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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 902/2018**

Date of Decision: 14.3.2019

M/S SHIV SHAKTI ENTERPRISES Petitioner
Through Ms. Seema Singh, Adv.

versus

UNION OF INDIA & ORS. Respondents
Through Mr. Ruchir Mishra and Mr. M.K.
Tiwari, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. Notice in this petition was issued on 19.12.2018.
- 1.1 On that date, Mr. Mukesh Kumar Tiwari accepted notice for the respondents.
2. It was made clear that if the counsel for respondents receive instructions to resist the petition, a reply will be filed before the next date of hearing.
3. To be noted, no reply has been filed.
4. Briefly, the case of the petitioner is that this Court vide order dated 11.1.2017 passed in ARB.P. No.696/2016, passed an order to the effect that respondent no.1/UOI will appoint a named Arbitrator as the sole Arbitrator.
5. Pertinently, the petitioner at that point in time waived the applicability of the provisions of Section 12(5) of the Arbitration and Conciliation Act,

1996 (for short '1996 Act') and, therefore, in effect, had agreed to the appointment of an Arbitrator by respondent No.1/UOI. Resultantly, an Arbitrator was appointed on 4.2.2017 by respondent No.1/UOI.

6. The Arbitrator so appointed by respondent No.1/UOI held a preliminary hearing in the matter on 15.9.2017.

7. According to the petitioner, thereafter, the learned Arbitrator convened hearings on 6.3.2018 and 20.3.2018 followed by another hearing in May, 2018.

8. The petitioner has not referred to a specific date as to when exactly the hearing was held in May, 2018.

9. These assertions are made by the petitioner in paragraph 22 of the captioned petition. The petitioner in the very same paragraph also avers that the Arbitrator resigned on 9.11.2018.

10. Evidently, the petitioner on 10.11.2018 wrote to respondent No.1/UOI for appointment of an Arbitrator in terms of Condition No.70 of the General Conditions of the Contract.

11. Given the fact that there was no movement in the matter, the petitioner approached this Court.

12. Mr. Mishra, who appears for respondent No.1/UOI, says that on 24.12.2018, a communication was sent to the petitioner to intimate the name of the officer who could be appointed as an Arbitrator by the respondents in place of Mr. Vinay Shandilya (Director), who had resigned as an Arbitrator.

13. Furthermore, Mr. Mishra says that in view of the fact that the petitioner had waived the applicability of Section 12(5) of the 1996 Act, the respondents would continue to have the leeway to appoint their employee as an Arbitrator.

14. On the other hand, Ms. Singh, who appears for the petitioner, says that while the petitioner had conceded to the appointment of the respondents' employee as the Arbitrator at the hearing held on 11.1.2017 in ARB.P. No.696 the circumstances, then obtaining, had changed in view of the facts articulated in the petition.

15. Ms. Singh says that a fresh cause of action had arisen and, therefore, the so called waiver cannot continue to obtain at this juncture.

16. I have heard the learned counsel for the parties and perused the record.

17. The dates and events which have been stated above are not in dispute.

18. Clearly, when the petitioner had approached this Court in the first instance, the petitioner had waived the applicability of the provisions of Section 12(5) of the 1996 Act.

19. Thereafter, respondent No.1/UOI did appoint an Arbitrator, who, unfortunately, did not act with due expedition.

20. Mr. Shandilya was appointed as an Arbitrator on 4.2.2017 and he resigned as an Arbitrator on 9.11.2018.

21. Even according to Mr. Mishra, only two hearings were held by Mr. Shandilya i.e. the erstwhile Arbitrator.

22. What is also evident is the fact that the statutory period provided for concluding the arbitration proceedings has also expired.

23. It is clear that respondent No.1/UOI is not able to appoint an Arbitrator who is able to devote time for adjudication of disputes between the parties. The gap between two hearings held by Mr. Shandilya was over 9 (nine) months.

24. Furthermore, given the fact that the petitioner's suggestion for

appointment of an Arbitrator was sought only on 24.12.2018 *albeit* after the petitioner had moved this Court, right, if any, in law which was available to the respondents stood dissolved.

25. Thus, Mr. Mishra's contention that respondent No.1/UOI would still have the right to appoint an Arbitrator in view of the petitioner waiving the applicability of Section 12(5) of the 1996 Act is a submission, which I am not impressed with.

26. Having regard to the aforesaid facts and circumstances, the petition is disposed of with the aforesaid directions:

- (i) Mr. Hari Prakash Sharma, Retd. ADJ, Delhi (Cell No.9810968693), is appointed as an Arbitrator.
- (ii) The learned Arbitrator will be paid his fee in accordance with the provisions of the Fourth Schedule appended to the 1996 Act.
- (iii) Needless to say, before the learned Arbitrator enters upon reference, he will file a declaration in terms of Section 12(5) read with the attendant provisions of the 1996 Act.

27. The petition is disposed of with the aforesaid directions.

28. For the purposes of good order and record, the Registry will scan and upload a copy of the letter dated 24.12.2018 handed over in Court by Mr. Mishra.

RAJIV SHAKDHER, J

MARCH 14, 2019

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