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

Date of decision: 1st November, 2018

+ ARB.P. 777/2018

VASCULAR THERAPEUTICS INDIA PVT. LTD.

..... Petitioner

Through: Mr.Sandeep Narain, Ms.Asha
Goplan Nair, Ms.Ashwarya
Gopakumar and Ms.Nivedita
Nair, Advs.

versus

INDIA MEDRONIC PRIVATE LIMITED & ANR

..... Respondents

Through: Mr.Suhail Dutt, Sr. Adv.with
Mr.Rajiv Mohan Brahma,
Mr.Kushagra Sah and Mr.Azhar
Alam, Advs. for R-1.
Mr.A.S. Mathur, Ms.Priya Singh,
Ms.Sweta Singh and
Ms.Deepabali Datta, Advs. for
R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner praying for a direction to the respondent no.2 to appoint an Arbitral Tribunal in accordance with the Arbitration Agreement as contained in Clause 15.2 of the Distribution Agreement dated

17.11.2014 executed between the petitioner and Covidien Healthcare India Private Limited, which has merged into respondent no.1.

2. Clause 15.2 of the Distribution Agreement is reproduced hereinbelow:

“15.2 Arbitration

(a) Any dispute arising out of or relating to this Agreement, if not finally settled by mutual agreement of the Parties within 25 Business Days of the first meeting referred to in Clause 15.1, may be referred by any Party to and, if so referred, finally resolved by arbitration in the Jurisdiction in accordance with the UNCITRAL Rules of Arbitration by a panel of 3 arbitrators appointed by the arbitration body specified in Item 11 of Schedule 1. All hearings and proceedings shall be conducted in the English language.

(b) The cost of the arbitration shall be shared equally by the Parties, unless otherwise determined by the arbitration tribunal in writing. Each Party shall be responsible for its own costs relating to its claim or defence, including legal fees, witness fees, discovery related charges, and travel expenses.

(c) The Parties shall be bound by any decision of the arbitration tribunal. Such decision can be registered and enforced in any country where any Party is authorised to carry on business, subject to the applicable laws and regulations governing the registration and enforcement of arbitral judgments.”

3. Clause 11.8 of the Schedule 1 is reproduced hereinbelow:

“11.8 Arbitration

Arbitration body:

Indian Council of Arbitration”

4. In terms of the Arbitration Agreement therefore, the Arbitral Tribunal consisting of three Arbitrators was to be appointed by the

Indian Council of Arbitration (ICA), that is, respondent no.2

5. The disputes having arisen between the parties, Covidien Healthcare India Private Limited invoked the Arbitration Agreement vide its letter dated 20.09.2017 and requested respondent no.2 to *inter-alia* provide an updated list of names in the panel of Arbitrators to enable it to appoint its nominee Arbitrator. Instead of sending the notice of this request to the respondent or seeking its opinion on its nominee Arbitrator, ICA vide its notice dated 10.01.2018 sent through e-mail of the same date and by a notice dated 11.01.2018 informed the parties, that is the petitioner and the respondent no.1, of the constitution of the Arbitral Tribunal consisting of the nominee Arbitrator of the petitioner and the respondent no.1 and the Presiding Arbitrator.

6. The counsel for the respondent no.2 admits that no notice was served on the petitioner before appointing the Arbitrators nor any nomination was sought from the petitioner for its nominee Arbitrator.

7. It appears that the Arbitral Tribunal called upon the parties to appear before it on 05.05.2018 for the First Preparatory Conference. However, as one of the Arbitrators was not present in such meeting, the same was deferred. The Second Preparatory Conference was called for on 23.06.2018, however, was thereafter shifted to 28.07.2018, first at the request of the respondent no.1 and thereafter at the request of the petitioner.

8. In the Second Preparatory Meeting held on 28.07.2018 the Arbitral Tribunal apart from declaring the seat of the Arbitration to be at Delhi and fixing its fee, sought consent letters from the parties to their appointment.

9. Admittedly, no such consent letter was given by the petitioner, instead, the petitioner vide letter dated 20.08.2018 addressed to the respondent no.2 challenged the procedure adopted by the respondent no.2 for appointing the Arbitral Tribunal and requested it to direct the Arbitral Tribunal to defer further hearing as it proposed to approach the High Court for appropriate orders. The respondent no.2 vide its letter dated 21.08.2018, in turn, forwarded the said letter to the Arbitral Tribunal.

10. The Arbitral Tribunal by the letter dated 30.08.2018 forwarded a decision taken by it on 28.08.2018 *inter-alia* recording as under:

“2. The Arbitral Tribunal is given to understand that whereas the claimant has offered to pay its share of the aforesaid "first advance towards the costs of arbitration", the respondent has depicted its disinclination in the matter.

