

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
27.02.2019	31.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

O.A. No.11 of 2019

M/s.A.S.Nutesh Electricals Pvt. Ltd.,
 Represented by its Director Arun Srivastava
 240-241 Block A
 Vardhaman Grand Plaza,
 Manglam Place
 Sector 3
 Rohini
 New Delhi

... Petitioner

M/s.Larsen & Toubro Ltd.,
 Having its registered office at
 L&T House, Ballard Estate,
 P.O.Box 278
 Mumbai

... Respondent

Prayer: Petition filed to appoint an Arbitrator to adjudicate upon the disputes between the petitioner and the respondent under Clause 20 of the Letter of Intent dated 10.03.2011.

For Petitioner : Mr.Arun Karthik Mohan
 For Respondent : Mr.Arztat Mohammed

ORDER

This original petition has been filed under Section 11 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as 'the Act') for appointment of Arbitrator in furtherance of Clause 20 of the Letter of Intent (in short 'LOI') dated 10.03.2011 to adjudicate upon the dispute/differences between the petitioner and the respondent.

2. The necessary facts, which are required to be noticed for the disposal of this original petition, are as follows:

That the petitioner is a registered company incorporated and registered under the provisions of the Companies Act, 1956. It carries the business of erection of electrical installations, providing technical know-how and implementing electrical projects and supply of equipment.

2.1. The respondent is also a Company registered under the Companies Act, 1956 and it is carrying on business in Civil and Engineering activities. The petitioner and the respondent Companies entered into an agreement to undertake a work for supply, installation and commissioning of electrical work at All India Institute of Medical Sciences (AIIMS) at Jodhpur, Rajasthan. Accordingly, a Letter of Intent (LOI) dated 10.03.2011 has been

issued by the respondent, which is otherwise called as “agreement or contract” between the parties and for the purpose of this original petition, this shall be called as “arbitration agreement”.

2.2. According to the LOI, the total value of the project was Rs.10,72,05,548/-. As per the terms of contract work had been commenced in 2011 and was over by February 2017. During the work period, periodically running bills were raised by the petitioner and bill No.1 was raised accordingly, on 03.08.2011 and bill No.34 was raised on 20.10.2016.

2.3. The petitioner claimed to have submitted bills to the tune of Rs.8,57,01,421/- plus Rs.8,50,000/- by way of deviation amount, out of the said bills, a total amount of Rs.7,26,00,000 was paid.

2.4. Thereafter some more bills have also been made by the petitioner and part of the amount for the said bills also have been paid by the respondent. According to the petitioner, there has been a due for a sum of Rs.1,58,84,651/-, since the last payment of Rs.2 lakhs was made on 16.11.2016 and as per the LOI, work was carried out and it was closed only by letter dated 18.04.2017, the remaining outstanding, as set out above was due according to the petitioner, payable by the respondent.

2.5. Since the said outstanding amount, according to the petitioner, has not been paid by the respondent, in order to recover the said amount, the petitioner initially filed a civil suit in CS(COMM) 601 of 2017 before the High Court of Delhi. However, the Delhi High Court, by taking into account the arbitration clause contained in the LOI, vide its order, dated 14.11.2017, dismissed the said suit with liberty to the parties to refer the matter to the arbitration proceedings.

2.6. Consequent upon the said order passed by the Delhi High Court, dated 14.11.2017, the petitioner has claimed to have sent a notice on 18.11.2017, invoking Section 11 of the Act by suggesting two sole arbitrators to be considered for appointment to resolve the disputes between the parties and required the respondent to give its consent for such appointment of the sole arbitrator among the two names suggested by the petitioner.

2.7. In this context, it is the case of the petitioner that, the said notice dated 18.11.2017 issued under Section 11 invoking the arbitration clause under the Act, though has been addressed to the correct address of the respondent Company at New Delhi, it has been returned. Thus, the petitioner claimed that, purposefully in order to evade the receipt of such notice under Section 11 of the arbitration Act, the respondent has not received the same.

