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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 26th February, 2018
Pronounced on: 09th March, 2018**

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ARB.P. 824/2017

GMR AMBALA CHANDIGARH EXPRESSWAYS PVT LTD

..... Petitioner

Through : Mr.Atul Sharma, Mr.Sarojanand
Jha, Mr.Yash Srivastava and
Mr.Siddharth Mehra, Advs

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ORS

..... Respondents

Through : Mr.Nishant Anand, Adv. for R-1.
Dr.Ashwinie Kumar Bansal and
Mr.Pankaj Mehta, Advs. for R-2
&3.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This is a petition under Section 11 (6) read with Section 15 (2) of the Arbitration and Conciliation Act, 1996.

2. It is submitted by learned counsel for the petitioner that in May, 2005 respondent No. 1 invited bids from interested parties for Improvement Operation and Maintenance including Strengthening and Widening of Existing 2 lane Road to 4 lane Dual Carriageway from (i). km 5.735-km 39.960 of NH-22 and (ii) km 0.00 to km 0.871 of NH-21 (Ambala Chandigarh Section) in

the States of Haryana and the State of Punjab ("Project Highway") on BOT basis. On 29.06.2005 Respondent No. 1 issued Letter of Acceptance to the Petitioner's Consortium. On 16.11.2005 Respondent No. 1 entered into a Concession Agreement with the Petitioner. On 21.02.2006 Petitioner, Respondent No. 1 and Respondent No. 3 entered into State Support Agreement. On 08.03.2006 Petitioner, Respondent No. 1 and Respondent No. 2 entered into State Support Agreement. On 14.11.2008 Commercial Operations were commenced on the Project Highway.

3. It is further submitted that in 2006-2010 Respondent No. 2 and 3 developed, improved and strengthened peripheral roads around the Project Highway in breach of the State Support Agreement and the Concession Agreement resulting in traffic deviation from the Project Highway causing huge revenue loss to the Petitioner. On 17.02.2010 Petitioner raised a dispute and filed a claim with the Respondent No. 1. On 05.08.2011 Respondent No. 1 rejected the request of the Petitioner for determination of compensation/loss. In August 2011 Petitioner filed a Writ Petition before the High Court of Delhi being W.P. (C) No. 5804/2011 challenging the letter dated 05.08.2011.

4. On 20.09.2011 W.P. (C) No.5804/2011 was filed for appointment of an arbitrator and it was disposed of by directing that in view of the arbitration clause in the State Support Agreements, Petitioner nominates one Arbitrator for both arbitral tribunals, Respondent No. 1 nominates one Arbitrator for both

Arbitral Tribunals and Respondent No. 2 and 3 jointly nominate the same person as the Arbitrator for both Arbitral Tribunals.

5. On 31.10.2011 pursuant to the order dated 20.09.2011, the Petitioner nominated Justice R.C. Lahoti (Retd.) as its nominee arbitrator in both the arbitral tribunals. On 30.11.2011 pursuant to the order dated 20.09.2011, the Respondent No. 1 appointed Justice S.P. Bharucha (Retd.) as its nominee arbitrator in both the arbitral tribunals. On February, 2012 upon failure of the Respondent No. 2 and 3 to appoint an arbitrator in terms of the order dated 20.09.2011, the Petitioner filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 before the this Court being Arbitration Petition No. 69 of 2012.

6. It is further submitted by learned counsel for the petitioner that on 18.5.2012 this Court in Arbitration Petition No. 69 of 2012 under Section 11 of the Arbitration and Conciliation Act, 1996 appointed Hon'ble Dr. Justice A.S.Anand (Retd.) as common nominee arbitrator on behalf of Respondent No. 2 and 3 in the both the arbitral tribunals. On 8.6.2015 during the course of arbitration proceedings, Mr. Justice S.P. Bharucha tendered his resignation as an arbitrator from the arbitral tribunals citing personal reasons. On 23.6.2015 Respondent No. 1 appointed Shri Shishir Kumar Naik, IAS (Retd.) as the substitute arbitrator in place of Mr. Justice S.P. Bharucha in both the arbitral tribunals. On 4.10.2015 Mr. Justice R.C. Lahoti tendered his resignation from the arbitral tribunal citing paucity of time. On 6.10.2015 petitioner appointed Mr. Justice Deepak Verma as the substitute arbitrator in place of Mr.

