

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

ARB No. 319 of 2018 (O&M)

Date of decision: 4.10.2019

M/s IST Conbuild Private Limited

.. Petitioner

vs

M/s Unitech Limited

.. Respondent

Coram: Hon'ble Mr. Justice Rajiv Sharma, Acting Chief Justice

Present Mr. Ramandeep Singh, Advocate, for the petitioner.
None for the respondent.

Rajiv Sharma, Acting Chief Justice

1. This petition has been filed under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of sole arbitrator in terms of arbitration clause 45 of the agreement (Annexure P-1). Petitioner sent a communication to the respondent on 15.6.2018 for appointment of sole Arbitrator. No Arbitrator has been appointed as per arbitration clause contained in the agreement. Certain disputes have arisen between the parties.

2. Despite the respondent being served, there is no representation on its behalf.

3. Their Lordships of Hon'ble the Supreme Court in Deep Trading Company vs Indian Oil Corporation and others, (2013) 4 SCC 35 have held that once arbitrator is not appointed as per agreed procedure within stipulated time, right of party concerned to appoint arbitrator is forfeited. Their Lordships have held as under:

“11. Sub-sections (3), (4) and (5) of Section 11 have no application in the present case as the parties have agreed on a procedure for appointing the arbitrator in Clause 29.

Subsection (2) provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) makes provision for making an application to the Chief Justice concerned for appointment of an arbitrator in three circumstances; (a) a party fails to act as required under the agreed 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. If one of the three circumstances is satisfied, the Chief Justice may exercise the jurisdiction vested in him under Section 11(6) and appoint the arbitrator. In the present case, the dealer moved the Chief Justice of the Allahabad High Court under Section 11(6)(a) for an appointment of an arbitrator as the Corporation failed to act as required under Clause 29.

12. The three basic facts are not in dispute, namely, (i) on 09.08.2004, the dealer called upon the Corporation by a written notice to appoint an arbitrator in accordance with the terms of Clause 29 of the agreement; (ii) the dealer made an application under Section 11(6) for appointment of the arbitrator on 06.12.2004; and (iii) the Corporation appointed the sole arbitrator on 28.12.2004 after the application under Section 11(6) was already made by the dealer.

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16. In *Punj Lloyd [Punj Lloyd Ltd. v. Petronet MHB Ltd. [(2006) 2 SCC 638]]*, the agreement entered into between the parties contained arbitration clause. The disputes and differences arose between the parties. *Punj Lloyd* (appellant) served a notice on *Petronet* (respondent) demanding appointment of an arbitrator and reference of disputes to him. *Petronet* failed to act. On

expiry of thirty days, Punj Lloyd moved the Chief Justice of the High Court for appointment of the arbitrator under Section 11(6). Petronet had not made appointment till the date of moving the application. The designate Judge refused to appoint the arbitrator holding that the remedy available to it was to move in accordance with the agreement. Aggrieved by the said order, a writ petition was filed which was dismissed and the matter reached this Court. A three- Judge Bench of this Court referred to Datar Switchgears' case and held that the matter was covered squarely by that judgment and the view taken by the designate Judge in dealing with the application under Section 11(6) and the Division Bench was not right. This Court restored the application under Section 11(6) before the Chief Justice of the High Court for fresh consideration and appointment of the arbitrator in accordance with Section 11(6).

17. We are in full agreement with the legal position stated by this Court in Datar Switchgears[Datar Switchgears Ltd. v. Tata Finance Ltd. and Another: [(2000) 8 SCC 151]] which has also been followed in Punj Lloyd[Punj Lloyd Ltd. v. Petronet MHB Ltd.: [(2006) 2 SCC 638]].

18. Section 11(8) provides that Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects; (a) qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator. In Northern Railway Administration[Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited: [(2008) 10 SCC 240]], a three-Judge Bench of this Court considered the scheme of Section 11. Insofar as Section 11(8) is concerned, this Court stated that appointment of the

arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements mentioned therein have to be kept in view.

19. If we apply the legal position expounded by this Court in Datar Switchgears [Datar Switchgears Ltd. v. Tata Finance Ltd. and Another: [(2000) 8 SCC 151]] to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 09.08.2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.

20. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement.

21. Learned senior counsel for the Corporation, however, referred to an unreported order of this Court in Newton Engineering [M/s. Newton Engineering and Chem. Ltd. v Indian Oil Corporation Ltd. & Ors.: (2013)]

4 SCC 44. The arbitration clause in that case was similar to the arbitration clause in the present case. The contractor had written to the Corporation to appoint E.D. (NR) as sole arbitrator as per the agreement. But the Corporation wrote back to the contractor that office of E.D. (NR) has ceased to exist due to internal re-organisation. The Corporation offered to the contractor to substitute E.D.(NR) with Director (Marketing) to which contractor did not agree. The Corporation then appointed Director (Marketing) as arbitrator. The contractor made an application under Section 11(6)(c) read with Sections 13 and 15 of the 1996 Act for appointment of a retired Judge as the sole arbitrator. The Single Judge dismissed the petition filed by the contractor. Against that order, the special leave petition was filed by the contractor. This Court in paragraph 7 of the order stated as follows :

“7. Having regard to the express, clear and unequivocal arbitration clause between the parties that the disputes between them shall be referred to the sole arbitration of the ED(NR) of the Corporation and, if ED(NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED(NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. If the office of ED(NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED(NR) or his nominee and no one else. In the

circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(c), 13 and 15 of the 1996 Act have no application in light of the reasons indicated above.”

22. We are afraid that what has been stated above has no application to the present fact situation. In Newton Engineering, this Court was not concerned with the question of forfeiture of right of the Corporation for appointment of an arbitrator. No such argument was raised in that case. The question raised in Newton Engineering was entirely different. In the present case, the Corporation has failed to act as required under the procedure agreed upon by the parties in Clause 29 and despite the demand by the dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made under Section 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of the matter, the Chief Justice ought to have exercised his jurisdiction under Section 11(6) in the matter for appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of proceedings under Section 11(6) was of no consequence.”

4. Accordingly, I am satisfied that all the requirements of the Arbitration and Conciliation Act, 1996 have been fulfilled by the petitioner and the Sole Arbitrator is required to be appointed to resolve all the disputes which have arisen between the parties.

5. Accordingly, Mr. R. S. Virk, District & Sessions Judge (Retd.) is appointed as sole Arbitrator. The sole Arbitrator is requested to enter into reference within a period of two weeks from the date of receipt of the copy of the order. Thereafter, the petitioner is directed to file claim petition within a period of three weeks. Reply be filed by the respondent within a

further period of three weeks. The pleadings, including, rejoinder and counter-claim, shall also be completed by the parties within a period of eight weeks after entering into reference by the sole Arbitrator. It shall be open to the Arbitrator to determine his own procedure with the consent of the parties. The award shall be made strictly as per the provisions of the Arbitration and Conciliation Act, 1996 within six months. Needless to add that the Arbitrator shall pass a speaking order. The Registry of this Court is directed to immediately inform Mr. R. S. Virk, District & Sessions Judge (Retd.) about the passing of the order by sending a copy of this order to him.

6. In view of this, the petition stands disposed of.

4.10.2019
vs

(Rajiv Sharma)
Acting Chief Justice

Whether speaking/ reasoned
Whether Reportable

Yes/No
Yes/No