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

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Date of decision: 30.01.2018

+ ARB.P. 243/2017

SIEMENS LIMITED

..... Petitioner

Through Mr.Jayant Malik, Adv.

versus

JINDAL INDIA THERMAL POWER LIMITED Respondent

Through Ms.Suruchi Agarwal and Mr.Sushil
Bhatt, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

IA No.4378/2017 (exemption)

Allowed subject to all just exceptions.

ARB.P. 243/2017

1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking appointment of an arbitrator on behalf of the respondent. Some of the salient facts as stated in the petition are that the respondent issued a tender dated 29.04.2011 for design, engineering, etc. of equipment/items for extension of its 765/400 KV Angul Pooling Station (Power Grid) complete in all respects along with metering yard and civil work etc.

2. On 21.07.2011, the bid of the petitioner was accepted and a letter of intent was entered into between the parties envisaging the scope of work @

Rs. 18,81,00,000/-. On 17.09.2011, two separate orders were placed by the respondent. It is the case of the petitioner that on 02.06.2014, the work under the contract was completed to the respondent's satisfaction.

3. Disputes having arisen between the parties, the petitioner on 02.01.2017 invoked the arbitration clause and nominated Mr. Justice Vikramjit Sen (Retd.) as an arbitrator in accordance with the terms of the contract. The case of the petitioner is that despite receipt of notice dated 02.01.2017 invoking the arbitration clause and lapse of 30 days period during which, as per the arbitration clause, the respondent was requested to resolve the disputes, the respondent failed to resolve the disputes. Thereafter another 30 days lapsed but the respondent took no steps to appoint their Arbitrator.

4. The respondent have filed their affidavit in opposition. It is their contention that in terms of clause 11 and 14 of the Contract the parties have to first endeavour to resolve all the disputes amicably between themselves arising in connection with the contract and in case any of the disputes remain unresolved within 30 days of the matter being raised by either party, either party may refer the disputes for settlement through arbitration. It is urged that by the same notice, the petitioner sought resolution of the disputes and also sought invocation of the arbitration clause prematurely. Hence, it is pleaded that the petition of the petitioner is premature.

5. I have heard learned counsel for the parties.

6. Learned counsel for the petitioner relying upon the Judgment of the Supreme Court in the case of *Datar Switchgears Ltd. vs. TATA Finance Ltd., (2000) 8 SCC 151* has reiterated that the respondent having failed to nominate their arbitrator as required and are now disqualified from doing so

and this court may appoint the arbitrator on behalf of the respondent. Reliance is also placed on the judgment of the Supreme Court in the case of ***Visa International Ltd. v. Continental Resources (USA) Ltd., (2009) 2 SCC 55*** and judgment of this court in the case of ***Ravinder Kumar Verma v. BPTP Ltd., 2015 (147) DRJ 175.***

7. Learned counsel for the respondent has opposed the petition. She has reiterated her contention as stated in the reply, namely, that the invocation is premature. It is urged that the procedure as prescribed in the arbitration clause has not been followed. It is urged that even after notice dated 02.01.2017 and filing of the present petition on 11.04.2017, there has been continuous efforts by the parties to settle the matter and meetings have taken place on 16.02.2017 and 18.04.2017. Reliance is also placed on a communication dated 01.05.2017 which was sent by the petitioner where the petitioner have taken a stand that in view of the order of this court dated 13.04.2017, they were attempting to reach an amicable settlement. The communication notes that if the respondent does not come with mutually acceptable terms before 30.05.2017, the petitioner will not entertain any further communication or proposal. It is pleaded that the settlement talks were going on and hence, it is urged that invocation of the arbitration clause by the petitioner is premature and the present petition is not maintainable. It is further pleaded that the petitioner himself has violated the procedure prescribed in the arbitration clause and now cannot blame the respondent. Learned counsel relies upon the judgment of Rajasthan High Court in case of ***M/s. Simpark Infrastructure Pvt.Ltd. vs. Jaipur Municipal Corporation, MANU/RH/1010/2012*** and the judgment of Uttarkhand High Court in case of ***Golden Infracon Pvt. Ltd. vs. State Infrastructure & Industrial***

Development Corporation of Uttarakhand Ltd., MANU/UC/0026/2017 to contend that where a procedure prescribed by an arbitration clause is not followed by the party invoking the arbitration clause, the petition would be premature. She further submits that the respondent are willing to nominate their arbitrator in terms of the arbitration clause.

8. Relevant part of Section 11 of the Act reads as follows:

“11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and

—
(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by [the Supreme Court or, as the

case may be, the High Court or any person or institution designated by such Court].

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

.....”

9. I may first look at the arbitration clause between the parties. Clause 11 and Clause 14 of the orders placed on the petitioner dated 17.09.2011 which are signed by both the sides reads as follows.