2.8. It is the further case of the petitioner that, since the said notice dated 18.11.2017 has been returned unserved, the petitioner, through his lawyer, had sent an e-mail communication on 28.11.2017 to the e-mail address of the respondent, which, the respondent received. And on the same date, hard copy of the notice had also been sent to the respondent by post to the registered office of the respondent at Mumbai address, which has been delivered on 29.11.2017 and a delivery report also has been received by the petitioner to that effect. In this context, it is the further case of the petitioner that, the respondent, having receipt of notice under Section 11 of the Act dated 28.11.2017, both by way of e-mail as well as through post, have not acted upon either by approving the arbitrators' name suggested by the petitioner or responding to the said notice within 30 days period as contemplated under Section 11 of the Act. Thus, the said inaction of the respondent, according to the petitioner, triggered the petitioner to invoke Section 11 of the Act to approach the High Court of Delhi, where, according to the petitioner, the execution of the subject contract had been taken place and accordingly, an arbitration petition under Section 11 of the Act was filed by the petitioner before the Delhi High Court. It is the further case of the petitioner that, the Delhi High Court, in the said arbitration original petition No.9/2018, issued notice to the respondent and when the original petition came up for hearing on 09.01.2018 before the Delhi High Court, the respondent

entered appearance through his counsel and he sought for time to file reply to the original petition filed by the petitioner. Thereafter, a communication purported to have been dated 20.12.2017, was issued only on 11.01.2018 to the petitioner by the respondent stating as if that on 20.12.2017, the respondent has appointed a sole arbitrator. The said communication dated 20.12.2017 despatched on 11.01.2018 is a fabricated document making an ante-date and therefore, in this regard, in order to take criminal action against the authorised signatory, who claimed to have sent the document, dated 20.12.2017, the petitioner, accordingly, filed a criminal miscellaneous application in CrI.M.A.No.3501/2018 in the said arbitration petition No.9/2018 under Section 340 of the Code of Criminal Procedure.

2.9. It is also the case of the petitioner that, on receipt of the said petition, the Delhi High Court has directed the respondent to file the relevant records to show that how the despatch records are being maintained at the office of the respondent and in this regard, the Delhi High Court also directed one Mr.L.Ramakrishnan, who signed the said letter dated 20.12.2017 to appear before the Delhi High Court on 03.04.2018. However, on 03.04.2018, when the arbitration original petition along with the said criminal Miscellaneous Application came up for hearing, it was submitted on behalf of the respondent that, since clause 20 of the arbitration agreement ie., LOI dated 10.03.2011,

makes it clear that the place of arbitration shall be at Chennai and the jurisdiction Court is only at Chennai, the said original petition 9/2018 ought not to have been entertained by the Delhi High Court, since it does not confer the jurisdiction. Having accepted the said plea raised by the respondent, the Delhi High Court on 03.04.2018 passed an order directing the petitioner to approach the jurisdictional Court ie., at Chennai and accordingly, the said original petition was dismissed. By dismissing the arbitration original petition in the said order dated 03.04.2018, the Delhi High Court had observed that, the issues raised in the original petition can be raised before the jurisdictional Court by the petitioner and the respondent.

2.10. Pursuant to the said order passed by the Delhi High Court, the petitioner has filed the present original petition under Section 11 of the Act with the aforesaid prayer for appointment of a sole arbitrator as prayed therein. That is how, the present original petition has been filed before this Court.

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3. The respondent, on notice, entered appearance and filed counter affidavit, where, inter-alia, the averments made in the petition by the petitioner have been generally denied and insofar as the specific denial on the averments are concerned, it is the case of the respondent that, the respondent

has not purposely evaded any letter/notice issued by the petitioner dated 18.11.2017. The respondent averred that, they received the e-mail dated 28.11.2017, which was the only communication received by the respondent and the same was promptly acted upon by the respondent by sending a letter to the petitioner informing that the respondent appointed one Mr.K.D.Arcot to be the sole arbitrator to arbitrate the disputes arising under the LOI.

4. Insofar as the despatch of letter dated 20.12.2017, only on 11.01.2018 is concerned, it is the contention of the respondent in the counter affidavit that, the inadvertent delay in posting the letter dated 20.12.2017, was due to communication gap between the departments of the respondent and therefore, it was despatched only on 11.01.2018. However, it is the stand of the respondent that, immediately on receipt of the notice dated 28.11.2017 from the petitioner, the respondent acted upon and after having appointed a sole arbitrator, a communication to that effect dated 20.12.2017 was sent. However, the said communication has been despatched through post belatedly on 11.01.2018 due to some inadvertent delay between the departments and therefore, according to the respondent, within a period of 30 days, the respondent acted upon and appointed a sole arbitrator. Therefore, there is no need to invoke section 11 once again by filing original petition before this Court under Section 11 of the Act, by the petitioner.

