conciliation Act, 1996 shall not be applicable to the Arbitration in such a case. The Award of the Arbitrator shall be binding upon the parties to the dispute, provided however, that any party aggrieved by such award may make a further reference for setting aside or revision of the Award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice Govt. of India. Upon such reference, the dispute shall be decided by the Law Secretary, whose decision shall bind the parties finally and conclusively. The Parties to the dispute will share equally the cost of Arbitration as intimated by the Arbitrator. The Arbitrator shall make a speaking Award and the Award may be published on plain paper. In the event of the Sole Arbitrator dying, neglecting or refusing to act or being unable to act for any reason, it shall be lawful for the Secretary to the Govt. of India in charge of the Department of Public Enterprises to nominate another person in place of the outgoing Arbitrator to act as Sole Arbitrator. The new Arbitrator as appointed shall as far as practicable proceed from the stage where it was left by the outgoing Arbitrator.

It is a term of this Contract that the party invoking arbitration shall give a list of disputes with amount claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Appellate Authority of the appeal in the form at Annexure. 'F'. It is a term of this Contract that "Excepted matter or matters where the decision of the Engineer-in-Charge or any higher authority has been stipulated as "Final and Binding" in various clauses of Contract, stand specifically excluded from the purview of Arbitration Clause.

It is also a term of this contract that no person other than a person appointed by such Appointing Authority as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all. It is also a term of this Contract that if the Contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the Contractor shall be deemed to have been waived and absolutely barred and the Employer shall be discharged and released of all liabilities under the Contract in respect of these claims.”

9. A plain reading of the arbitration clause indicates that it is severable insofar as it provides for appointment of serving officers as arbitrators. The first sub-paragraph of paragraph 2 of Clause 25 of GCC plainly reads that in case, the disputes and differences are not settled in terms of paragraph 1 of Clause 25, the same shall be referred for adjudication through arbitration by a sole arbitrator appointed by the appointing authority. Thus, clearly, the parties have unequivocally agreed that the disputes would be resolved by a sole arbitrator to be appointed by the appointing authority.

10. The second sub-paragraph of paragraph 2 of Clause 25 of GCC provides for a further procedure which entails that the appointing authority would send to the contractor, a list of three serving officers of RITES, who are unconnected with the work in question for being appointed as an arbitrator. The contractor would have 15 days time to select and communicate the name of the arbitrator to be appointed by the appointing authority. It is further provided that if the contractor fails to communicate

the name of the arbitrator within the stipulated period, the appointing authority would without delay select one officer from the list and appoint him as the sole arbitrator. Clearly, the provision as to only a serving officer will be appointed as an arbitrator is no longer valid, in view of the provisions of Section 12(5) of the Act. However, that would not in any manner dilute the agreement that the disputes between the parties would be resolved by arbitration by an arbitrator to be appointed by the appointing authority. The first sub-paragraph of paragraph 2 of Clause 25 of GCC is clearly severable from the procedure as envisaged in the second sub-paragraph of paragraph 2 of Clause 25 and the statutory mandate that arbitration be conducted by independent and impartial persons cannot be read as destructive of the commitment of the parties to resolve their disputes by arbitration.

11. The reference to third sub-paragraph of paragraph 3 of Clause 25 of GCC, which expressly provides that *no person other than a person appointed by such Appointing Authority as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all*, is misplaced. It is clear from the plain language that it is only applicable in cases where there is impossibility for an arbitrator appointed by the appointing authority, to act as an arbitrator. In the present case, it is nobody's case that it would be impossible for an arbitrator appointed by the appointing authority to act as such. In the present case, the appointing authority has failed to appoint the arbitrator as required under the provisions of the Act. Undisputedly, an independent arbitrator – who is not ineligible to act as such in terms of section 12(5) of the act –

appointed by the appointing authority would have no impediment in acting as an arbitrator.

12. The decision in *Newton Engineering and Chemicals Limited* (*supra*) also does not advance the case of RITES any further. In that case, the arbitration clause expressly provided that the disputes would be referred to the sole arbitration of ED (NR) of the respondent corporation (IOCL) and due to restructuring of the IOCL, the office of ED(NR) had ceased to exist. Nonetheless the petitioner therein insisted that only the ED be appointed as the arbitrator. It is in that context, the Court had held that appointment of Director (Marketing) as an arbitrator was not possible. In the present case, the facts are materially different. As stated earlier, the procedure which requires RITES to furnish names of serving officers is severable from the agreement to resolve the disputes by arbitration. It is difficult to accept that the arbitration clause would stand frustrated if a serving officer of RITES is not appointed as an arbitrator.

13. This is also how RITES had understood the said clause as it had proceeded to appoint an arbitrator *albeit* after the petitioner had moved this Court. The contention that the entire clause stands frustrated appears to be an afterthought and has been raised only after RITES had appointed an arbitrator. Clearly, if the clause was frustrated as contended, there was no occasion for RITES to proceed to appoint an arbitrator in the first place.

14. This controversy is also required to be viewed from another perspective: the stated policy to encourage resolution of disputes by arbitration. It is now a stated legislative intent that alternative dispute

resolution mechanism must be encouraged and, therefore, the Courts are required to exercise their jurisdiction to hold the parties to their bargain to resort to arbitration for adjudication of the disputes.

15. In **Chloro Controls (I) P. Ltd v Severn Trent Water Purification Inc.** **and Ors:** (2013) 1 SCC 641, the Supreme Court had observed as under:

“96. Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers.”

16. Thus, arbitration clause must be interpreted in favour of sustaining the arbitration agreement as opposed to permitting the parties to resile from the same on technical grounds. As indicated above, the second sub-paragraph of paragraph 2 of Clause 25 of the GCC in so far as it requires a serving officer to be appointed as an arbitrator, must be read as severable from the first sub-paragraph of paragraph 2 of Clause 25 of GCC.

17. In addition to the above, I am also persuaded to accept the contention that question of the right of the appointing authority to appoint an arbitrator and the procedure relating thereto would be relevant only if the appointing authority had proceeded to appoint the arbitrator within the time prescribed or in any event, prior to the petitioner moving this Court. In **Deep Trading Company** (*supra*), the Supreme Court had considered its earlier decision in the case of **Newton Engineering and Chemicals Limited** (*supra*) and had distinguished the same by holding that in that case, the Supreme Court was

not concerned with the question of forfeiture of the right of the corporation for appointment of an arbitrator. The Supreme Court further held that since the corporation (IOCL) had failed to act as required under the procedure, it had forfeited its right to do so. In the present case also although RITES had forwarded names of three persons to be appointed as an arbitrator, it had failed to appoint the arbitrator as required under the arbitration clause. This is so because the petitioner had failed to respond to the letter of RITES dated 28.07.2016 within a period of 15 days and thus, in terms of the arbitration clause, the appointing authority was to proceed to appoint an arbitrator which admittedly the appointing authority had failed to do so.

18. It is apparent from the above that RITES had forfeited its right to appoint an arbitrator in terms of the arbitration clause and, therefore, an arbitrator is required to be appointed by this Court.

19. Accordingly, it is directed that Justice Vikramajit Sen (Retired) (Mob. No. +91 8447333366), former Judge of the Supreme Court of India, is appointed as a Sole Arbitrator to adjudicate the disputes between the parties. The present appointment is subject to the necessary disclosure being made under Section 12 of the Act and the arbitrator not being ineligible under Section 12(5) of the Act. The parties are at liberty to approach the arbitrator for fixing the preliminary hearing.

20. The petition and the pending application are disposed of.

21. *Dasti.*

VIBHU BAKHRU, J

JANUARY 31, 2017/MK