

HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

ARBITRATION APPLICATION NO.48 OF 2017

ORDER:

This application, under Section 11(6)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act"), is filed by M/s. Blue Star Limited seeking appointment of a Presiding Arbitrator. The agreement dated 05.12.2008 contains an arbitration clause. Clause 32.3 of the General Conditions of contract reads thus:

"Settlement of Disputes by Arbitration: Except the matters covered under above Clause No.32.1 all disputes and differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this contract or the breach thereof shall be settled by Arbitration. **Each party shall appoint its arbitrator, the two arbitrators so appointed shall appoint the third arbitrator who shall be the presiding arbitrator. The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 and the statutory modifications to the said Act.** The award made in pursuance thereof shall be binding on the parties, provided that withholding of any of the certificate, decision, opinion, direction, valuation etc., by the Engineer for a period of more than six months shall be referable to Arbitration and shall not be barred as Excepted matter."

The aforesaid arbitration clause requires each party to appoint its arbitrator, and the two arbitrators so appointed to appoint the third arbitrator who would be the presiding arbitrator; the arbitration is to be governed by the provisions of the Act, and the statutory modifications to the said Act. While the applicant had appointed Sri Y.K. Rao as their arbitrator, the respondent had appointed Sri T. Bhaskara Rao as their nominee. The dispute in the present case revolves around the question whether or not both these arbitrators had appointed Sri D. Tarakaram, retired District Judge-cum-Sessions Judge, as the presiding arbitrator. At this stage, it must also be noted that Sri

Y.K. Rao subsequently resigned, and in his place the applicant appointed Justice N.R.L. Nageswara Rao as its arbitrator.

It is the case of the applicant that, even without the consent of Sri Y.K. Rao (their nominee), the arbitrator nominated by the respondent (i.e., Sri T. Bhaskar Rao) had addressed an e-mail to Sri D. Tarakaram on 08.02.2017 at 18.23 p.m. marking a copy thereof to Sri Y.K. Rao. In the said e-mail Sri T. Bhaskara Rao, retired District Judge, thanked Sri D. Tarakaram for acceding to their request, and for having given his consent to be the presiding arbitrator in the subject dispute; and, since constitution of the arbitral tribunal was complete, he should issue proceedings for convening the first meeting of the Tribunal wherein the seat of arbitration, the rules of procedure to be adopted etc., should be decided. Two days thereafter, i.e at 11.00 a.m. on 11.02.2017, Sri Y.K. Rao (the nominee arbitrator of the applicant), informed Sri T. Bhaskara Rao, the nominee arbitrator of the respondent (marking a copy of the said e-mail to Sri D. Tarakaram), that he was in receipt of the e-mail sent by Sri T. Bhaskara Rao; with due apology he wanted to clarify as there was a communication gap between them in the matter of appointment of the presiding arbitrator; during their discussions, when he had suggested the name of Sri V.S. Rao, DGM (Rtd) HPCL as the presiding arbitrator since the subject matter appeared to be technical in nature, Sri T. Bhaskara Rao had suggested the name of Sri D. Tarakaram, retired District Judge; even though he had no past acquaintance with Sri D. Tarakaram and was not aware of his past experience in arbitration matters, he had given his in-principle consent for appointing him as the presiding arbitrator, out of respect for Sri T. Bhaskar Rao as he was

a retired District Judge; however, actual appointment of the Presiding Arbitrator had to be made jointly by both of them which had not been made so far; he was expecting that Sri T.Bhaskar Rao would furnish him the profile of Sri D. Tarakaram before they appointed him as the presiding arbitrator; and, in the meanwhile he had received e-mail addressed to Sri D. Tarakaram unilaterally, which was not in tune with the arbitration clause in the agreement; and such appointment could not have been made until both the arbitrators addressed a letter to him jointly. Sri Y.K. Rao further stated that, in the circumstances, he had decided not to continue as the arbitrator; and, therefore, he was resigning as the arbitrator in the subject dispute. He expressed his regret for any misunderstanding or inconvenience caused in this regard.

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the applicant, would submit that, since both the arbitrators had not jointly agreed to the appointment of Sri D. Tarakaram as the presiding arbitrator, the vacancy in the office of the presiding arbitrator continued to remain, justifying the applicant invoking the jurisdiction of this Court under Section 11(6) of the Act; the in-principle approval by the applicant's nominee arbitrator Sri Y.K. Rao, was pending receipt of the profile of Sri D. Tarakaram and other particulars, to enable him to take a considered decision as to whether or not Sri D. Tarakaram should be appointed as the presiding arbitrator; and since the two appointed arbitrators had failed to reach an agreement, as prescribed under the Arbitration Clause of the agreement, for appointment of the presiding arbitrator, it is only the jurisdiction of

this Court which can be invoked seeking appointment of the presiding arbitrator.