5. According to the counter affidavit, the further case of the respondent is that, apart from Clause 20 of the LOI, ie., arbitration agreement dated 10.03.2011, there is a clause ie., Clause 16 under Enterprise Information Portal (in short 'EIP') of the respondent Company, which has been accessed by the petitioner. Therefore, the petitioner also agreed upon whatever conditions available in Enterprise Information Portal (EIP). As per the said clause 16 of the EIP, under the heading "dispute resolution", the appointment of sole arbitrator has been fixed with the respondent Company being a buyer and therefore, invoking Clause 16 of the EIP, the respondent appointed a sole arbitrator on 20.12.2017 and the same has been communicated only on 11.01.2018. Therefore, within 30 days, since the respondent had acted upon by appointing the arbitrator, the petitioner cannot seek indulgence of this Court by invoking Section 11 of the Act, as the mandate of the sole arbitrator, already exercised by the respondent, it cannot be terminated under Section 11 of the Act. And if at all the petitioner has got grievance over the appointment of the sole arbitrator by the respondent, the same shall be assailed only seeking for the termination of the mandate under Section 13 of the Act and therefore, according to the respondent, this present original petition under Section 11 of the Act is not maintainable and therefore, the same, even on merits, not deserved to be considered, hence, it is to be dismissed.

6. I have heard Mr.Arun Karthik Mohan, learned counsel for the petitioner and Mr.Arzat Mohammed, learned counsel for the respondent.

7. The learned respective counsel made submissions, in support of the aforesaid contentions raised by the petitioner as well as the respondent side and the learned counsel for the petitioner submits that, the letter dated 20.12.2017 definitely an ante-dated letter, as the same was despatched only on 11.01.2018. Therefore, the 30 days period was over and within which, since the respondent has not acted upon, in response to the invocation of arbitration clause by sending a notice, suggesting the names for arbitrators to be appointed, the petitioner is very much entitled to seek indulgence of this Court under Section 11 of the Act and in this regard, the petitioner approached the Delhi High Court by filing original petition as referred to above, in view of the execution of the contract taken place at Delhi and since the place of arbitration has been specifically mentioned, despite taking that ground, the Delhi High Court driven the petitioner to approach this Court. Accordingly, the present original petition is filed. But, at any rate, since the respondent failed to respond to the invocation of arbitration clause made by the petitioner within 30 days period as stipulated under Section 11 of the Act, the petitioner is very much entitled to seek for appointment of sole arbitrator by this Court under Section 11(4), (5) and (6) of the Act. Therefore, the original petition

has to be ordered, the learned counsel contended.

8. On the other hand, the learned counsel for the respondent would submit that, merely because the letter dated 20.12.2017 was despatched belatedly on 11.01.2018, the same cannot be construed that the respondent has not acted upon within 30 days time stipulated under the provisions of the Act and infact, the respondent, having stated that, had communicated the said appointment order to the arbitrator also on 11.01.2018 and on receipt of the appointment of arbitrator, the learned arbitrator Mr.K.D.Arcot already entered into the reference on 13.02.2018 and he, infact on the date, sent a communication to the counsel for the petitioner, which is a reply of the sole arbitrator to the letter issued by the counsel for the petitioner, dated 29.01.2018. Infact, the sole arbitrator, on 19.01.2018, has sent communication that he has entered upon the reference and pursuant to the reply given by the petitioner on 29.01.2018, that was also responded by the sole arbitrator on 13.02.2018 stating that, in view of the pendency of the original petition before the Delhi High Court, he has to wait till a decision is made by the Delhi High Court. Therefore, the learned counsel for the respondent submits that, the sole arbitrator, since has already been appointed by the respondent by invoking clause 16 of the EIP and the sole arbitrator also has entered upon the reference, if at all the petitioner has got any objection

over the appointment of the said sole arbitrator, for redressal of his grievance that, for termination of the mandate of the arbitrator, the petitioner has to give reason and to file petition only under Section 13 of the Act and therefore, the petitioner ought not to have filed the original petition under Section 11 of the Act, even before the Delhi High Court and the very same reason would apply to the petitioner here also, where once again the petitioner invoked section 11 of the Act and filed this original petition. Therefore, the same is liable to be dismissed, he contended.

9. In support of the said contentions raised by the learned counsel for the respondent, he relied upon two decisions of the Apex Court ie.

