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

Date of decision: 7th May, 2018

+ ARB.P. 281/2018
SATISH BUILDERS

..... Petitioner

Through: Mr.Sunil K. Mittal, Mr.Anshul Mittal,
Ms.Vaishali Mittal & Mr.Sushant
Bali, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Mr.Akshay Makhija, CGSC with
Mr.Aaditya Goyal & Mr.Kriti
Awasthi, Advs.
Mr.Vinod Diwakar, CGSC with
Mr.Praveen Kumar Jain &
Ms.Titasha, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Award of Work for Construction of Apartment Tower (T- 2) at Indian Institute of Science Education & Research (IISER), Bhopal including Water Supply, Sanitary Installation, Drainage and Electrical Works. The said agreement contains an Arbitration Agreement between the parties in Clause 25 of the General Conditions of Contract (GCC).
2. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement by its letter dated 03.03.2018. Having received no response from the respondent, the present petition was filed.

3. The counsel for the respondent submits that this Court would not have territorial jurisdiction to entertain the present petition inasmuch as the agreement between the parties vests jurisdiction in Courts where the headquarter of the division of the respondent, which has floated the tender is situated. He submits that as in the present case the headquarter is situated in Bhopal, Madhya Pradesh, only the High Court at Madhya Pradesh would have jurisdiction under Section 11 of the Act.

4. The learned counsel for the petitioner on the other hand brings to my attention the Integrity Agreement dated 06.02.2014 that has been executed between the parties at Delhi. He submits that due to execution of this agreement at Delhi, at least a part of the cause of action has arisen at Delhi, and as such this Court would have the jurisdiction to entertain the present petition. He further submits that prior to filing of the present petition, the petitioner had filed a petition under Section 9 of the Act being OMP. (I) (COMM.) 542/2017. There was no objection to the territorial jurisdiction taken by the respondent in opposition to that petition. Being aggrieved with the order dated 20.12.2017 passed by this Court in the said petition, the petitioner challenged the same by way of FAO (OS) (COMM.) 26/2018. The said appeal was disposed of by the Division Bench of this Court by its order dated 12.02.2018, however, the respondent again did not take any objection with respect to the territorial jurisdiction of this Court. He further submits that on the basis of the permission granted by the Division Bench in the said order, the petitioner filed an application in the above mentioned petition seeking modification of the order dated 20.12.2017 being IA No. 2658/2018. The respondent has filed a response to the said application, however, again there is no objection taken with respect to the territorial jurisdiction of this

Court. On basis of the above facts, the counsel for the petitioner relies upon Section 42 of the Act to submit that this Court would now have the territorial jurisdiction to entertain the present petition.

5. I have considered the submissions made by the counsel for the parties. It cannot be denied by the respondent that due to execution of the Integrity Agreement at Delhi, this Court would have territorial jurisdiction to entertain the present petition. Clause 7(1) of the Integrity Agreement would vest exclusive jurisdiction in the Courts at Bhopal, however, by the subsequent conduct of the parties and the non insistence of the respondent for the petitioner to strictly act in accordance with the said exclusion, it cannot be said that this Court would not have the jurisdiction to entertain the present petition.

6. As noted above, filing of a petition under Section 9 of the Act and the respondent failing to take any objection with respect to the territorial jurisdiction of this Court would also attract Section 42 of the Act in the peculiar facts of the present case. In *State of West Bengal and Others v. Associated Contractors*, (2015) 1 SCC 32, the Supreme Court while dealing with the scope of Section 42 of the Act has held that Section 9 applications being applications made to a court are applications which are within Section 42 of the Act.

7. As this Court otherwise has territorial jurisdiction due to execution of the Integrity Agreement at Delhi and due to the subsequent conduct of the parties, I hold that the present petition would be maintainable before this Court.

8. The second objection taken by the counsel for the respondent is that in terms of Clause 25 of the GCC, only a person appointed by the Chief

Engineer, CPWD or Additional Director General or Special Director General or Director General, CPWD can act as an Arbitrator and if for any reason that is not possible, the Arbitration Agreement specifically provides that the matter shall not be referred to arbitration at all. He submits that as in the present case, the Arbitrator has been appointed by the Chief Engineer (Central Zone), CPWD, though after the filing of the present petition, only such appointed person can act as an Arbitrator.