Justice R.C. Lahoti. On 1.12.2017 Mr. Justice A.S. Anand (Retd.) expired, hence this petition.

7. Notice of the petition was issued and the respondent has now appeared before the Court and have stated that they have appointed Mr.J.S.Khehar, Chief Justice of India (Retd.) as their nominee arbitrator.

8. Learned counsel for the petitioner have objections to it and he submits that since an arbitrator has been appointed by the Court and since the respondent No.2 and 3 failed to appoint an arbitrator at the initial stage, now only the Court under Section 11 has power to appoint the arbitrator and the procedure in the arbitration clause would not apply. In support of its contentions the learned counsel for the petitioner has referred to *Mithilesh Kumar Aggarwal V. Athena Infrastructure Ltd.* MANU/DE/5972/2017 decided on 23.03.2017, wherein it was held as under :

6. The Supreme Court in Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and Anr. (2006) 6 SCC 204 had interpreted Section 15(2) of the Act liberally and had explained that the provision applicable for appointment of the substitute arbitrator would be the same as "at the initial stage". Thus, the expression "rules" in Section 15(2) of the Act, was read to imply that the same procedure which was applicable for appointment of an arbitrator, who is sought to be substituted, would be applicable for appointment of the substitute arbitrator.

7. In The Chhotanagpur Regional Handloom v. Association of Corporation and Apex:

Manu/DE/2600/2008, a Coordinate Bench of this Court while considering the applicability of the provisions of Section 15(2) of the Act in context of the petition filed under Section 14 of the Act, rejected the contention that after the mandate of the arbitral tribunal was declared as terminated under Section 14 of the Act, the parties were to be relegated to start the process under the original agreement and this Court ought not to proceed to appoint a substitute arbitrator. The Court referred to the decision of the Supreme Court in Yashwith Constructions (supra) and held that Section 15(2) of the Act has to be viewed as a part of a broader effort to strengthen the alternative dispute resolution mechanism rather than undermine it. Relegating the parties to commence the process once again may lead to confusion and may in certain circumstances compel one of the parties to again approach the Court under Section 11(6) of the Act which could not be the legislative intent. The Court held that Section 15(2) required the Court to appoint an arbitrator as a logical sequitur to Section 14 of the Act.

8. In *Ramjee Power Construction Ltd. v. Damodar Valley Corporation*: (2009) 2 Arb LR 625, the Calcutta High Court considered the decision of the Supreme Court in *Yashwith Construction* (supra) and observed as under:-

"As observed above, the expression "rules that were applicable to the appointment of the arbitrator being replaced" in section 15, have carefully been chosen. If the arbitrator being replaced was appointed by the Chief Justice and/or his designate in accordance with section 11 of the 1996 Act read with the applicable rules, the substitute arbitrator would also have to

be appointed by the Chief Justice and/or his designate in the same manner."

9. The Calcutta High Court following the decision of the Supreme Court in Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.: (2002) 8 SCC 151, held that once an application under Section 11 was made, the right of either party to appoint an arbitrator stood extinguished. In view of the aforesaid, the Court reasoned that if the arbitrator is appointed in accordance with Section 11 of the Act, the substitute arbitrator would also have to be appointed in the same manner. This Court respectfully concurs with the aforesaid view.

9. However, learned counsel for the respondent has relied upon *NHAI & Anr. V. Bumihway DDB Ltd. (JV) & Ors.* 2006 (10) SCC 763 to say that even if the arbitrator is appointed by the Court but if the vacancy has arisen because of his retirement or his resignation then procedure in the arbitration clause would apply. Reference has been made to the following paras :

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b) Whether on resignation of one of the arbitrators, the statutory provision that comes into play is Section 15(2) or Section 11(6) of the Arbitration and Conciliation Act, 1996?

