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

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Date of Decision: 11.08.2017

+ ARB.P. 503/2017

ITD CEMENTATION INDIA LTD. Petitioner
Through Mr.Manish Dembla, Mr.Amit Raina
and Mr. Sidhant Kaushik, Advs.

versus

PUBLIC WORKS DEPARTMENT GOVT.
OF NCT OF DELHI Respondent
Through Mr. Ramesh Singh, Standing Counsel
for GNCTD with Mr.Sandeepan Pathak and
Mr.Rahul Rajput, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

IA No.9093/2017 (exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

ARB.P. 503/2017

1. The present petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the Act) seeking appointment of an independent and impartial arbitrator to adjudicate the disputes between the parties.
2. Some of the brief relevant facts are that the respondent had issued a tender for comprehensive Development of Corridor (Outer Ring Road)

between Mangolpuri to Madhuban Chowk. The bid of the petitioner was accepted vide letter of acceptance dated 19.03.2013. There had been several delays in completion of the project. As per the respondent the said work was completed by the petitioner on 4.8.2016 whereas the scheduled date of completion was 9.4.2015. The respondents communicated to the petitioner on 17.11.2016 that the petitioner was responsible for a delay of 78 days subsequent to 18.5.2016 on account of which the petitioner was liable to pay a sum of Rs.11,08,68,659/-. The petitioner denies the submissions of the respondent and states that on 17.01.2016, the project was inaugurated by the Chief Minister and has been in use since then.

3. Earlier the petitioner had filed a petition under Section 9 of the Act being OMP (I) (COMM.) 279/2017 against the respondent seeking direction to the respondent to release the alleged liquidated damages of Rs.11,08,68,659/- to the petitioner against submission of Bank Guarantee of an equivalent amount. In that petition, the respondent were restrained from deducting/withholding any amount on account of liquidated damages subject to the petitioner furnishing an appropriate bank guarantee to the respondent. It was directed that the said payment shall be released by the respondents on furnishing of an appropriate bank guarantee by the petitioner and the bank guarantee would be kept alive during the pendency of the interim order. That petition was disposed of with the aforesaid directions.

4. As disputes have arisen between the parties, the petitioner took steps as per the arbitration clause mentioned in the agreement.

5. Clause 25 (i) of the GCC 2010 of the contract provides for arbitration in case of disputes. The clause gives an elaborate procedure for reference of disputes to an arbitrator. It states that if the contractor is dissatisfied with

the decision of the Chief Engineer, it may file an appeal to the Dispute Redressal Committee. The Committee shall give its decision within 90 days. If the contractor is not satisfied with the said decision of the Committee, it may within 30 days of the receipt of the decision of the Committee give notice to the chief Engineer for appointment of an arbitrator on the prescribed performa. In the present case, the petitioner gave the said notice on 19.06.2017.

6. Pursuant to the said request, the respondent on 14.07.2017 wrote a communication to the petitioner seeking 'no objection' to the appointment of Sh. Rajesh Banga as the sole arbitrator. This 'no objection' was sought in terms of Section 12(5) of the Act in view of the fact that Sh. Rajesh Banga is an employee of CPWD and is on deputation as Arbitrator with the Ministry of Urban Development, Government of India. The petitioner filed this petition on 29.07.2017. The petitioner thereafter vide its communication dated 09.08.2017 refused to give his 'no objection' to the appointment of Sh. Rajesh Banga. Accordingly, the respondent have on 10.08.2017 appointed Sh. B.B.Dhar, Chief Engineer(Retd.), CPWD as the sole arbitrator.

7. I have heard learned counsel for the parties.

8. Learned counsel for the petitioner relies upon the judgment of the Supreme Court in the case of *Deep Trading Company vs. Indian Oil Corporation & Ors.*, AIR 2013 SC 1479 to contend that where an opposite party has been unable to make appointment within 30 days of the demand the right to appointment is not forfeited but continues till a petition is filed by the first party under Section 11 of the Act seeking appointment of an arbitrator. He submits that the present petition was filed on 29.07.2017. As till that date no steps had been taken by the respondent to appoint an

arbitrator, the right to appoint an arbitrator by the respondent stood forfeited and hence, the petitioner is seeking appointment of an independent and impartial arbitrator by this court.

9. Learned counsel for the respondent however refutes the submission of the petitioner. He relies upon the proviso to Section 12(5) of the Act which provides that subsequent to disputes having arisen between the parties, the parties may by an express agreement in writing waive off the applicability of Section 12(5). He submits that under these circumstances, as the proposed arbitrator Sh.Rajesh Banga was an employee of the respondent the consent of the petitioner was sought in terms of Section 12(5) of the Act. The petitioner, he submits, has delayed in giving its consent or taking steps pursuant to the communication of the respondent dated 14.07.2017. The refusal to give its consent was communicated by the petitioner only on 09.08.2017 and the respondent have on 10.08.2017 itself appointed a new Arbitrator.

