

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 02nd November, 2017
Pronounced on: 08th November, 2017

+

ARB.P. 443/2017

**U.A.N. RAJU- IVRCL
CONSTRUCTION (JV)**

..... Petitioner

Through : Ms.Kiran Suri, Senior Advocate
with Mr.Purvesh Buttan, Mr.Fahad
Imtiaz, Advocates.

versus

**KONKAN RAILWAY
CORPORATION LIMITED**

..... Respondent

Through : Ms.Rukhmini S Bobde, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The petitioner has filed this petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the 'Act') for appointment of the presiding arbitrator in a dispute between the parties.

2. It is alleged by the learned counsel for the petitioner that on 12.04.2004, the LOA No.KR/PD/J&K/Cont. Tunnel/T6-T12 was issued in favour of the petitioner for the project "B.G. Single Line Tunnels T6 to T12". On 30.08.2006 the arbitration agreement was executed between the parties. On 27.10.2006, the petitioner

submitted its first set of claims to the tune of ₹29.35 Crores to ED of respondent for the period ending July 2006. The said claims were referred to the three members Standing Arbitral Tribunal on 26.06.2007 which was constituted on 16.11.2007. On 03.03.2008 the petitioner filed their claims to the tune of ₹79.33 crores for the period from August 2006 till the date of suspension in July 2008. On 24.07.2009 Shri Rajiv Dutt resigned and on 05.08.2009 Mrs.Sunitha Awasthi was appointed. On 21.05.2009 Shri Arun Kumar also resigned. Shri S.B.Ninanve, CTE (SECR)/Bilaspur was then appointed a co-arbitrator and in this way hearing of the proceedings initiated. The arguments on claim No.1 were over by 22.08.2014 but thereafter, no date has been fixed by the arbitral tribunal despite various letters written by the claimant. It is admitted that for the last four years there has been no hearing in the matter, hence this petition.

3. The learned counsel for the petitioner submitted that as per clause **2.4** of the arbitration agreement dated 30.08.2006, if an arbitrator is unable or unwilling to perform his function for any reason whatsoever or fails to act without undue delay, the Managing Director shall terminate the mandate of such arbitrator and thereupon the new arbitrator shall be appointed in the same manner. The period of the arbitration given in clause No.**2.5.5** is only two months from the date of the communication of the dispute and that arbitral tribunal is to pass a reasoned written award. Per clause No.**2.6.2**, the provisions of the Act with statutory

modifications thereto will apply as to the proceedings under this agreement, interim and final award. Clause No.2.6.5 says that the arbitral tribunal shall conduct the proceedings either at Mumbai and/ or Delhi or any other convenient venue of the KRCL viz the respondent.

4. It is urged that since for the last 3-4 years, the arbitral tribunal is not sitting and has not been able to conclude its proceedings within two months, per clause 2.5.5 above, hence, the mandate of the arbitrator stands terminated and a new chairman of the tribunal be elected.

5. The learned counsel for the respondent admits the arbitral tribunal is not functioning since 3-4 years and also agree to the appointment of the presiding arbitrator, but insists the appointment should be strictly as per clause 2.4, of the agreement viz..., only the official of the department be appointed. Now where despite request the respondent had failed to appoint chairman, then can this plea of respondent be accepted.

6. In *Datar Switchgears Limited vs. Tata Finance Limited and Another* (2000) 8 SCC 151 the Supreme Court notes:-

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

7. In *Union of India vs. Uttar Pradesh State Bridge Corporation Limited* (2015) 2 SCC 52 wherein the facts were similar to the present case the Apex Court held :-

17. In the case of contracts between Government Corporations/State owned companies with private parties/contractors, the terms of the agreement are usually drawn by the Government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a

managing director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers etc., then the principle of 'default procedure' at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard.

xxx xxx

20. As pointed above, the Appellant has not questioned the order of the High Court in so far as it has terminated the mandate of the earlier Arbitral Tribunal because of their inability to perform the task assigned to them. In such a situation, leaving the Respondent at the mercy of the Appellant thereby giving the power to the

Appellant to constitute another Arbitral Tribunal would amount to adding insult to the serious injury already suffered by the Respondent because of non conclusion of the arbitral proceedings even when the dispute were raised in the year 2007....."

8. The above two judgments negates the plea raised by the learned counsel for respondent viz only the respondent is empowered to appoint substitute arbitrator.

9. Though the learned counsel for the respondent referred to *Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Limited* (2008) 10 SCC 240 to bring home her point that while appointing the arbitrator in the PSUs or the government companies due regard be given to the qualifications required by the agreement and other considerations, but in *Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665 the Supreme Court has desired the DMRC to prepare a panel of serving or retired engineers of government department and public sector undertakings and likewise the panel should also comprise of person with legal background i.e. Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Hence it is not essential the technical, officials could only be appointed. The concern of technicalities raised by the respondent can duly be taken care of by the two members of the tribunal, which are

nominated by the respondent, as per the contract. However the presiding arbitrator can be from a legal background as would expedite the case.

10. At the end, the learned counsels agreed for the arbitration to be seated at Mumbai and Justice (Retd) S.N.Variava, Ready Money Mansion, 2nd Floor, next to Akbarallys, 43, Veer Nariman Road, Fort, Mumbai-400001 (Telephone No.022-22835970) be appointed as the presiding arbitrator.

11. In the circumstances, the petition stands disposed of while appointing Justice (Retd) S.N.Variava as presiding arbitrator, who shall determine his fee in consultation with the parties.

12. No order as to cost.

NOVEMBER 08, 2017

M

YOGESH KHANNA, J