9. I cannot agree with the said submission of the learned counsel for the respondent. In *Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr.*, (2000) 8 SCC 151, Supreme Court has clarified that if the party empowered to appoint an Arbitrator does not appoint an Arbitrator till the filing of a petition under Section 11 of the Act, it forfeits its rights to appoint an Arbitrator. In the present case, as the respondent failed to appoint an Arbitrator till the filing of the present petition, it had forfeited its rights to appoint an Arbitrator. In view thereof, the appointment of Mr.K.K. Verma as a Sole Arbitrator by the respondent cannot be given effect to.

10. Clause 25 of the GCC is in two parts; the first part is an Agreement between the parties to have the disputes adjudicated through the mechanism of arbitration, the second part is the procedure of the appointment of an Arbitrator. Merely because the respondent has failed to appoint an Arbitrator it cannot frustrate the Arbitration Agreement between the parties.

11. In *Indian Oil Corporation Ltd. & Ors. Vs. M/s Raja Transport (P) Ltd.* 2009 (4) RAJ 53 (SC), the Supreme Court, had held that such a condition in the Arbitration Agreement interferes with the power of the Court under Section 11 of the Act and is liable to be ignored being contrary to the Act. Para 20 of the said judgment is quoted hereinbelow:-

“20. This takes us to the effect of the condition in the arbitration agreement that “it is also a term of this contract that no other person other than the Director, Marketing or a person nominating by such Director, Marketing of the Corporation as aforesaid shall act as Arbitrator. “Such a condition interferes with the power of the Chief Justice and his designate under section 11(8) of Act to appoint a suitable person as arbitrator in appropriate cases. Therefore, the said portion of the arbitration clause is liable to be ignored as being contrary to the Act. But the position will be different where the arbitration agreement names an individual (as contrasted from someone referred to by designation) as the Arbitrator. An example is an arbitration clause in a partnership deed naming a person enjoying the mutual confidence and respect of all parties, as the Arbitrator. If such an arbitration agreement provides that there shall be no arbitration if such person is no more or not available, the person named being inextricably linked to the very provision for arbitration, the non-availability of the named arbitrator may extinguish the very arbitration agreement. Be that as it may. ”

12. In ***Nandyal Co-op. Spinning Mills Ltd. vs. K.V.Mohan Rao*** (1993) 2 SCC 654, the Supreme Court, considering Section 8 of the Arbitration Act, 1940 had held as under:-

“11. It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of the receipt of the notice, the Administrative Head of the appointment had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Sri Rao, therefore, that since the agreement postulated preference to arbitrator appointed by the Administrative Head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is sign that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit.

That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the Administrative Head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(1) (a), then the respondent has been given right under clause 65.2 to avail the remedy under Section 8(1)(a) and request the court to appoint an arbitrator. If the contention of Sri Rao is given acceptance, it amounts to put a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself. ”

13. In **TRF Ltd. vs. Energo Engineering Projects Ltd.**, (2017) 8 SCC 377, the Supreme Court held that an arbitration clause may be divided into various parts; one providing for the adjudication of the disputes through an arbitrator, while the other relating to the procedure of appointment of the arbitrator. The Arbitration Agreement providing for the resolution of disputes through arbitration being separate from its procedure of appointment, would survive the failure of the party to adhere to the procedure of appointment and the Court can appoint an Arbitrator on such failure of the party.

14. In view of the above, I see no impediment in appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above work. I appoint Justice J.D. Kapoor, Retired Judge of this Court (R/o. H No. 17, Sec A, Pocket C, Vasant Kunj, New Delhi, Mobile: 9871257474) as a Sole Arbitrator for adjudicating such disputes.

15. The Sole Arbitrator shall give his Disclosure Statement in terms of Section 12 of the Act before proceeding with the reference. The Arbitrator shall be entitled to charge fee in accordance with the Fourth Schedule of the Act.

16. The petition is disposed of with the above directions and with no order as to costs.

Dasti.

NAVIN CHAWLA, J

MAY 07, 2018/rv