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

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Date of decision: August 23, 2017

+ ARB.P. 778/2016 and IA No. 15280/2016

ENGINEERING DEVELOPMENT CORPORATION..... Petitioner

Through Ms.Monica Sharma, Adv.

versus

NORTH MUNICIPAL CORPORATION OF DELHI..... Respondent

Through Mr.Sunil Goel, Standing Counsel with
Ms.Supree Bambra, Adv. for NDMC.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking appointment of an independent sole arbitrator to adjudicate the disputes between the parties.

2. The disputes between the parties have a long chequered history. On 29.05.1991, the respondent floated a tender for the work of construction of Municipal Staff Quarters at Model Town Phase-II, New Delhi. On 16.01.1992 the work was awarded to the petitioner. On 21.05.2002, disputes having arisen between the parties, the petitioner invoked the arbitration clause. Sometimes in May 2003, the Commissioner, MCD appointed Sh.

C.M. Vij as an Arbitrator to adjudicate the disputes between the parties. Sh. C.M.Vij is said to have entered into reference on 25.07.2003. It appears that the proceedings before the learned Arbitrator were meandering on as neither the parties nor the Arbitrator was showing much interest. On 22.04.2016, the learned Arbitrator passed away. It was at that stage the petitioner appears to have woken up and on 16.05.2016 filed a petition under Sections 14 and 15 of the Act for appointment of an Arbitrator. This petition was dismissed as withdrawn. Thereafter, the petitioner wrote a letter dated 16.06.2016 to the respondent to appoint another arbitrator to adjudicate the disputes between the parties. On 27.07.2016, the respondent wrote to the petitioner seeking better details of the case as the file was not traceable. On 29.08.2016, the petitioner replied to the said letter. On 19.09.2016, the respondent again wrote to the petitioner seeking further details of the case. This communication was replied on 28.09.2016. The petitioner has filed the present petition on 06.12.2016 seeking reference of the disputes to an independent arbitrator. Now, the respondent have appointed a new arbitrator on 19.12.2016.

3. It is the contention of the petitioner that the period of 30 days in terms of the judgment of the Supreme Court in the case of ***Datar Switchgears Ltd. vs. TATA Finance Ltd.& Anr., (2000) 8 SCC 151*** has expired and that the petitioner has also filed the present petition under Section 11 of the Act prior to the appointment of the arbitrator by the respondent and hence, as the respondent have failed to perform their duty under the arbitration clause, they have lost their right to now appoint an arbitrator and that it is for this court to appoint an independent arbitrator.

4. Learned counsel for the respondent has opposed the appointment of an arbitrator by this court. He has pointed out that firstly, the petitioner gave wrong facts to the respondent in their letter dated 16.06.2016 about the contract number on account of which there was some confusion. He submits that despite several communications with the petitioner, there was no proper response. The matter being very old, there was no clarity as to whether any such matter was pending for arbitration as the matter pertained to the year 1992. Finally, it is stated that the respondent approached the daughter of Sh.C.M. Vij (Ms. Mona Vij) to supply the arbitral record. It is from the said record that the respondent got full details of the pending arbitration proceedings and have hence now on 19.12.2016 appointed Sh. Dipak Mukopadhaya (Retired E-in-C) as the Arbitrator and that he has also entered into reference on 13.01.2017. He has secondly submitted that in the present case Section 11 has no application and it is Section 15 of the Act that would apply. Hence he submits that the dicta of the judgment of the Supreme Court in the case of *Datar Switchgears Ltd. vs. TATA Finance Ltd. (supra)* would not be applicable as that was a case relating to non-compliance of Section 11(6) of the Act.

5. The first issue arises as to whether the appointment of an Arbitrator in place of the previous Arbitrator who has deceased is to be made under Section 11(6) of the Act or under Section 15 of the Act. Section 11(6) and 15 of the Act reads as follows:-

“11 Appointment of arbitrators. —xxx

xxx

(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.

xxx”

“15. Termination of mandate and substitution of arbitrator.—

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

- (a) where he withdraws from office for any reason; or
- (b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

6. In the present case it is no doubt true that the Arbitrator has de facto ceased to be able to act in terms of Section 14(1) of the Act. Hence, under

Section 15(1) of the Act, the substituted arbitrator was to be appointed according to the arbitration clause. In this case, as per the arbitration clause, the arbitrator had to be appointed by the respondent. The said clause reads as under:

“CLAUSE 25
Settlement of Dispute & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions here in before mentioned and as to the quality of workmanship or materials as 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-in-Charge on any matter in connection with or arising out of the contract of carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer 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 Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer 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 Chief Engineer shall give his decision within 30 days of receipt of contractors appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Commissioner MCD 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 (i) above disputes or difference shall be referred for adjudication through arbitration a sole arbitrator appointed by the Commissioner MCD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a terms of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Commissioner MCD 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 MCD shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996(26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

If is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceed Rs. 1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitration in his sole discretion. The fees, if any, of the arbitration shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the Arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid .”

7. The question that arises is that in case the respondent fails to take steps despite request from the petitioner under Section 15(2) of the Act to appoint a substitute Arbitrator what would be the remedy available to the petitioner.