“11.0 ARBITRATION:

To the best of their ability, the parties hereto shall endeavour to resolve amicably between themselves all disputes arising in connection with this work order. If the same remain unresolved within thirty (30) days of the matter being raised by either party, either party may refer the dispute for settlement by arbitration. The arbitration to be undertaken by two arbitrators, one each to be appointed by either party. The arbitrators appointed by both the parties shall mutually nominate a person to act as umpire before entering upon the reference in the event of a difference between the two arbitrators and the award of the said umpire in such a contingency shall be final and binding upon the

parties. The arbitration proceeding shall be conducted In accordance with this provision of the Indian Arbitration & Conciliation Act, 1996 and the venue of such arbitration shall be city of New Delhi only.

14.0 ARBITRATION:

To the best of their ability, the parties hereto shall endeavour to resolve amicably between themselves all disputes arising in connection with this work order. If the same remain unresolved within thirty (30) days of the matter being raised by either party, either party may refer the dispute for settlement by arbitration. The arbitration to be undertaken by two arbitrators, one each to be appointed by either party. The arbitrators appointed by both the parties shall mutually nominate a person to act as umpire before entering upon the reference in the event of a difference between the two arbitrators and the award of the said umpire in such a contingency shall be final and binding upon the parties. The arbitration proceedings shall be conducted in accordance with this provision of the Indian Arbitration & Conciliation Act, 1996 and the venue of such arbitration shall be city of New Delhi only.”

10. Hence, in view of the above arbitration clause, the parties have to endeavour to resolve the matter amicably and if the same remains unresolved within 30 days of the matter being raised by either party, either party may refer the dispute for settlement by arbitration. The bone of contention is as to whether the petitioner followed the above stated procedure.

11. Reference may be had to the notice invoking the arbitration clause on 02.01.2017 sent by the petitioner. The relevant clause of the said notice reads as follows:

“10. As stated above, Siemens has repeatedly called upon you to reconcile accounts and make payments, and you have failed to

take any steps to amicably resolve the disputes that have arisen. Notwithstanding this, we hereby invoke the arbitration clause contained in the Contracts and provide you with a period of 30 days to resolve the dispute raised by Siemens. In this regard, please communicate with Ashish Mathur/Milind Wasekar in Siemens, Gurgaon office.

11. In the event you fail to resolve these disputes amicably, treat this notice as a notice invoking arbitration under both Contracts. We expressly reserve our client's rights to raise all claims arising under the Contracts in the arbitral proceedings, including by modifying, amending or adding to the claims asserted in this notice. We nominate Justice (Retd.) Vikramjit Sen as an arbitrator, and call upon you to nominate an arbitrator in accordance with the terms of the Contracts and the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time.”

12. As per the above notice, the case of the petitioner is that they have been attempting to settle the matter with the respondent. They have further stated that the parties have failed to resolve the disputes amicably. They further state that they further provide a period of 30 days to resolve the disputes between the parties and mention the names of two officials in their Gurgaon Office who can be communicated for the purpose of settling the disputes. They have also nominated their own arbitrator and have requested the respondent to also nominate their own arbitrator.

13. It is also admitted that a settlement meeting took place between the parties on 16.02.2017. The petitioner has filed this petition on 11.04.2017, though the affidavit in support is dated 27.03.2017.

14. The Supreme Court in *Visa International Ltd. v. Continental Resources (USA) Ltd.*(supra) was dealing with an arbitration clause, which reads as follows:

“11. The disputed arbitration clause in the present case reads as under:

Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996.”

15. It had been pleaded by the respondent that the above clause is not an arbitration clause and is incapable of being enforced. The Supreme Court held as follows:

26. The submission is unsustainable for more than one reason. No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.

27. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties. The respondent in none of its letters addressed to the applicant suggested that the dispute between the parties is required to be settled through conciliation and not by arbitration. In response to the applicant's letter invoking the arbitration clause the respondent merely objected to the names inter-alia contending the suggested arbitration would not be cost effective and the demand for arbitration itself was a premature one.

.....

30. In the present case as is evident from Clause VI of the agreement the parties intended to settle the disputes amicably among themselves and only in case of failure the disputes were required to be settled in accordance with the provisions of the Act. It is clearly evident from the language employed in Clause VI that on failure to settle the disputes amicably the parties intended to invite a binding verdict in accordance with the provisions of the Act. The parties never intended to go through

the conciliation proceedings even after their failure to arrive at an amicable settlement among themselves. It is pertinent to observe that the respondent never initiated any conciliation by sending any written invitation to conciliate under Part III of the Act. In the circumstances, it is impossible to accede to the submission that the parties intended to settle their future disputes arising out of the agreement through conciliation.