(1) **2014(11) SCC 560 [Antrix Corporation Limited v. Devas Multimedia Private Limited]** and

(2) **2018 SCC online SC 2673 [SP Singla Constructions Pvt. Ltd., v. State of Himachal Pradesh]**.

10. By relying upon these two decisions, the learned counsel for the respondent would submit that, in view of the law laid down in these two decisions, the present original petition under Section 11 of the Act filed by the petitioner is liable to be rejected.

11. I have considered the said submissions made by the learned counsel for the parties and also have perused the materials placed before this Court.

12. The admitted facts are that, there has been an agreement between the respondent and the petitioner and in this regard a written agreement called LOI, between the parties, dated 10.03.2011 ie., letter of Intent, which is otherwise called as, arbitration agreement, has been entered into.

13. Insofar as the dispute arises between the parties is concerned, pursuant to the LOI, work has been entrusted to the petitioner by the respondent to the tune of Rs.10,72,50,548/-. In this regard, according to the petitioner, the work has been completed by February 2017 and periodically bills have been raised, considerable amount against each of the bills have been paid by the respondent. However, there is an outstanding for a sum of Rs.1,58,84,651/-. Though the said factor is disputed by the respondent in its counter, this is, infact, the dispute between the parties, which can only be adjudicated by the arbitrator.

14. Under the LOI, there is a clause called resolution of disputes

under clause 20, which reads thus:

“20) Resolution of disputes:

a) All disputes of difference of opinions, on account of interpretation of clauses, technical specifications etc. shall be resolved through direct and mutual discussions. In the case of difference of opinion is still persisting, then the matter shall be referred to Arbitration in accordance with the provisions of the Arbitration and Conciliation Act 1996 as amended from time to time. Such arbitration proceedings will take place in Chennai and shall be subject to jurisdiction of the Courts in Chennai.”

15. The said clause 20 makes it clear that, all disputes, all difference of opinions shall be resolved through direct and mutual discussion and in case of difference of opinion still persist, it shall be referred to arbitration proceedings. In accordance with the provisions of the Act, the place of arbitration has been fixed at Chennai and the jurisdiction of the Courts are only at Chennai.

16. With these admitted facts, where there is any dispute between the parties, including the issue of quantum of due claimed by the petitioner, the petitioner, instead of invoking the arbitration clause, has wrongly chosen

to file a civil suit before the Delhi High Court in C.S.(COMM) No.601/2017.

17. The said civil suit was disposed of by the Delhi Court, by order dated 14.11.2017, by referring the parties to the arbitration and the said order is extracted hereunder:

“Today, learned counsel for plaintiff states that he has no objection to the matter being referred to the Arbitration provided the Court-fees paid in the present suit is refunded.

Consequently, with consent of parties, this Court refers the parties to the Arbitration. Accordingly, present suit stands disposed of.

Registry is directed to issue to an authorised representative of the plaintiff a certificate authorizing him/her to receive back from the Collector full amount of the Court fee paid by them in the present suit.”

18. On disposal of the said suit as above by the Delhi High Court, on 14.11.2017, immediately, the petitioner, invoking Section 11 of the Act, issued a notice on 18.11.2017 to the respondent, where the petitioner called upon the respondent to act upon in the following directions:

“As per the Letter of Intent dated 10.03.2011 the disputes are to be referred to arbitration and as such we hereby propose the name of Justice (Retd.) Uma Nath

Singh (former Chief Justice of Meghalaya High Court) or Justice (Retd) S.K.Agarwal (former Judge of Delhi High Court) to be the sole arbitrator in the matter. Kindly convey your concurrence and acceptance of either of them within the stipulated time as per the Arbitration & Conciliation Act, 1996 (amended up to date) so that the matter may be placed before the arbitrator to adjudicate upon the disputes pertaining to the dues of my client against you.”

19. It is claimed by the petitioner that, the said notice dated 18.11.2017 sent by registered post has not been served and it has been returned and in this regard, it is the case of the petitioner that, the respondent purposely evaded the receipt of said notice. However, there is no postal endorsement to suggest that, the respondent has refused to receive such notice. Hence, it cannot be stated that, the respondent has purposely evaded the notice dated 18.11.2017 sent by the petitioner through registered post.

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20. However, since notice sent was not served, the petitioner, through its lawyer, has sent an e-mail notice with the same content invoking Section 11 of the Act to the respondent on 28.11.2017 and the said e-mail notice has been delivered to the respondent.