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22. *Reliance was placed on the case of Yashwith Construction P. Ltd. Vs Simplex Concrete Piles India Ltd & Anr., 2006 (7) Scale 48 (at para 4) wherein this Court had held that "The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1) (a) of the Act*

and therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced." However, the process which had been reinitiated by the two nominated arbitrators was restrained by the High Court vide order dated 9-9-2005. It is pertinent to mention that the re-initiation of the process of appointment was accepted by the Respondents as is evident from the rejoinder filed by them before the High Court.

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28. *Learned Solicitor General appearing for the appellants argued that on the resignation of an arbitrator, the statutory provision which steps in is only Section 15(2) and not Section 11(6). Hence, after the resignation of Mr. Justice Y. Bhaskar Rao, the process of appointment had restarted as per Section 15(2). However, the concerned institution i.e. IRC being restrained by the High Court from making the appointment, there was no failure on the part of the concerned institution i.e. IRC so as to justify invocation of Section 11(6).*

29. *Reliance was placed on the case of Yashwith Construction P. Ltd. vs. Simplex Concrete Piles India Ltd. & Anr. (supra) wherein this Court had reiterated the well settled law and held that there was no failure on the part of the concerned party as per arbitration agreement, to fulfill his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party had failed to act in terms of the arbitration agreement. In the light of the legal position, it was submitted*

that the impugned order is wholly erroneous and liable to be set aside.

30. In our view, the invocation of Section 11(6) of the Arbitration & Conciliation Act, 1966 is squarely based on a default of a party. The ratio laid down in the case of Datar Switchgear Ltd. vs. Tata Finance Ltd. & Anr. (2000) 8 SCC 151 is the correct proposition and the case of Punj Lloyds Ltd. vs. Petronet MHB Ltd. (supra) followed Datar Switchgear. The question arises for consideration here is who had defaulted and on what basis of default has the Court entered jurisdiction under Section 11(6). This question though raised by the appellant in the counter affidavit before the High Court has not been answered at all. Hence, the assumption of jurisdiction and adjudication by the High Court, in our opinion, is vitiated.

10. However, if one may look into paras 4, 9, 26 & 40 of the same judgment one finds the facts are little different Bhumihway case (supra). Para 4 gives the relevant arbitration clause which is as under:

“4. On 11.06.2001, the appellants entered into an agreement with respondent No.1 for the aforesaid contract. The contract agreement contained a mechanism for resolution of disputes between the parties as contained in Sub-Clause 67.3 Sub-Clause 67.3 reads as follows:

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall

act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the President, Indian Roads Congress.”

“9. Mr.D.P.Gupta, vide letter dated 15.04.2005, disagreed with the names proposed by respondent No.3. Thereafter, in view of the disagreement between the two nominated arbitrators, respondent No.1 sought clarification from respondent No.2 herein vide its letter dated 29.04.2005. Respondent No.1 requested respondent No.2 if any judicial arbitrator is available with them for the purpose of nomination as Presiding Arbitrator. It was pointed out that respondent No.1 never sought any intervention of respondent No.2 for appointment of the Presiding Arbitrator rather it only sought clarification in this regard. Vide letter dated 03.05.2005, respondent No.2 - Indian Road Congress (IRC) informed respondent No.1 that there does not exist any judicial arbitrator in its panel. Thereafter, respondent No.1 filed Arbitration Petition No. 23 of 2005 before the High Court under Section 11(6) of the Arbitration & Conciliation Act,1996 (hereinafter referred to as "the Act") requesting for the appointment of the Presiding Arbitrator. The said petition, according to the appellants, was in gross violation of the statutory provisions of Section 11(6) as also against the contractual terms agreed to between the parties without making any reference to respondent No.2 for the appointment of the Presiding Arbitrator.

26.It is pertinent to state that under Section 11(6) of the Act, the Court has jurisdiction to make the appointment only when the person including an

institution, fails to perform any function entrusted to it under that procedure. In the present case, the relief claimed by the respondents by invoking Section 11(6) is wholly erroneous as prior to the order dated 1.7.2005, the respondents only sought a clarification from IRC and without making a reference to them, immediately filed the petition under Section 11(6) on the purported ground that the Indian Road Congress had failed to make the appointment within the stipulated time. Therefore, the reliance placed by the respondent on the judgment of this Court in the case of Punj Lloyd Ltd. vs. Petronet MHB Ltd., (2006) 2 SCC 638 is wholly erroneous and is not applicable to the facts of the present case.