On the other hand Sri A. Krishnam Raju, Learned Counsel for the respondent, would submit that it is evident from the e-mail sent by Sri T. Bhaskara Rao to Sri D. Tarakaram on 08.02.2017 that, both he and Sri Y.K. Rao had together appointed Sri D. Tarakaram as the presiding arbitrator in the subject mentioned arbitration, and had requested Sri D. Tarakaram to convey his consent to be the presiding arbitrator by e-mail; Sri Y.K. Rao had, in his e-mail dated 11.02.2017, admitted having given his in-principle consent to the appointment of Sri D. Tarakaram as the presiding arbitrator; once in-principle consent is accorded, the vacancy of the presiding arbitrator must be held to have been supplied; as there is no vacancy in the office of the presiding arbitrator, the applicant is not entitled to invoke the jurisdiction of this Court under Section 11(6)(b) of the Act; and, since Sri D. Tarakaram has been appointed as the presiding arbitrator in accordance with Clause 32.2 of the General Conditions of the contract, the application, as filed before this Court, is liable to be dismissed. Learned Counsel would rely on **Grid Corpn. of Orissa Ltd. v. AES Corpn**¹ in this regard.

As noted hereinabove, Clause 32.3 of the General Conditions of the Contract requires the two arbitrators, appointed by the parties, to appoint the third arbitrator who would be the presiding arbitrator. It is only if both the arbitrators have agreed to the appointment of a person to be appointed as the presiding arbitrator, can it then be said that the vacancy in the office of the presiding arbitrator has been filled up. The question which necessitates

¹ (2002) 7 SCC 736

examination is whether, from the correspondence placed on record before this Court, both the arbitrators can be said to have appointed Sri D. Tarakaram as the presiding arbitrator for it is only then can it be said that the vacancy in the office of the presiding arbitrator has been filled up. In **Grid Corpn. of Orissa Ltd.**¹, the Supreme Court observed:

“...In my opinion, it is not necessary within the meaning of Section 11(3) that the presiding arbitrator must be appointed by the two appointed arbitrators in writing nor is it necessary that the two appointed arbitrators must necessarily sit at one place, deliberate jointly and take a decision in the presence of each other in regard to the appointment of the presiding arbitrator. It is enough if they have actually consulted or conferred with each other and if both or any of them communicates to the parties the appointment of the presiding arbitrator as having taken place by the joint deliberation of the two. It is clearly spelled out from the correspondence between the two arbitrators reproduced hereinabove that the two arbitrators had agreed on principle that the third arbitrator shall be of a nationality different from the one to which either of the parties belongs. They had also agreed upon the appointment of Mr Williams. The communication of such appointment though made by Mr Donovan is on behalf of himself and Mr Verma. The correctness of such consultation having preceded the appointment is not doubted in the correspondence and has also not been disputed by the learned Senior Counsel for the petitioners during the course of hearing. Mr Verma’s protest to appointment of Mr Williams was based on “reconsideration” of the issue, that is, on second thoughts. The practice adopted by the two arbitrators is consistent with the practice of international commercial arbitration and conducive to the convenience of the parties and also saves them from avoidable expenditure. When an effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties. The appointment need not necessarily be by a writing signed by the two arbitrators; it satisfies the requirement of law if the appointment (i) has been actually made, (ii) is preceded by such consultation as to amount to appointment by the two, and (iii) is communicated. It is not essential to the validity of the appointment that the parties should be consulted, or involved in the process of appointment or given a previous notice of the proposed appointment....”

It is evident, therefore, that, for appointment of the presiding arbitrator, it is not necessary that the two appointed arbitrators must, necessarily, sit at one place, deliberate jointly and take a decision in the presence of each other in regard to such appointment of the presiding arbitrator. It is enough if they have actually consulted or conferred with each other, and if both or any one of them have communicated to the parties that the appointment of the presiding arbitrator had taken place by the joint deliberation of the two. If both arbitrators have agreed on the presiding

arbitrator, it is wholly unnecessary for both of them either to record the minutes of their mutual agreement to the appointment of the presiding arbitrator and it would suffice if, from the material on record, it is clear that both the arbitrators have agreed to the appointment of the third arbitrator.

