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

+ **ARB.P. 302/2020**

TATA PROJECTS LIMITED

..... Petitioner

Through: Ms. Sushma Nagaraj, Ms. Renu Gupta, Ms. Akshaya Ganpath and Ms. Vibhuti Keny, Advs.

versus

OIL AND NATURAL GAS CORPORATION LIMITED

..... Respondent

Through: Mr. Shekhar Vyas and Ms. Nitya Rao, Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (ORAL)

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09.10.2020

(Video-Conferencing)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”).

2. As the merits of the disputes between the parties would have to be appreciated by the Arbitral Tribunal, it is not necessary for this Court to expatiate, in detail, thereon, and a bare outline of the facts would suffice.

3. A tender, for “Madanam CPF and Pipelines Project-Cauvery Asset” was awarded, by the respondent, to the petitioner, resulting in a contract dated 1st February, 2017.

4. The petition alleges that, on account of the respondent, various delays and hindrances were encountered in undertaking the contracted work. As a result, it is alleged that the project was disrupted, and the petitioner had to suffer considerable additional financial outlay.

5. Resultantly, disputes surfaced between the parties.

6. The contract, dated 1st February, 2017, contemplated a resolution of the disputes, in the first instance, by settlement and conciliation and, in default thereof, by arbitration.

7. Clauses 1.3.4 and 1.3.2 of the contract, which provide for resolution and arbitration, respectively, may (to the extent relevant) be reproduced thus:

“1.3.4 Resolution of disputes through conciliation by OEC:

Parties hereby agree as under:

If any difference or dispute (hereinafter referred “Dispute”) under the Contract arises, the party shall give a 60 days written notice (“Dispute Notice”) to the identified officer of the other party mentioned in the Contract giving details of the Dispute. The Parties shall use all reasonable endeavours to resolve the Dispute mutually and amicably. All efforts by either party within these 60 days Dispute Notice Period shall be kept confidential by both the parties under Section 75 of the Arbitration and Conciliation Act 1996. Parties shall not rely upon any views expressed or suggestions made by the other party, admissions made by the other party or the fact that the other party had

indicated his willingness to enter into a settlement as evidence in an Forum/ arbitration/court proceedings.

If Parties are unable to resolve the Dispute amicably within 60 days of receipt of the Dispute Notice then after expiry of the 60 days Dispute notice period the aggrieved Party can refer the Dispute to conciliation and/or arbitration subject to terms and conditions contained here below.”

“1.3.2 Arbitration (other than Public Sector Enterprises)

5. For a dispute involving claims above Rs 5 crores and upto Rs 100 crore, the claimant shall appoint an Arbitrator and communicate the same to the other Party in the Invocation Notice itself along with the copy of disclosure made by nominated Arbitrator in the form specified in Sixth Schedule of the Arbitration & Conciliation Act 1996. For the purpose of Section 21, the Arbitration Proceeding shall commence only upon date of receipt of Invocation Notice complete in all respects mentioned above.

The other Party shall then appoint the second Arbitrator within 15 days from the date of receipt of written notice. The two Arbitrators appointed by the Parties shall appoint the third Arbitrator within 30 days, who shall be the Presiding Arbitrator.

The parties agree that they shall appoint only those persons as arbitrators who accept the conditions of this arbitration clause. No person shall be appointed as arbitrator or presiding arbitrator who does not accept the conditions of this arbitration clause.

14. Subject to the above the provisions of the Arbitration and Conciliation Act 1996 as amended and

applicable from time to time shall apply to the arbitration proceedings under this Contract.”

8. In accordance with the mandate of Clause 1.3.4, the petitioner wrote, on 8th April, 2020, to the respondent, seeking resolution of the disputes between them. Though a meeting was convened, between the parties, on 11th April, 2020, it is not in dispute that, till the expiry of the period of 60 days stipulated in Clause 1.3.4, the disputes could not be resolved.

9. Mr. Shekhar Vyas, learned counsel appearing for the respondent, submits that this was on account of default on the part of the petitioner, in providing requisite documents and details, and that the respondent was always willing to settle the disputes.

10. I do not think this argument needs to engage me, as the mandate of Clause 1.3.4 is clear and categorical. In case, the disputes between the parties are not amicably resolved within 60 days of the receipt of the Dispute Notice (which, in the present case, was dated 8th April, 2020), the aggrieved party can refer the disputes to arbitration. The reason for non-resolution of the disputes, within the 60 day period, is entirely irrelevant, insofar as the operation of Clause 1.3.4 of the agreement is concerned.

11. On 26th June, 2020, the petitioner addressed a notice, to the respondent, invoking arbitration and suggesting the name of Hon’ble Mr. Justice Dilip Ganesh Karnik, a retired Judge of High Court of Bombay, as its arbitrator.