.....

36. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties at pages 54-77 of the Paper-book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other. In this regard a reference may be made to the letter dated 15th September, 2006 from the respondent herein in which it is inter-alia stated "...since February, 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and MOU was signed between parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the above mentioned agreements were executed." In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any Funding Schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke arbitration clause."

16. Hence, the Supreme Court for a somewhat similar clause has noted that exchange of letters between the parties discloses an attempt being made

for amicable settlement without any result leaving no option to one of the parties but to invoke the arbitration clause.

17. In *Ravinder Kumar Verma v. BPTP Ltd.*(supra), this court was dealing with the following clause:

“All and any disputes arising out of or touching upon or in relation to the terms of this application and/or Standard Floor Buyer's Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a sole arbitrator appointed by the Company. The applicant(s) hereby confirms that he/she shall have or raise no objection to this appointment. The Courts at New Delhi alone shall have the jurisdiction in all matter arising out of/touching and/or concerning this application and/or Floor Buyers agreement regardless of the place of execution of this application which is deemed to be at New Delhi.”

While interpreting the above clause, this court held as follows:

“8(i). In my opinion, there are two other reasons, and which are in addition to the reasoning given in the case of *Saraswati Construction Co. (supra)* for holding that a prior requirement to be complied with before seeking reference of disputes to the arbitration is only directory and not mandatory

(ii) The first reason is that if the arbitration clause is read in a mandatory manner with respect to prior requirement to be complied with before invoking arbitration, the same can result in serious and grave prejudice to a party who is seeking to invoke arbitration because the time consumed in conciliation proceedings before seeking invocation of

arbitration is not exempted from limitation under any of the provisions of the Limitation Act, 1963 including its Section 14. Once there is no provision to exclude the period spent in conciliation proceedings, it is perfectly possible that if conciliation proceedings continue when the limitation period expires the same will result in nullifying the arbitration clause on account of the same not capable of being invoked on account of bar of limitation i.e when proceedings for reference to arbitration are filed in court, the right to seek arbitration may end up being beyond three years of arising of the disputes and hence the petition for reference may be barred by limitation. Another example would make this position clear that suppose on the last date of limitation period of three years a party wants to invoke an arbitration clause but the arbitration clause contains the requirement of invoking the precondition of 'mutual discussion'. Surely, on the last date if a notice has to be given for invoking mutual discussion, no mutual discussion or conciliation can take place on the same date of the notice itself i.e., no mutual discussion can take place before expiry of the period of limitation which expires on that very day on which the notice for mutual discussion is given. Therefore, if the pre-condition of mutual discussion is treated as mandatory, valuable rights of getting disputes decided by arbitration will get extinguished and which is not a position which should be acceptable in law.

9 (i). Any doubt on this aspect as to whether conciliation proceedings as required by an arbitration clause are directory or mandatory is removed when we refer to Section 77 of the Act, and which is the second reason that the precondition of mutual discussion is only a directory requirement and not a mandatory one. Section 77 of the Act states that in spite of conciliation proceedings going on, the existence of the same will not prevent any of the parties to exercise its rights in accordance with law. Section 77 of the Act reads as under:-

“Section 77. Resort to arbitral or judicial proceedings.- The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.”

(ii) Section 77 of the Act specifically uses the expression proceedings which are necessary for preserving rights and therefore if rights are to be preserved on account of limitation expiring, because after expiry of the period of limitation arbitration clause cannot be invoked either by filing of a petition under Section 8 of the Act or under Section 11 of the Act, therefore, existence of conciliation proceedings or mutual discussion should not be a bar for enforcing rights to arbitration either by filing a petition under Section 11 of the Act or by seeking to get the suit dismissed by filing an application under Section 8 of the Act because such proceedings are necessary to preserve rights of getting the disputes decided by arbitration.”

18. Clause 11 and 14 of the agreements between the parties merely states that the parties shall endeavour to resolve amicably all disputes. It provides a period of 30 days for trying to resolve the said disputes. Other than that no specific procedure is prescribed as to how the parties are to try and resolve the disputes. As per the judgment of the learned Single Judge of this court in the above case of ***Ravinder Kumar Verma v.BPTP Ltd.(supra)*** the procedure for amicable settlement as provided in said clause 11 and 14 of the Agreement would be merely directory and in case of failure of the petitioner to abide by those terms, no fault could be found in the act of the petitioner in invoking the arbitration clause and filing of the present petition.

19. Apart from the above, in my opinion, in any case the petitioners have complied with the requirements stated in clause 11 and 14 of the Agreement.

20. I may note that in the petition, the petitioner has pointed out that the petitioner has been continuously writing to the respondent to release its pending dues and settle the claims arising out of the contract. Letters were sent on 01.07.2016, 26.07.2016 and 30.11.2016. Various e-mails have been sent by the petitioner which have not been replied to by the respondent.