The e-mails addressed to Sri D. Tarakaram on 08.02.2017 congratulating him, and informing him that both he and Sri Y.K. Rao had unitedly appointed him as the presiding arbitrator, and the e-mail which followed immediately thereafter at 18.23 hours on the same day, are both addressed to Sri D. Tarakaram by Sri T. Bhaskara Rao. While the earlier e-mail of 08.02.2017 does not appear to have been marked to Sri Y.K. Rao, the subsequent e-mail evidently was. Sri Y.K. Rao in his reply thereto, vide e-mail dated 11.02.2017, had informed Sri T. Bhaskara Rao that there was a communication gap, and his in-principle approval could not be construed as his consent for appointing Sri D. Tarakaram as the presiding arbitrator, as he had no past acquaintance with Sri D. Tarakaram nor was he aware of his past experience in arbitration matters; and he was expecting to be furnished the profile of Sri D. Tarakaram before both the arbitrators appointed him as the presiding arbitrator. This is the only e-mail addressed by Sri Y.K. Rao which records his version regarding appointment of Sri D. Tarakaram as the presiding arbitrator, for all the other e-mails placed on record were addressed by Sri T. Bhaskara Rao to Sri D. Tarakaram, and not by Sri Y.K. Rao.

Unlike, in the present case where Sri T. Bhaskara Rao was informed by Sri Y.K. Rao two days after the e-mail dated 08.02.2017, (by e-mail dated 11.02.2017), that there was a

communication gap and, while he had in-principle agreed to the name of Sri D. Tarakaram, he had not given his consent as he was awaiting details of Sri D. Tarakaram and his experience in arbitration matters, in **Grid Corpn. of Orissa Ltd.**¹ there was no ambiguity on the issue of the applicants' nominee arbitrator having agreed to the appointment of the presiding arbitrator as he had, by his letter dated 24.01.2002, informed the arbitrator nominated by the respondent that he wished to reconsider his earlier agreement for the appointment of Sri David A.R. Williams as the presiding arbitrator. Having given his consent to the appointment of a presiding arbitrator, the nominee arbitrator of the applicant had sought to reconsider his earlier consent. It is because the vacancy of the presiding arbitrator had been filled up, on the applicant's nominee arbitrator having consented to the appointment of the presiding arbitrator, that the Supreme Court, in **Grid Corporation of Orissa Ltd**¹, held that there was no deficiency in the Constitution of the arbitral Tribunal.

In the case on hand the only communication from Sri Y.K. Rao is his e-mail dated 11.02.2017 which clearly shows that there was a communication gap between the parties regarding appointment of Sri D. Tarakaram as the presiding arbitrator, and that Sri Y.K. Rao was awaiting details regarding the profile of Sri D. Tarakaram and his experience in arbitration matters before giving his final consent to such appointment. It is evident from the correspondence, as indicated hereinabove, that Sri Y.K. Rao had not agreed to the appointment of Sri D. Tarakaram as he was awaiting further information, and was expecting that both the arbitrators would thereafter appoint the presiding arbitrator. As the

requirement of Clause 32.3 of the General Conditions of Contract is for both the arbitrators to appoint the presiding arbitrator, and since, in the present case, the nominee arbitrator of the applicant had not consented to such appointment, it is evident that the vacancy of the presiding arbitrator had not been filled up, and the applicant was therefore entitled to approach this Court, under Section 11(6)(b) of the Act, seeking appointment of the presiding arbitrator.

In such circumstances, I consider it appropriate to appoint Hon'ble Sri Justice Vilas V. Afzulpurkar, Flat No.401&402, Ruby, Lumbini Rockdale Apartments, Beside Eenadu Office, Somajiguda, Hyderabad - 82 (Retired Judge of this High Court), as the presiding arbitrator. The Learned Presiding Arbitrator shall fix his remuneration, and incidental charges for the arbitration proceedings, in consultation with the parties. The arbitration proceedings shall be completed and an award passed at the earliest, preferably within a period of six months from the date of commencement of the arbitral proceedings. He is also requested to hold sittings, as far as possible, in the mediation centre of the High Court.

The Arbitration Application is, accordingly, disposed of. The miscellaneous petitions pending, if any, shall stand closed. No costs.

RAMESH RANGANATHAN, ACJ

Date: 19.01.2018.

MRKR

