

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

Judgment reserved on: 25.10.2018
Judgment pronounced on: 08.02.2019

+ ARB.P. 407/2018

NCC LIMITED

..... Petitioner

Through Dr. Amit George, Mr. Rishabh Dheer,
Mr. Swaroop George, Mr. K. Dileep
and Ms. Rajsree Ajay, Advs.

versus

INDIAN OIL CORPORATION LIMITED

..... Respondent

Through Mr. V.N. Koura with Mr. Nikhil
Mundeja, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. The captioned petition is part of a batch of petitions which raised a common issue for consideration. Counsel for the parties addressed arguments in the lead petition which is numbered as ARB. P. No.115/2018. I have already rendered my decision today i.e. 8.2.2019 in ARB. P. No.115/2018. It is common ground of counsel that, broadly, the facts obtaining in the captioned petition are same as those which obtain in ARB. P. No.115/2018.

2. Except for the dates of important correspondence exchanged between the parties the stand taken by both sides remains the same. As noticed in ARB. P. No.115/2018 the petitioner i.e. NCC Ltd. (in short "NCCL") takes the position that the claims lodged which Notified Claims and that they ought to be referred for adjudication to the Arbitral Tribunal.

2.1 On the other hand, the respondent i.e. Indian Oil Corporation Ltd. (in short "IOCL") takes the stand that the determination by the General

Manager as to whether or not the claims lodged by NCCL are Notified Claims is final. In other words, according to IOCL once the General Manager rules that the claims lodged by a Contractor (in this case NCCL) are not Notified Claims, then, no reference need to be made to the Arbitral Tribunal.

3. In the judgment rendered in ARB. P. No.115/2018, after considering the arguments of both sides and analyzing the documents placed before me, I have summed up my conclusions as follows: -

“I) Where there is contestation to the decision rendered by the General Manager is argumentative in nature the issue as to whether the claims lodged by a Contractor can be categorized as Notified Claims is best left to the Arbitral Tribunal. In other words, except for the situation where there is no doubt that the claims were not lodged with the Engineer and the Site Engineer as required under Clause 6.6.1.0 read with 6.6.3.0, the matter would have to be left for resolution by Arbitral Tribunal.

II) Aspects with regard to accordance satisfaction of the claims made where there is a dispute will also have to be left to the Arbitral Tribunal. The position in law in this regard remains the same both pre and post amendment brought about in the 1996 Act after 23.10.2015.

III) After the insertion of Section 11(6A) in the 1996 Act the scope of inquiry by the Court in a Section 11 petition, (once it is satisfied that it has jurisdiction in the matter) is confined to ascertaining as to whether or not an arbitration agreement existence between the parties before it which is relatable to the disputes at hand in relating the disputes to the arbitration existence.

IV) The exercise with regard to curating the dispute at hand with the arbitration agreement is very narrow in scope and ambit. Thus, except for an open and shut case which points in the direction of a particular dispute not it falling within the four corners of the arbitration agreement obtaining between the parties the matter would have to be resolved by an Arbitral Tribunal where there is contest on this score.”

4. In so far as the captioned petition is concerned, the following dates and events are required to be noticed:

4.1 Parties executed a contract qua the subject project on 21.05.2010. The final bill with regard to the work executed by the NCCL was submitted on 15.07.2016. The arbitration mechanism was triggered by NCCL on 23.02.2018. IOCL forwarded NCCL's claims to its General Manager on 21.03.2018. The General Manager via letter dated 27.03.2018 called upon NCCL to file its submissions with regard to following: -

“a) Notified Claims of the Contractor as defined in Clause 6.6.1.0 of the GCC;

(b) That the Notified Claims have been included in Final Bill in accordance with the provisions of Clause 6.6.3.0 of the GCC; or

(c) That the said claims, otherwise fall within the scope of the arbitration agreement embodied in Clause 9.0.1.0 of the GCC.”

5. Resultantly, NCCL submitted the information sought by the General Manager under the cover of letter dated 31.03.2018. The assertion is that the submission made to IOCL's General Manager received by respondent on 31.03.2018. Since, there was no response by IOCL's General Manager for a period of nearly one and a half months, on 14.05.2018, NCCL instituted the captioned petition in this Court. The record shows that the General Manager made his determination as to whether or not the claims lodged by NCCL are Notified Claims only on 22.06.2018. Given this background, amongst others, one of the arguments which has been advanced on behalf of NCCL is that the determination made by IOCL's General Manager after the petition was lodged in this Court is inefficacious as the determination has been made by the IOCL's General Manager not only 30 days after the submission by NCCL but also after it had lodged the instant petition in this Court.

6. This submission is pivoted on the judgment of Supreme Court rendered in *Datar SwitchGears vs. Tata Finance Ltd. and Anr.*, (2000) 8 SCC 151¹. According to me, this argument has merit and, therefore, on this ground itself the matter would have to be referred to an Arbitral Tribunal. Besides this, the captioned matter would also, in my view, fall foul of other conclusion as the determination made by the General Manager is argumentative. In other words, there is contestation and scope for arguments with regard to the correctness of the conclusion reached by the General Manager. The matter, in my view, is covered by the judgment in ARB. P. No.115/2018 and hence the captioned petition would have to be allowed.

7. It is ordered accordingly.

8. Resultantly, Hon'ble Mr. Justice Madan B. Lokur (Cell no:9868219007), former Judge, Supreme Court of India is appointed as an Arbitrator in the matters. The learned Arbitrator's fees will be governed by the provisions of Fourth Schedule appended to the 1996 Act. Before entering upon reference, the learned Arbitrator will file a declaration as required under Section 12 and other attendant provisions of the 1996 Act.

¹ 18. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?

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. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

9. It is, however, made clear that the parties will bear their own costs.
10. The Registry will dispatch a copy of the order to the learned Arbitrator.

RAJIV SHAKDHER
(JUDGE)

FEBRUARY 8, 2019/rb

