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

+ **ARB.P. 19/2017**

OFFSHORE INFRASTRUCTURES LIMITED Petitioner

Through: Mr Gaurav Dudeja and Mr Sudhanshu
Goil, Advocates.

versus

BHARAT HEAVY ELECTRICALS LIMITED Respondent

Through: Mr Udit Seth and Mr J. C. Seth,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **09.01.2017**

IA No.238/2017

1. Allowed, subject to all just exceptions.

ARB.P. 19/2017

2. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act'), *inter alia*, praying that an Arbitrator be appointed.

3. The learned counsel for the respondent, who appears on advance notice, states that the Arbitrator was appointed by a letter dated 13.12.2016 which was also dispatched to the petitioner on 15.12.2016. He also handed over a copy of the minutes of the hearing held by the Arbitrator on 04.01.2017.

4. The petitioner issued a notice dated 10.11.2016 invoking the

arbitration clause, which was received by the respondent on 15.11.2016. There is some controversy with regard to this as learned counsel for the respondent states that the letter was received on 16.11.2016. However, the minutes of the meeting held before the Arbitrator on 04.01.2017 indicates that the notice was received by the respondent on 15.11.2016.

5. The respondent acted within the period of 30 days of receipt of the notice and issued a letter dated 13.12.2016 appointing an Arbitrator. The said letter was also dispatched to the petitioner on 15.12.2016. However, the learned counsel for the petitioner states that the same was received on 19.12.2016. The Arbitrator is stated to have received the said notice on 23.12.2016.

6. After receipt of the letter of appointment, the Arbitrator had made the disclosure as required under Section 12 of the Act and by mail dated 26.12.2016 scheduled a hearing on 04.01.2017

7. Thus, prior to the petitioner moving this petition before the court - that is today - the Arbitrator had already entered upon reference.

8. The learned counsel for the petitioner states that since the present petition was filed on 17.12.2016 and the appointment was made thereafter, and therefore the respondent had forfeited its right to do so. He has relied on the decision of a coordinate Bench of this Court in ***R. S. Avtar Singh v. India Tourism Development Corporation:104(2003) DLT 227*** wherein this Court had held that the appointment of an Arbitrator would be taken to have been made when the letter is communicated and received by the Arbitrator. He states that in view of the aforesaid decision the respondent would have

forfeited its right to appoint an Arbitrator.

9. In my view, the aforesaid statement cannot be accepted as in terms of Section 11(6) of the Act, there is no time period prescribed for appointment of an Arbitrator. This is also been held by the Supreme Court in ***Datar Switchgear Ltd v. Tata Finance Ltd : (2000) 8 SCC 151*** wherein the Court held as under:-

“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.

20. In the present case the respondent made the

appointment before the appellant filed the application Under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

10. The plain words of sub-section 11(6) of the Act indicates that an application can be moved by the party if the person who is entrusted with the procedure for appointment of an Arbitrator fails to "act as required" under the procedure as agreed by the parties. In the present case, there is no undue delay on the part of the respondent in responding to the petitioner's request for appointment of an Arbitrator. Admittedly, the letter appointing the Arbitrator had been issued on 13.12.2016, *albeit*, dispatched a few days later. The appointment of the Arbitrator was also duly communicated to the petitioner and even according to the petitioner the same was received on 19.12.2016. In the facts of the case it is difficult to accept that the respondent has failed to act, warranting any measure by this court.

11. In ***R. S. Avtar Singh v. India Tourism Development Corporation*** (supra) the arbitrator was sought to be appointed much after the petitioner therein had moved the court and after the court had issued notice in the petition under section 11 of the Act. In that case the petitioner (therein) gave a notice invoking arbitration on 20.08.2001, since the petitioner did not hear from the respondent, it filed a petition under section 11 of the Act on 22.09.2001 and notice of the same was issued on 24.09.2001. The respondent appointed an arbitrator thereafter, on 05.10.2001. In the present case, the letter appointing the arbitrator was issued prior to filing of the

petition and much prior to the petitioner moving the court. Thus even if it is accepted that the appointment of the arbitrator was not complete, nonetheless, the process to appoint the arbitrator had been initiated.

12. As stated earlier, in the present case there has been no delay on the part of the respondent and it has acted within the period of thirty days from the date of invocation of the arbitration clause. Thus, in the facts and circumstances of this case, it is not necessary to appoint Arbitrator as the Arbitral Tribunal has already been constituted.

13. The petition is, accordingly, dismissed.

JANUARY 09, 2017
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VIBHU BAKHRU, J