21. In this context, it is the admitted case of the respondent that the notice sent by the petitioner on 28.11.2017 has been received by the respondent and in this context, the averment, at paragraph No.15 of the counter affidavit of the respondent, can usefully be referred, which reads thus:

“15.The averments contained in para 9 is a matter of record and the mail dated 28.11.2017 was the only communication received by the respondent and the same was promptly acted upon by the respondent by sending a letter to the petitioner, appointing Mr.K.D.Arcot to be the sole arbitrator to arbitrate the disputes arisen under the Letter of Intent.”

22. In this context, it is the case of the respondent that 28th November 2017 mail was the only mail received by them, which was promptly responded by the respondent by appointing a sole arbitrator, viz., one Mr.K.D.Arcot and the same has been communicated by letter dated 20.12.2017.

23. Here, there is a controversy, as the said letter dated 20.12.2017 of the respondent, admittedly, has been despatched only on 11.01.2018 and this factor has been admitted by the respondent at the counter affidavit and

the relevant portion of the said admission reads thus:

“.... I submit that, as stated earlier, the respondent took note of the invocation of the arbitration proceedings by the petitioner and thereby appointed, Mr.K.D.Arcot as the sole arbitrator vide its letter dated 20.12.2017 posted on 11.01.2018 due to some delay internally within the company which was beyond the control of the respondent.”

24. However, since 28.11.2017 letter/notice under Section 11, of the petitioner, has not been acted upon within 30 days period as contemplated under Section 11 of the Arbitration Act, the petitioner moved the Delhi High Court by filing Arbitration Original Petition No.9/2018.

25. Only in that circumstances, the reply of the respondent dated 20.12.2017 despatched on 11.01.2018 was served on the petitioner, where the respondent has not agreed upon the two names suggested by the petitioner as sole arbitrator, instead, the respondent invoked clause 16 of the EIP, ie., Online Enterprise Information Portal (in short 'EIP') system of L&T and accordingly, the right of appointment of sole arbitrator is fixed only with the buyer, ie., L&T, therefore, invoking clause 16 of the EIP, the respondent claimed to have appointed one Mr.K.D.Arcot, Fellow of Institute of Engineers,

Chartered Engineer, D.R.B. Member (USA), Member - Indian Council of Arbitration, as sole arbitrator for adjudicating all disputes and differences arising out of the contracts between the parties. Having receipt of the said letter, dated 20.12.2017 despatched on 11.01.2018, the petitioner has filed Crl.M.A.No.3501/2018 in the said arbitration OP No.9/2018 before the Delhi High Court to take criminal action against the respondent, especially, by initiating prosecution against one Mr.L.Ramakrishnan, authorised signatory, who claimed to have signed the letter, dated 20.12.2017, which, according to the petitioner, is ante-dated one. In the said criminal miscellaneous application No.3501/2018, the Delhi High Court passed the following order on 23.02.2018, which reads thus:

“1.Issue notice. The learned counsel appearing for respondent accepts notice.

2.The respondent shall file an affidavit clearly indicating the manner in which the records of the company are kept. All the relevant records to indicate that the letter in question (letter dated 28.12.2017) was signed on the said date including the Dak Register showing the dispatch of the letter be produced before this Court on the next date of hearing.

3.The concerned Officer, namely, Mr.L.Ramakrishnan is also directed to be personally present in Court on the next date of hearing.

4.List on the date already fixed on 03.04.2018.”

26. Pursuant to the said order of the Delhi High Court, dated 23.02.2018, when the case came up for hearing next on 03.04.2018, a plea was raised by the respondent that, under clause 20 of the arbitration clause, ie., LOI, dated 10.03.2011, the place of arbitration shall only be at Chennai and the jurisdiction of the Courts is only at Chennai and therefore, the original petition cannot be entertained at Delhi High Court.

27. Impressed upon the said plea raised by the respondent and in fact, by having taken into consideration clause 20 of the LOI, ie., arbitration agreement, the Delhi High Court, by order dated 03.04.2018, directed the petitioner to approach the appropriate Court, ie., at Chennai, by dismissing the said OP. In order to appreciate the said position, the order passed by the Delhi High Court dated 03.04.2018 is extracted hereunder:

“2.It is apparent from the plain reading of the aforesaid clause that the place of arbitration is Chennai and further the parties have also agreed that such arbitration shall be subject to the jurisdiction of the Courts in Chennai. The Supreme Court in the case of Indus Mobile Distribution Pvt. Ltd., v. Datawind Innovations Pvt. Ltd : (2017) 7 SCC 678 had authoritatively held tht the jurisdiction of Courts in respect of arbitral proceedings shall be the place where the arbitration is to be conducted. In this view, there is merit in the contention advanced by

the respondent that this Court would not have any jurisdiction to entertain the present petition.