8. The legal position in this regard is quite clear. The Supreme Court in ***Shailesh Dhairyawan vs. Mohan Balkrishna Lulla (2016) 3 SCC 619*** has noted as follows:

“20. The scheme of Section 8 of the 1940 Act and the scheme of Section 15(2) of the 1996 Act now needs to be appreciated. Under Section 8(1)(b) read with Section 8(2) if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, Under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the Section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8 is resurrected while construing Section 15(2). The arbitration agreement between the parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or

otherwise, such a substitution must take place. In fact, Sub-sections (3) and (4) of Section 15 also throw considerable light on the correct construction of Sub-section (2). Under Sub-section (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly appointed Tribunal, unless parties have agreed otherwise. Equally, orders or rulings of the earlier arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be sub-served by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off.”

9. In view of the above, it is quite clear that once a vacancy is caused, the substitute arbitrator has to be appointed under Section 15(2) of the Act and not under Section 11(6) of the Act. In the eventuality, the party who has to take steps for appointment of an arbitrator under Section 15(2) of the Act fails to take steps, the remedy available to the other party would then be under Section 11(6) of the Act, namely, a request to the Supreme Court or the High Court to take necessary measures for securing appointment of an arbitrator. This procedure has been clarified by the Supreme Court in ***Yashwith Construction P. Ltd. vs. Simplex Concrete Piles India Ltd. and Anr. (2006) 6 SCC 20***, where the court held as under:

4..... The term "rules" in Section 15(2) obviously referred to the provision for appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the

Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.

10. I will now see factually as to whether the respondent failed to take steps for appointment of an arbitrator. The case of the respondent is that the communication dated 16.06.2016 sent by the petitioner to fill the vacancy was received by the respondent on 30.06.2016. However, there was some confusion regarding the work order. In the said letter the petitioner gave the work order number as WO No.EE-XVII/TC/118 dated 16.01.1992. This, it is urged, work order was different from the one given by the petitioner in OMP (T) (COMM) 46/2016, namely, WO No. EE-XXVI/93-94/23 dated 16.01.1992 that was filed under Section 14 and 15 of the Act and was dismissed as withdrawn. Hence, it is urged that there was some doubt about the existence of any such work order, the matter being 24 years old. It is urged that inquiries revealed that this work order EE-XXVI/93-94/23 dated 16.01.1992 had actually been entrusted to one Engineering Development Corporation for construction of a Fire Station at Mayur Vihar. Hence, on 27.07.2016, a letter was written to the petitioner pointing out the discrepancy in the work order stated by the petitioner. The petitioner replied on

29.08.2016 but no proper clarification was furnished. Hence, again the respondent wrote to the petitioner on 19.09.2016 asking for the copy of the work order and the copy of the Commissioner's letter by which Mr. C.M.Vij was appointed as an Arbitrator. It is stated that on 28.09.2016, the petitioner supplied incomplete copy of the work order. As there were grave doubts as to whether any such work order existed, on 20.10.2016, the Department approached Ms.Mona Vij, the daughter of the deceased Arbitrator seeking the Arbitral Record. It is only on receipt of the record of the learned Arbitrator that the respondent were able to get proper details and thereafter, the Commissioner of the respondent has on 19.12.2016 appointed the Arbitrator. It is further urged that a perusal of the record of the previous Arbitrator would show that the first hearing took place on 23.01.2001 before the first Arbitrator and from November 2006 to 08.02.2008, none appeared before the Arbitrator. Hence, it is claimed that the petitioner himself did not follow the case before the Arbitrator and the matter has been lingering on.

11. The facts show that there is merit in the contention of the respondent. A perusal of the letters sent by the petitioner would show that the communications fail to clearly state the complete details of the Work Order in question. In fact, the last communication sent on 28.09.2016, the petitioner supplied incomplete copy of the Work Order on account of which there were bona fide doubts as to whether any such work order existed.

12. We may however see at the legal position in these facts. The Supreme Court in the case of ***Datar Switchgears Ltd. vs. TATA Finance Ltd.(supra)*** held as follows:-

“19. So far as cases falling Under Section 11(6) are conceded - 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.”

13. The above legal proposition has been upheld by the Supreme Court in the case of ***Deep Trading Company vs. Indian Oil Corporation and Others, (2013)4 SCC 35.***

14. Hence, the legal position is settled that in case the opposite party does not make an appointment within 30 days of the demand and before the first party has moved the court under Section 11 of the Act, the right to make the appointment gets automatically forfeited. However, manifestly, demand for appointment of an arbitrator must contain full facts, especially, when dealing with a body like MCD which would have entered into a hundred of contracts. It is quite clear that in the present case, there was a genuine confusion about the contract number. The petitioner had merrily been sleeping over the matter since May 2003 when the learned Arbitrator was

initially appointed. Proceedings appear to have been meandering on from July 2003 to April 2016 i.e. for full 13 years till the learned Arbitrator passed away. Thereafter, suddenly the petitioner got activated. In this background, in the absence of full information being supplied to the respondent in its notice invoking the arbitration clause on 16.06.2016 and also in subsequent communications, it is clear that the invocation cannot be said to be in order as it lacked necessary and material details and particulars. In these circumstances, it cannot be said that the right of the respondent to appoint the arbitrator stood automatically forfeited.

15. Accordingly, there is no merit in the present petition. The respondent have already appointed Sh. Sh. Dipak Mukopadhaya (Retired E-in-C) as the Arbitrator.

16. In the interest of justice, a request is made to the learned Arbitrator to expeditiously deal with the proceedings. The learned Arbitrator would proceed from the stage at which the previous Arbitrator had left.

17. The petition is accordingly disposed of.

(JAYANT NATH)
JUDGE

AUGUST 23, 2017
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