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

% *Date of Judgment: 19th February, 2021*

+ **ARB.P. 815/2019**

M/STECHNOCRATS ADVISORY SERVICES

PRIVATE LIMITED

..... Petitioner

Through: Mr Darpan Wadhwa, Senior
Advocate with Ms Mani Gupta,
Mr Vedant Kumar, Advocates.

versus

**MINISTRY OF ROAD TRANSPORT
& HIGHWAYS**

..... Respondent

Through: Mrs Bharathi Raju, CGSC for
UOI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. Technocrats Advisory Services Private Limited (hereafter 'TASPL'), a private company incorporated under the Companies Act, 2013, has filed the present petition under the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia*, praying as under:

“(a) a sole arbitrator may kindly be appointed by this
Hon’ble Court to adjudicate the claims of the

Petitioner against the Respondent from among the names on the panel of the Indian Road Congress (as annexed herewith);

(b) award the costs of this Petition in favor of the Petitioner and against the Respondent;”

2. On 28.10.2015, the respondent (hereafter ‘MoRTH’) had entered into an Agreement for consultancy services (hereafter ‘the Agreement’) with MC Consulting Engineers Private Limited, in association with Sugam Technocrats Private Limited (hereafter ‘the Original Consultant’). The said consultancy agreement was with regard to collection and analysis of Highways for a period of three years.

3. The Original Consultant demerged its consultancy business in the field of Road / Highways and Bridges in terms of a Scheme of Arrangement *cum* Demerger, which was approved by the High Court of Telangana and Andhra Pradesh as well as by this Court. In terms of the said Scheme, the specified consultancy business including the business conducted under the Agreement dated 28.10.2015 between the Original Consultant and MoRTH stood vested with TASPL. Thereafter, TASPL and MoRTH entered into a Substitution Agreement dated 10.02.2017, whereby MORTH transferred and conveyed on, “*as is where is and continuing basis*” all rights and liabilities under the Agreement dated 28.10.2015 to TASPL. In terms of the said Substitution Agreement, TASPL assumed and undertook all rights and liabilities of the Original Consultant arising out of or in

terms of the Agreement and, for all intents and purposes, TASPL was substituted as a party in place of the Original Consultant, in the Agreement dated 28.10.2015, between the Original Consultant and MoRTH.

4. The Special Conditions of the Contract (SCC) between the parties includes an Arbitration Clause that reads as under:

“4.5 ARBITRATION

- (a) In the event of any question, dispute or difference arising under general conditions or special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by the general or the special conditions), the same shall be referred to the sole arbitrator, appointed by the Indian Road Congress (IRC). The arbitrator will be a retired Government Servant of Chief Engineer Level. The ‘Award’ of the arbitrator shall be final and binding on the parties to this contract.
- (b) In the event of the Arbitrator’s dying, neglecting or refusing to act or resign or being unable to act for any reason, or his Award being set aside by the Court for any reason, it shall be lawful for the IRC to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.
- (c) It is further a term of this contract that no person, other than the person appointed by the IRC as aforesaid, should act as arbitrator and that, if for any reason that is not

possible, the matter is not to be referred to Arbitration at all.

- (d) The arbitrator may, from time to time with the consent of all the parties to the contract, extend the time for making the Award.
- (e) Upon every and any such reference, the assessment of the costs incidental to the reference and Award, respectively, shall be at the discretion of the arbitrator.
- (f) Subject as aforesaid, the Arbitration Act, 1996 as amended and the rules there under and any statutory modification thereof for the time being in force shall be deemed to apply to the Arbitration proceedings under this clause.
- (g) If the value of the claim in a reference exceeds Rs. 1 lakh, the arbitrator shall give reasoned Award.
- (h) The venue of arbitration shall be the place from which formal Acceptance of Tender is issued or such other place as the DG(RD) &SS at his discretion may determine.”

5. Certain disputes have arisen between the parties in connection with the contract. In view of the said disputes, TASPL invoked the Arbitration Clause and by a letter dated 01.07.2019, addressed to the Secretary General, Indian Road Congress (hereafter ‘IRC’), TASPL declared that disputes have arisen with MoRTH (Ministry of Road Transport and Highways). TASPL stated that its works had been foreclosed by MoRTH without assigning reason after 75% of the work in question had been completed. It informed IRC that the disputes

between the parties relate to extra cost and its claims amounted to ₹47,25,57,765/-, in addition to the return of Bank Guarantee of ₹1,00,00,000/-. It called upon the IRC to appoint a Sole Arbitrator in terms of Clause 4.5 of the SCC.

6. MoRTH also raised counter claims to the extent of ₹1,20,30,32,000/-, by its letter dated 03.12.2019. It subsequently revised the same and by a letter dated 19.12.2019, informed TASPL that its counter claims had been revised to ₹156,36,42,000/-. TASPL disputes the said counter claims and communicated the same to MoRTH. In the meanwhile, on 25.11.2019, TASPL filed the present petition, as IRC (Indian Road Congress) had not appointed an Arbitrator as required in terms of the Arbitration Clause included in the SCC.