3.The petition is, accordingly, dismissed. All other pending applications are also dismissed. It is open for the petitioner to approach the appropriate Court.

4.Needless to state that all contentions of the parties are open, including the contention that the letter dated 20.12.2017 has been anti dated as, admittedly, the same was dispatched only on 11.01.2018.”

28. These series of proceedings would go to show that it was an understanding of the parties, both by the petitioner and the respondent, that, the dispute arises between the parties can be resolved by referring the matter to the arbitration proceedings and for the said purpose, clause 20 of the LOI, dated 10.03.2011 is invocable. Infact, the Delhi High Court, in the said order dated 03.04.2018, has only relied upon clause 20 of the LOI and accordingly, dismissed the original petition by directing the petitioner to approach the jurisdictional Court ie., at Chennai, therefore, it goes without saying that, the clause 20 of the LOI, otherwise called as arbitration agreement, is the only invocable clause for the purpose of arbitration proceedings.

29. Insofar as the plea raised by the respondent that, they invoke clause 16 of the EIP and accordingly, the right of appointment of sole

arbitrator vest with them and therefore, they appointed the sole arbitrator, whether to be accepted or not, is the next question to be answered.

30. In this context, it is to be made clear that, the law is well settled in this regard that, the Courts, while exercising jurisdiction under Section 11 of the Act, must see only as to whether there is an arbitration agreement between the parties in writing and if both parties signed in the said agreement, whether there is a clear arbitration clause and if these ingredients are satisfied, only based on which, the Courts, which exercise the power under Section 11 of the Act, can act upon for appointment of arbitral Tribunal or sole arbitrator.

31. It is an admitted fact between both parties that, the LOI is an agreement between the parties, which is in writing and signed by both parties, where there is a clear arbitration clause under clause 20, which has already been extracted hereinabove. The said clause 20 has very well been invoked not only by the petitioner, but also by the respondent, as the respondent raised a plea before the Delhi High Court, when the O.P.No. 9 of 2018 came up for hearing on 03.04.2018 that, under clause 20 of the arbitration agreement, ie., LOI, the place of arbitration is mentioned only at Chennai and the jurisdictional Court is at Chennai, therefore, the original petition cannot be

maintained at Delhi High Court. This plea has been accepted by the Delhi High Court and accordingly, the original petition was dismissed driving the petitioner to approach the jurisdictional Court, ie., at Chennai.

32. Therefore, it is evidently clear that, the respondent itself has made a plea before the Delhi High Court that clause 20 of the LOI dated 10.03.2011 alone is invocable by the parties for arbitration.

33. Moreover, so far as clause 16 of the EIP is concerned, even according to the respondent, it is only an online Enterprise Information Portal system of L&T, which is general in nature. Therefore, the same cannot be pressed into service by the respondent against the petitioner, as in the absence of the petitioner having specifically agreed upon in writing by affixing their signature, which are essential ingredients for invocation of clause 11 of the Act.

34. If at all the respondent was very specific that, clause 16 of the EIP is invocable, according to them, at the earliest instance when the suit was filed against them before the Delhi High Court, that could have been admitted by the respondent that, with clause 20 of the LOI dated 10.03.2011, clause 16 of the EIP also can be invoked by invoking both the clauses combinedly matters

can be referred to the arbitration proceedings by appointment of a sole arbitrator by the respondent Company. There was no such admission even made by the respondent, when the suit was dismissed for the purpose of referring the matter to the arbitration proceedings.

35. Moreover, when the second time ie., original petition came up for hearing on 03.04.2018 before the Delhi High Court, the respondent has never said anything about clause 16 of EIP and has only mentioned about clause 20 of the LOI and that was taken into account, infact, by the Delhi High Court. These factors make very clear the issue that, as far as the invocation of Section 11 of the Act is concerned by either of the parties, it is possible for the parties only by virtue of clause 20 of the LOI, but not under clause 16 of the EIP, as claimed by the respondent.