10. In ***Deep Trading Company vs. Indian Oil Corporation & Ors.(supra)*** the court held as follows;

“16. In *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* MANU/SC/0651/2000 : (2000) 8 SCC 151, a two-Judge Bench of this Court considered the scheme of Section 11, noted the distinguishing features between Section 11(5) and Section 11(6) and then considered the question whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of thirty days from the date of demand. This Court held that in cases arising under Section 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but continues, but such an appointment has to be made before the first party makes application under Section 11 seeking appointment of an arbitrator. If no appointment has been made by

the opposite party till application under Section 11(6) has been made, the right of the opposite party to make appointment ceases and is forfeited.

17. In *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638, the agreement entered into between the parties contained arbitration clause. The disputes and differences arose between the parties. Punj Lloyd (Appellant) served a notice on Petronet (Respondent) demanding appointment of an arbitrator and reference of disputes to him. Petronet failed to act. On expiry of thirty days, Punj Lloyd moved the Chief Justice of the High Court for appointment of the arbitrator under Section 11(6). Petronet had not made appointment till the date of moving the application. The designate Judge refused to appoint the arbitrator holding that the remedy available to it was to move in accordance with the agreement. Aggrieved by the said order, a writ petition was filed which was dismissed and the matter reached this Court. A three-Judge Bench of this Court referred to *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* MANU/SC/0651/2000 : (2000) 8 SCC 151 and held that the matter was covered squarely by that judgment and the view taken by the designate Judge in dealing with the application under Section 11(6) and the Division Bench was not right. This Court restored the application under Section 11(6) before the Chief Justice of the High Court for fresh consideration and appointment of the arbitrator in accordance with Section 11(6).

18. We are in full agreement with the legal position stated by this Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* MANU/SC/0651/2000 : (2000) 8 SCC 151 which has also been followed in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638.”

11. It is manifest that once a party invokes the arbitration clause, in a case falling under Section 11 (6) of the Act, the opposite party is as per settled legal position obliged to appoint an arbitrator within 30 days of the demand.

In case the opposite party does not appoint an arbitrator within 30 days of the demand, the right to make the appointment continues till the first party makes an application under Section 11 of the Act. In the present case, the respondent instead of appointing an arbitrator whose appointment is not prohibited under Schedule Seven of the Act has chosen to try to appoint an employee of the respondent as an arbitrator. For the said purpose, they sought the consent of the petitioner.

12. Section 12(5) of the Act reads as follows:

“Section 12(5): Notwithstanding any prior agreement to the contrary, any person whose relationship, 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:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

13. Hence, even where the person who is sought to be appointed as an arbitrator falls in any of the categories specified in the Seventh Schedule, the parties may waive the applicability of the Seventh Schedule by an express agreement in writing. The respondent contends that it was trying to seek the consent of the petitioner to appoint an arbitrator who fell in one of the categories specified in the said Seventh Schedule and that the petitioner took his own time to communicate his refusal. The respondent hence argue that the time spent in trying to take consent of the petitioner has to be taken into account and this period has to be added to the period of 30 days which was available to the respondent for appointment of an arbitrator.

14. In my opinion, it was manifest that the respondent had 30 days from

the date of invocation of the arbitration clause vide the letter dated 19.06.2017, to take steps for appointment of the arbitrator. The consent of the petitioner to waive of Schedule Seven of the Act also was also required to be taken within 30 days. The respondent instead sent a communication seeking no objection to the appointment of Shri Rajesh Banga from the petitioner on 09.08.2017. Once the period of 30 days had lapsed from the date of invocation of the arbitration clause it was implicit that the petitioner is not giving his consent and the respondent should have taken the required steps. There was no obligation on the part of the petitioner to respond to the communication dated 14.07.2017 of the respondent. The respondent have taken steps to appoint the arbitrator after filing of the present petition under Section 11 of the Act and after expiry of 30 days from the date of invocation of the arbitration clause. In view of the above noted settled legal position, the respondent have lost their right to appoint the arbitrator.

15. Accordingly, I appoint Mr.Amar Nath (District & Sessions Judge (Retd.)) (Mobile No.9958697030) as the sole Arbitrator to adjudicate the disputes between the parties. The arbitrator shall fix his own fees in consultation with the learned counsel for the parties. He is also requested to comply with the provisions of Section 12(1) of the Act by filing an appropriate declaration.

16. The petition stands disposed of.

JAYANT NATH, J

AUGUST 11, 2017
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