40.As rightly pointed out by the appellants, the High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the Presiding Arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only respondent No.2 was authorized to make the appointment. Unless respondent No.2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Respondent No.1 has wrongly invoked the jurisdiction of this Court without first following the procedure agreed to between the parties. Thus no cause of action had arisen in the facts of the case to seek the appointment from the High Court under Section 11(6) of the Act and thus the said petition was premature. The High Court also is not correct in relying on the contention of the respondent No.1 that in case one of the arbitrators is retired Chief Justice, the Presiding Arbitrator should be at least a retired Chief Justice or a retired Judge of a High Court with considerable experience. It was submitted by learned Solicitor General appearing for the appellants that the said

finding of the High Court is self contradictory inasmuch as if the Presiding Arbitrator is a retired Judge of the High Court and one of the arbitrators is a retired Chief Justice of the High Court, the member of hierarchy is upset. Even otherwise, there does not exist any such provision in law which requires that if one of the arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong.”

11. In *Union of India vs. Bharat Battery Manufacturing Co.(P) Ltd.* (2007) 7 SCC 684 the court held as under:

“9. We are unable to countenance with the submission of the learned counsel for the appellant. Section 11(8) of the Act could have come to the aid of the appellant had the appellant appointed the arbitrator within 30 days from the date of receipt of request to do so from the respondent or the extended time as the case may be. In the present case, as noticed above, Section 11(6) petition was filed on 30.3.2006 by the respondent. The appellant stated to have appointed one Dr. Gita Rawat on 15.5.2006, i.e. after Section 11(6) petition was filed by the respondent on 30.3.2006, which is not permissible in law. In other words, the appellants are stopped from making an appointment of the arbitrator in terms of Clause 24 of the agreement after Section 11(6) petition is filed by the respondent. Once Section 11(6) petition is filed before the Court, seeking appointment of an arbitrator, the power to appoint

an arbitrator in terms of arbitration clause of the agreement ceases.

12. A three-Judge Bench of this Court in Punj Lloyd Ltd. (appellant) v. Petronet MHB Ltd. (2006) 2 SCC 638 considered the applicability of Section 11(6) petition and considered the facts which are similar to the facts of the present case and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in Datar Switchgears Ltd. (appellant) v. Tata Finance Ltd. and Another (2000) 8 SCC 151 wherein at page 158 (para 19) SCC, this 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.

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Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.”

12. Thus the law as discussed is very clear that if within 30 days time a party fail to respond to the request of the applicant to appoint an arbitrator or it fails to appoint till prior to filing of an application under Section 11 of the Act he can still appoint, but once application under Section 11(6) is filed by the applicant the right of appointment of the non-applicant seizes.

13. *Bhumihway (Supra)* is distinguishable from the judgments cited above in the sense that instead of refusal to appoint the presiding arbitrator, the respondent no.1 rather sought a clarification from Indian Road Congress vide its letter dated 29.04.2005 requesting if any panel of judicial arbitrators is with them. It never sought intervention of respondent no.2 for appointment of presiding arbitrator nor refused but simply sought clarification, hence as there was no failure on the part of the respondent no.2 to nominate the presiding arbitrator, the Court held the respondent no.1 had no right to approach the Court under Section 11(6) of the Act.

14. However in the present case as there was a failure on the part of respondent no.2 and 3 to appoint to nominate their

arbitrator, so the Court appointed the same under Section 11(6). Per settled law as this Court had appointed Mr.Justice B.N. Kirpal (Retd.) the nominee arbitrator for respondents no.2 and 3, hence only this Court can nominate a substitute arbitrator in place of the said arbitrator.

15. In view of the above Mr.Justice A.S. Anand (Retd.), since has expired, I hereby nominate Mr.Justice T.S.Thakur, Chief Justice of India (Retd.) (Mobile No.8800309969) as *nominee* arbitrator on behalf of respondents no.2 and 3.

16. The petition stands disposed of in terms of the above.

MARCH 09, 2018
VLD/dv

YOGESH KHANNA, J