36. In view of the said factors, the unilateral invocation of Clause 16 of the EIP and by thus, appointing a sole arbitrator unilaterally on its own by the respondent through its letter dated 20.12.2017 is not acceptable.

37. Apart from the above issue, even if the case of the respondent for invocation of clause 16 of the EIP is accepted for arguments sake, whether, the respondent has acted upon within 30 days statutory period stipulated

under Section 11 of the Act, in response to the notice invoking the arbitration clause issued by the petitioner dated 28.11.2017, is the next question.

38. Even though the earlier notice dated 18.11.2017, which was sent by the petitioner, has not been served on the respondent for whatever reason, it is an admitted fact that, the 28th November 2017 notice, admittedly, has been served on the respondent and only in response to the same, according to the respondent, it has issued letter dated 20.12.2017 appointing a sole arbitrator.

39. Assuming that 20.12.2017 is the response to the arbitration notice of the petitioner dated 28.11.2017, the same has not been sent or communicated and admittedly, it has been despatched only on 11.01.2018. It is also a settled proposition of law that, unless and until, a communication is despatched/served on the addressee, it cannot be construed that the parties acted upon at an early date, ie., the date on which, the communication mentioned. Further, though it was claimed by the respondent that, the communication dated 20.12.2017, was made only on 20.12.2017 and on that date, the sole arbitrator was appointed, because, it was admittedly despatched only on 11.01.2018, ie., after 21 days and within that 21 days period, the 30 days limitation also expired, there is a possibility on the part of

the respondent to make the said letter, dated 20.12.2017, as if was made on 20.12.2017 and despatched on 11.01.2018.

40. Except this conclusion, no other conclusion could possibly be made as the respondent admitted in their counter that, due to some internal delay within the departments, it has been delayed for despatching it till 11.01.2018. The respondent, having known to the fact that, the 30 days period is there, within which, it has to be responded by the respondent on the notice sent by the petitioner dated 28.11.2017 invoking Section 11 of the Act, the respondent, certainly, would have acted upon swiftly and if at all, it has not acted upon swiftly and has awaited till 11.01.2018 to despatch, this Court can safely conclude that, there has been no appointment of sole arbitrator by the respondent on 20.12.2017.

41. In view of the said conclusions arrived at, after discussion, based on the factual matrix, this Court is of the view that, both the reasons cited by the petitioner, ie., the invocation of clause 16 of EIP as well as the claim that, on 20.12.2017, the sole arbitrator was appointed, are liable to be found against the respondent only.

42. Though the aforesaid two cases mentioned supra have been

cited by the learned counsel for the respondent, in support of his case, this Court, after going through the said decisions, is of the view that the principle enunciated under the said two decisions cannot be made applicable to the facts of the present case.

43. The reason being that, insofar as **(2014) 11 SCC 560 [Antrix Corporation Limited v. Devas Multimedia Private Limited]** case is concerned, the following two paragraphs would reveal the said principle:-

“29. In the instant case, Devas, without responding to the petitioner's letter written in terms of Article 20 of the arbitration agreement, unilaterally addressed a request for arbitration to the ICC International Court of Arbitration for resolution of the disputes arising under the agreement and also appointed its nominee arbitrator. On the other hand, the petitioner appointed its nominee arbitrator with the caveat that the arbitration would be governed by the 1996 Act and called upon Devas to appoint its nominee arbitrator under the said provisions. As Devas did not respond to the petitioner's letter dated 30.07.2011, the petitioner filed the application under Section 11(6) of the 1996 Act.

30. In the instant case, the arbitration agreement provides that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or Uncitral. Rightly or

wrongly, Devas made a request for arbitration to the ICC International Court of Arbitration on 29.06.2011, in accordance with the aforesaid agreement and one Mr.V.V.Veedar was appointed by Devas as its nominee arbitrator. By the letter written by the International Chamber of Commerce on 05.07.2011, the petitioner was required to appoint its nominee arbitrator, but it chose not to do so and instead made an application under Section 11(6) of the 1996 Act and also indicated that it had appointed Ms Justice Sujata V.Manohar as its arbitrator in terms of Article 20(9) of the agreement.

31.The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such

appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement.”

44. In the said case, the parties, namely, Devas, in view of the arbitration agreement therein, which provides that the arbitration proceedings would be held in accordance with the rules and procedures of International Chamber of Commerce, had requested the ICC International Court of Arbitration to appoint an arbitrator and accordingly, an arbitrator was appointed. Therefore, the subsequent invocation of 11(6) of the Act by the other party by approaching the Court was not accepted.