3. In the circumstances, the claimant will at its earliest pay in full, the aforesaid "first advance towards the costs of arbitration".”

11. Counsel for the petitioner submits that no formal hearing was scheduled for 28.08.2018 nor any notice in this regard was received by the petitioner. This is not disputed by the senior counsel appearing for the respondent no. 1.

12. It appears that the respondent no.1 thereafter paid the fee as demanded by the Arbitral Tribunal and the Arbitral Tribunal on 16.09.2018 fixed the schedule of completion of pleadings and filing of documents and fixed 28.08.2018 as date of hearing. It is at this stage that the petitioner filed the present petition challenging the appointment of the Arbitral Tribunal and seeking a direction for the respondent no.2

to appoint an Arbitral Tribunal in accordance with the Arbitration Agreement between the parties.

13. Counsel for the petitioner submits that as provided in Article 9 of UNCITRAL Arbitration Rules, where the Arbitral Tribunal is to be consist of three Arbitrators, each party is to appoint one Arbitrator and it is only upon failure of the second party to appoint an Arbitrator within 30 days after receipt of first party's notification of the appointment of an Arbitrator, that the first party may request the Appointing Authority to appoint the second Arbitrator. He submits that as no such notice was issued to the petitioner by the respondent no. 1, no failure to appoint an Arbitrator can be attributed to the petitioner thereby empowering the respondent no.2 to appoint a nominee Arbitrator on behalf of the petitioner. In this regard he further placed reliance on the ICA Rules of Domestic Commercial Arbitration and specifically Rules 23(b) thereof, which reads as under:

“23(b) Where the reference is to three Arbitrators, the Registrar shall in the first instance call upon the parties to nominate one arbitrator each from among the Panel of Arbitrators by a notice in writing, sent to them. The said notice shall specify the period within which the nomination shall be made which shall not be more than thirty days from the date of the said notice to the respective Parties. If a Party to the dispute refuses or neglects to appoint an arbitrator on his behalf within the period specified or if he requests the Registrar to nominate an arbitrator on behalf of that party, the Registrar in consultation with the Chairman of the Arbitration Committee and in his absence in consultation with the members of the Governing Body designated by the Chairman shall appoint the arbitrator from the Panel of arbitrators on behalf of that party. On receipt of the

nominations from the respective parties or on the appointment as aforesaid by the Registrar, the Registrar shall appoint another person as the Presiding Arbitrator of the arbitral tribunal in consultation with Chairman of the Committee and in his absence in consultation with members of the Governing Body designated by the Chairman, from among the panel of arbitrators to be: additional arbitrator to act as Presiding Arbitrator of the arbitral tribunal.”

14. He submits that the Arbitral Tribunal has not been constituted in accordance with the Arbitration Agreement between the parties and is a nullity and therefore, this Court has the jurisdiction to issue a direction as prayed for.

15. Learned senior counsel appearing for the respondent no.1 submits that the appointment of the Arbitral Tribunal is in accordance with the Clause 15.2 of the Distribution Agreement which provides that the Arbitrator shall be appointed by the respondent no.2. The Arbitration Agreement does not require respondent no.2 to seek consent of such appointment from the parties to the Distribution Agreement. He further submits that the petitioner had participated in the arbitration proceedings without any demure or protest. He submits that even otherwise, on account of delay in raising objection to the constitution of said Arbitral Tribunal, in terms of Section 4 of the Act, the petitioner is debarred from maintaining the present petition. He further submits that the Arbitral Tribunal having been already constituted, the petition under Section 11 of the Act would not be maintainable and the remedy of the petitioner, if any, has to be in form of an application under Section 13 of the Act before the Arbitral Tribunal itself. For this, he relies upon

the judgment of the Supreme Court in *Antrix Corporation Ltd. v. Devas Multimedia P. Ltd.*, MANU/SC/0514/2013.

16. Learned counsel appearing for the respondent no.2 also submits that in terms of the Arbitration Agreement between the parties the respondent no.2 was not to consult the parties before making the appointment of the Arbitrators for the constitution of the Arbitral Tribunal. He admits that no notice seeking concurrence or suggestion on the names of the Arbitrators was issued to either party before appointing the Arbitral Tribunal.

17. I have considered the submissions made by the counsels for the parties. Clause 15.2 as reproduced above, nominates the respondent no.2 as the Appointing Authority. In terms of Article 9 of the UNCITRAL Arbitration Rules, which are made applicable to the arbitration proceedings between the parties, a three member Arbitral Tribunal is to be formed with each party nominating one Arbitrator and the two nominated Arbitrators appointing the Presiding Arbitrator. Article 9 of the UNCITRAL Rules reads as under:

“Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator

shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.”