12. Clause 1.3.2(5) of the agreement, as is apparent from a reading thereof, required the respondent to appoint its arbitrator within 15 days of the receipt of the notice invoking arbitration from the petitioner. The said period of 15 days expired on 11th July, 2020. The respondent, however, admittedly, did not appoint its arbitrator, within the stipulated period.

13. In these circumstances, the petitioner has approached this Court, by means of the present petition under Section 11(6) of the 1996 Act, seeking the intervention of this Court to appoint an arbitrator, on behalf of the respondent, so that the said arbitrator and Hon'ble Mr. Justice Dilip Ganesh Karnik, a retired Judge of High Court of Bombay, can proceed to appoint a third Presiding Arbitrator.

14. After this petition has been filed, it appears that, on 17th August, 2020, the respondent addressed an e-mail to Hon'ble Mr. Justice G.S. Singhvi, a learned retired Judge of the Supreme Court of India, requesting him to act as an arbitrator on the respondent's behalf. Hon'ble Mr. Justice G.S. Singhvi, admittedly, accepted the request on the very same day.

15. Ms. Sushma Nagaraj, learned counsel appearing for the petitioner, submits that, in view of the law laid down by the Supreme Court in "*Datar Switchgear Ltd. v. TATA Finance Ltd.*¹", "*Union of*

¹ (2000) 8 SCC 151

*India v. Bharat Battery Manufacturing Co. (P) Ltd.*²” and “*Zion Promoters and Developers Pvt. Ltd. v. Ferrous Infrastructures Pvt. Ltd.*³.” the respondent lost its right to appoint an arbitrator, on the petitioner approaching this Court by means of the present petition.

16. There can be no gainsaying this proposition, and the Supreme Court has held as much, in the decisions as cited by Ms. Nagaraj.

17. Having said that, I pointed out to Ms. Nagaraj that though, in approaching Hon’ble Mr. Justice G.S. Singhvi (retd.), to act as its arbitrator on 17th August, 2020, the respondent may have acted in excess of the right available to it, Hon’ble Mr. Justice G.S. Singhvi was, nevertheless, an eminent retired Judge of the Supreme Court and there can be no objection, therefore, to his being appointed as the arbitrator on behalf of the respondent.

18. Ms. Nagaraj sought to submit, initially, that though she could have no possible objection to the appointment of Hon’ble Mr. Justice G.S. Singhvi (retd.) as the respondent’s arbitrator, in its judgment in *Bharat Battery Manufacturing Co. (P) Ltd.*², the Supreme Court had noted that, if the arbitrators, named by the respondent, were to be appointed by this Court in exercise of its power under Section 11(6) of the 1996 Act, that would effectively nullify the effect of Section 11(6), as it would result in the respondent indirectly being able to exercise right which directly was not available to it.

² (2007) 7 SCC 684

19. I have gone through the judgment in *Bharat Battery Manufacturing Co. (P) Ltd.*² and do not find, in the said decision any proscription, directly or indirectly, on the court, in exercise of powers vested in the Court under Section 11(6) of the 1996 Act, appointing the person, whose name was suggested by the defaulting respondent, as its arbitrator. No doubt, once the respondent has defaulted in complying with its obligation, under the arbitration clause contained in the agreement, and the petitioner has approached the Court, under Section 11(6), the respondent *loses its right* to appoint an arbitrator of its choice. The only consequence would be that, if the respondent suggests a name of a person, to act as its arbitrator, the Court *could* override the request and appoint another arbitrator, in place of the person whose name has been so suggested. There is no mandate, in the law, that the Court *should* do so. There is no embargo, explicit or implied, on the Court appointing the person, whose name has been suggested by the respondent, as its arbitrator, if the court is convinced that a person whose name has been suggested is suitable and qualified in that regard.

20. Given his eminence and reputation, there can be no reasonable objection to the appointment of Hon'ble Mr. Justice G.S. Singhvi (retd.), as the arbitrator on behalf of the respondent.

21. In view thereof, and in exercise of the powers vested in me by Section 11(6) of the 1996 Act, I confirm the appointment of Hon'ble Mr. Justice G.S. Singhvi (retd.), former Judge of the Supreme Court of

³ 2016 SCC OnLine Del 1668

India, as the arbitrator on behalf of the respondent.

22. The terms of appointment of Hon'ble Mr. Justice G.S. Singhvi (retd.) would be the same as the terms of appointment of Hon'ble Mr. Justice Dilip Ganesh Karnik (retd), the learned sole arbitrator who has been appointed by the petitioner.

23. Needless to say, the two learned arbitrators would proceed, in accordance with the arbitration clause in the agreement, to appoint a learned presiding arbitrator, so that the arbitration proceedings could move forward.

24. The learned arbitrators would file the requisite disclosures, under Section 12 of the 1996 Act, within a month of the Arbitral Tribunal entering on the reference in the present case.

25. This petition stands disposed of in the aforesaid terms, with no order as to costs.

C. HARI SHANKAR, J.
OCTOBER 9, 2020
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