45. Here in the case in hand, infact, it was triggered only by the petitioner, who invoked Section 11 and that was not responded in the eye of law by the respondent within 30 days time and delayed invocation of clause 16 of the EIP also, cannot be accepted in the absence of any agreed terms expressly agreed upon by the parties by way of bilateral agreement, the principle enunciated in the said case, in view of the said facts mentioned therein, cannot be applied to the present case. Infact, if the facts of the present case is applied to the principle enunciated in the aforesaid case of the

Apex Court, instead of advancing the case of the respondent, it, infact, advances the case of the petitioner.

46. Like that in the second case, ie., **(2018) SCC online SC 2673** in **SP Singla Constructions Pvt. Ltd., v. State of Himachal Pradesh** is concerned, the principle there was that, the challenge regarding the appointment of the arbitrator as per the agreement between the parties must be viewed in the context of the agreement between the parties. The relevant portion of the order reads thus:

“14.Any challenge regarding the appointment of an arbitrator as pr the terms of the agreement between the parties must be viewed in the context of the agreement between the parties. As pointed out earlier, the parties have mutually agreed that there will be sole Arbitration by the person appointed by the Engineer-in-Chief and that the appellant shall have no objection to any such appointment that the Arbitrator so appointed is a Government Servant. If the appellant has any grievance that the appointment of the arbitrator is by 'post' and not by 'person', the appellant ought to have raised the challenge before the arbitrator in the first instance. Be it noted, in the petition filed before the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 on 28.12.2013, the appellant has only prayed for quashing the appointment of the Superintendent

Engineer, Arbitration Circle, HPPWD, Solan as the sole arbitrator as unconstitutional and sought for appointment of an independent and impartial sole arbitrator to adjudicate the dispute between the parties. It is fairly well settled that any challenge to the arbitrator appointed ought to have been raised before the arbitrator himself in the first instance.”

47. Even the said principle mentioned in the aforesaid case of the Apex Court not advances the case of the respondent, as in the instant case, the appointment of the arbitrator shall be made only by mutual consent, otherwise, the matter has to be referred only to the competent Court under Section 11 of the Act, in view of the clause 20 of the LOI dated 10.03.2011. Since clause 16 of EIP is not invocable, in the present case, the appointment of arbitrator must be viewed only in the context of agreement between the parties, ie., only under clause 20 of the LOI and not under clause 16 of the EIP. Therefore, the second case of the Apex Court, cited by the respondent, would also advance the case of the petitioner and not the case of the respondent.

48. Thus, it become quite clear that on or before the expiry of 30 days from receipt of the notice invoking Section 11 of the Act from the petitioner, the respondent has not acted upon. Since communication dated

20.11.2017 has been admittedly despatched only on 11.01.2018, it can be safely concluded that there has been no appointment of arbitrator by the respondent within 30 days period, which ends between 20.12.2017 and 11.01.2018. It can also be concluded that, in the absence of any agreed terms between the parties, the clause 16 of EIP cannot be invoked by the respondent. Therefore, the sole arbitrator cannot unilaterally be appointed by the respondent and in that view of the matter, this Court is of the considered view that, there was no appointment of arbitrator within the meaning of Section 11 of the Act, in the case of resolving the disputes between the parties, especially, in the context of clause 20 of the LOI, dated 10.03.2011, which is an arbitration agreement expressly made, signed by both parties, in writing.

49. Therefore, this Court holds that the petitioner can very well invoke Section 11 of the Arbitration Act for appointment of sole arbitrator by this Court to resolve the dispute between the parties and by thus, this original petition is very well acceptable.

50. With the result, this Court is inclined to pass the following order:

(1) This Court is inclined to appoint a sole arbitrator to resolve the dispute between the parties;

(2) Accordingly, the Hon'ble Mr. Justice R.S.Ramanathan, former Judge of this Court, is hereby appointed as Sole Arbitrator ;

(3) The learned arbitrator shall enter into the reference and proceed in accordance with law;

(4) The learned arbitrator is at liberty to fix his remuneration and other incidental expenses, which shall be borne by both the parties equally.

51. With this order of appointment of arbitrator, this original petition is ordered. However, there shall be no order as to costs.

Index : Yes

Speaking order

RR

31.07.2019

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R.SURESH KUMAR, J.

RR



order made in
O.A. No.11 of 2019

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31.07.2019