21. None of these facts have been rebutted by the respondent in their reply affidavit. Hence, it is not as if even prior to invocation of arbitration clause on 02.01.2017, attempts were not made to resolve the disputes between the parties. Even from the date of the letters dated 1.7.2016, 26.7.2016 and 30.11.2016 thirty days' time has lapsed since the matter was raised by the petitioner.

22. It is also noteworthy that on receipt of notice dated 02.01.2017 the respondent never protested saying that the invocation is premature and that the parties should first try and resolve the disputes amicably. In fact, the parties did seek to resolve the disputes. The stated requirement was that the parties shall endeavour to amicably resolve their disputes. If the matter was not resolved within 30 days, the dispute may be referred to Arbitration. In my opinion, an attempt to resolve the dispute has been made. Parties had met on 16.02.2017 for the said purpose. The period of 30 days lapsed thereafter without any settlement. The said notice dated 02.01.2017 and the subsequent meeting that took place between the parties on 16.02.2017 was sufficient compliance of clause 11 and 14 of the contract regarding an attempt to amicably settle the disputes. Despite lapse of 30 days from the date of attempt to settle amicably the dispute, the respondent took no steps to nominate their Arbitrator. Notice of invocation was sent on 02.01.2017 and

the present petition was filed on 11.04.2017. The respondents have clearly defaulted.

23. I may look at the judgments relied upon by the learned counsel for the respondent. In the case of ***Golden Infracon Pvt. Ltd. vs. State Infrastructure & Industrial Development Corporation of Uttarakhand Ltd.(supra)***, the Uttarakhand High Court was dealing with an arbitration clause where the arbitrator was to be nominated by the Managing Director of the Lessor within 30 days from the date of receipt of a request . The petitioner in that case moved an application before the Managing Director not for appointment of an arbitrator but for giving its consent for the arbitrator who was suo moto appointed by the applicant himself in violation of the terms of the agreement. In those facts, the Uttarakhand High Court held that the petitioner had not followed the appointment procedure agreed upon by the parties and dismissed the application.

24. In the case of ***M/s. Simpark Infrastructure Pvt.Ltd. vs. Jaipur Municipal Corporation (supra)*** the Jaipur Bench of Rajasthan High Court was dealing with a clause in the agreement which stipulated that in case of a dispute, either party may require the disputes to be referred to the named authority for amicable settlement. It is further stated that upon such reference, the two parties shall met within seven days of the reference to discuss and attempt to amicably resolve the disputes. The petitioner not having followed that procedure, the application of the petitioner was dismissed as premature. The Court took the view that the stated procedure for amicable settlement is a condition precedent for invoking the arbitration clause.

25. As already noted above, in my opinion, clause 11 and 14 of the agreement between the parties which is the arbitration clause does not have any such procedure to amicably resolve the disputes other than stating that an attempt shall be made to amicably resolve the matter. The above judgment has no application to the facts of this case.

26. In the case of *Datar Switchgears Ltd. vs. TATA Finance Ltd.*(*supra*) the Supreme Court held as follows:-

“19. So far as cases falling Under Section 11(6) are conceded - 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.

27. The legal position that follows from above is that where one party demands the opposite party to appoint an Arbitrator and the opposite party does not make an appointment within thirty days of the demand, the right of appointment gets forfeited in case the first party moves the Court under

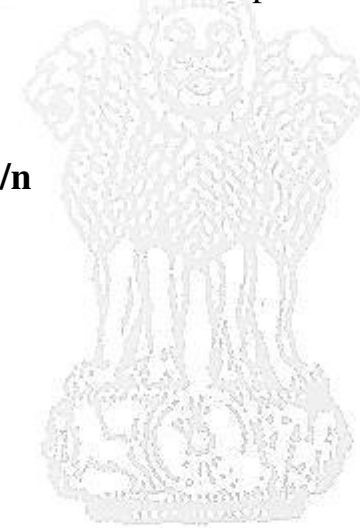
section 11 of the Act. In the present case, despite receipt of notice of invocation dated 3.1.2017 and despite lapse of thirty days from the date an attempt was made to resolve disputes in the meeting held on 16.2.2017, no steps were taken by the respondents to nominate its Arbitrator. The respondent hence forfeited its right to appoint an Arbitrator on its behalf.

28. Accordingly, the present petition is allowed.

29. I nominate Mr. Justice Anil Kumar (Retd.) (Mobile: 9818000140) as an arbitrator on behalf of the respondent. The learned arbitrators may take steps for nominating the third arbitrator, as per law.

(JAYANT NATH)
JUDGE

JANUARY 30, 2018/rb/v/n



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