18. Rule 23(b) of the ICA rules also provides for a similar procedure to be followed by the ICA while making appointment of the Arbitral Tribunal.

19. The designation of the respondent no.2 as the Appointing Authority, cannot allow the respondent no.2 to deviate from its own procedure of appointment. Rule 21 of the ICA rules also designates the Registrar of the ICA to be the Appointing Authority for the Arbitral Tribunal. However, the Registrar has to follow the procedure as mentioned in Rule 23 of the said Rules. I cannot agree with the submission made by the counsel for the respondents that ICA was not bound by its own rules of arbitration while making the appointment of the Arbitral Tribunal in terms of the Arbitration Agreement. Once the parties have bestowed the function of appointment of the Arbitral Tribunal to the respondent no.2, it is deemed to have also agreed to the procedure of the appointment that is prescribed in its Rules or is generally followed by the said institution. The Institution cannot act de hors its own rules and Act in complete contravention thereof.

20. In the present case, as the respondent no.2 did not follow the procedure as stipulated in the UNCITRAL Arbitration Rules that were expressly made binding on the arbitration proceedings between the parties and/or ICA Rules, the constitution of the Arbitral Tribunal was itself a nullity and without any legal effect.

21. Infact the respondent no.1 in its request for appointment of the

Arbitral Tribunal made to the respondent no.2 itself had sought a panel of Arbitrators from the respondent no.2 to choose its nominee Arbitrator. Further the appointment letter also suggests that the Arbitrators have been appointed as nominee Arbitrators for the petitioner and the respondent no.1 respectively. Who nominated these Arbitrators is, therefore, a mystery because no consent or consultation was made by the respondent no.2 with the petitioner or respondent no.1 before making such appointment.

22. In ***Dharma Prathishthanam v. Madhok Construction (P) Ltd.***, (2005) 9 SCC 686, the Supreme Court has held that where the constitution of the Arbitral Tribunal is itself a nullity all proceedings conducted by it would equally be null and void and with no legal effect.

23. As far as the objection of the learned senior counsel for the respondent no.1 relying upon Section 4 of the Act is concerned, I may only note that the Arbitral Tribunal in the Second Preparatory Conference held on 28.07.2018 had sought consent of the parties to their appointment. The petitioner had by its letter dated 20.08.2018 protested against the appointment of the Arbitral Tribunal to the respondent no.2. Section 4 of the Act is reproduced hereinbelow:

“4. Waiver of right to object.—A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so

object.”

24. In the present case, as the constitution of the Arbitral Tribunal itself was a nullity and the petitioner had protested against such appointment without any undue delay after the proceedings held on 28.07.2018, in my view such appointment of the Arbitral Tribunal cannot be ratified by relying upon Section 4 of the Act. It may be correct to state that the petitioner could have protested even prior to the Second Preparatory Conference, however, in my view that itself cannot again justify a wrongful appointment of the Arbitral Tribunal by the respondent no.2 or bar the petitioner from raising an objection against the same.

25. As far as the maintainability of the present petition is concerned, as the Arbitral Tribunal itself has been found to be invalidly constituted, petition under Section 13 of the Act would have no application. There is infact, no Arbitral Tribunal in existence in the eyes of law. The judgment of the Supreme Court in ***Antrix Corporation Ltd.***(supra) would, therefore, have no application to the facts of the present case.

26. In view of the above and as the existence of the Arbitration Agreement and due invocation thereof by the respondent no.1 is not denied, with the consent of the parties and at their request, instead of directing the respondent no.2 to appoint a three member Arbitral Tribunal, a Sole Arbitrator is hereby appointed for adjudicating the disputes that have arisen between the parties in relation to the Distribution Agreement dated 17.11.2014.

27. I appoint **Justice R.C. Chopra**, Retired Judge of this Court (N-7, Greater Kailash-I, New Delhi- 110048, Ph: 29248111, 32554242, 9818097777) as the Sole Arbitrator.

28. The Arbitrator shall give disclosure under Section 12 of the Act before proceeding with the reference.

29. The respondent no.1 shall be at liberty to file a copy of the Statement of Claim already filed by it before the earlier Arbitral Tribunal before the Sole Arbitrator.

30. Learned senior counsel for the respondent no.1 submits that the respondent no.1 has already paid the fee as demanded by the earlier Arbitral Tribunal. As the constitution of the Arbitral Tribunal itself has been held to be a nullity, the respondent no. 1 shall be entitled to seek appropriate order from the Arbitral Tribunal regarding the fee so paid and the application, if made, shall be appropriately considered by the said Arbitral Tribunal.

31. The petition is disposed of in the above terms, with no order as to cost.

Dasti.

NAVIN CHAWLA, J

NOVEMBER 01, 2018/Arya