7. After the said petition was filed, IRC issued a letter dated 13.12.2019, appointing Sh. B.V. Tripathi, Engineer-in-Chief & H.O.D. (Retd.), as a Sole Arbitrator to adjudicate the disputes between the parties.

8. In view of the above, there is no controversy that an Agreement to refer the disputes to Arbitration exists between the parties; disputes have arisen between them; TASPL has invoked the Arbitration Clause; and IRC had failed to appoint an Arbitrator prior to TASPL filing the present petition.

9. Mr Darpan Wadhwa, learned senior counsel appearing on behalf of TASPL submitted that, since IRC has not appointed an

Arbitrator within a reasonable period and prior to TASPL approaching this Court, it had forfeited its right to do so. He referred to the decision of the Supreme Court in ***Datar Switchgears Ltd. V. Tata Finance Ltd. And Anr.: (2000) 8 SCC 151***. He submitted that Sub-clause (c) of Clause 4.5 of SCC, which provides that no person, other than the person appointed by the IRC should act as an Arbitrator, is illegal. He submitted that a similar clause has been interpreted by the Supreme Court in ***Indian Oil Corporation Ltd. and Ors. v. M/s Raja Transport (P) Ltd.: Civil Appeal No. 5760/2009, decided on 24.08.200***, as being contrary to the provisions of the A&C Act. He also referred to the subsequent decision of the Supreme Court in ***Union of India v. Besco Limited: (2017) 14 SCC 187***, where the Supreme Court following the decision in ***Indian Oil Corporation Ltd. And Ors. v. M/s. Raja Transport (P) Ltd. (supra)*** held that if circumstances so warrant, the Chief Justice or a designated Judge would be free to appoint an independent Arbitrator even though an Arbitrator was specified in the Arbitration Agreement.

10. He also referred to the decision of this Court in ***B.E. Billimoria & Co. Ltd. v. Rites Limited & Anr.: 2017 SCCOnLine Del 6803***, where this Court had interpreted a somewhat similar clause and, had held that the same would be applicable only in cases where there was impossibility for an Arbitrator appointed by an appointing authority to act as such.

11. Ms Bharathi Raju, learned CGSC countered the aforesaid submissions. She submitted that IRC had appointed an Arbitrator and

therefore, the petitioner's grievance stood redressed. She further submitted that, since parties had agreed that no person, other than the person appointed by IRC, could act as an Arbitrator, this Court would not have the jurisdiction to appoint an Arbitrator.

12. The contentions advanced on behalf of the respondent are unmerited. In *Datar Switchgear Ltd. v. Tata Finance Ltd.* (*supra*), the Supreme Court rejected the contention that the right of a party to appoint an Arbitrator in terms of the procedure, as agreed, would stand forfeited if the said appointment was not made within a period of thirty days. The Court explained that unlike Sub-section (5), Sub-section (6) of Section 11 of the A&C Act did not stipulate any period for appointment of an Arbitrator and therefore, such a right to appoint an Arbitrator could be exercised even after a period of thirty days of the demand for the appointment of an Arbitrator being made. However, the same would be required to be made before the party moves the Court under Section 11 of the A&C Act. Once a party seeking the appointment of an Arbitrator files an application under Section 11 of the A&C Act, the right of the other party to appoint an Arbitrator ceases.

13. In *Deep Trading Company v. Indian Oil Corporation Limited and Others: (2013) 4 SCC 35*, the respondent (Indian Oil Corporation) appointed the Arbitrator after the appellant (Deep Trading Company) had moved the Chief Justice of Allahabad High Court under Section 11(6) of the A&C Act for the appointment of an Arbitrator. Following the decision in *Datar Switchgears Ltd.* (*supra*), the Supreme Court

observed as under:

“...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)”.

14. The said decision is squarely applicable to the facts of the present case, since IRC had not appointed an Arbitrator prior to TASPL moving this Court under Section 11(6) of the A&C Act, and therefore, MoRTH had forfeited its right to appoint an Arbitrator.

15. In view of the above, it is not necessary to examine TASPL's objection as to the impartiality and independence of the Arbitrator on the ground that the said Arbitrator had been appointed by a body, which consisted of officers of MoRTH.

16. The next question to be examined is whether this Court would have jurisdiction to appoint an Arbitrator in view of Sub-clause (c) of Clause 4.5 of the SCC. In ***Indian Oil Corporation and Ors. v. M/s. Raja Transport (P) Ltd.*** (*supra*), the Supreme Court examined an arbitration clause that included a term similar to Sub-clause (c) of Clause 4.5 of the SCC. The said term reads as under:

“...It is also a term of this contract that no person other than the Director, Marketing or a person nominated by such Director, Marketing of the Corporation as aforesaid shall act as arbitrator hereunder.”

17. In that case, the Chief Justice of the Uttaranchal High Court had

by an order dated 26.09.2008, appointed an Arbitrator to adjudicate the disputes between the parties. The said order was impugned before the Supreme Court. The Supreme Court, *inter alia*, framed the following question:

“(ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?”

18. In the aforesaid context, the Supreme Court held as under:

“20. This takes us to the effect of the condition in the arbitration agreement that “it is also a term of this contract that no person other than the Director, Marketing or a person nominated by such Director, Marketing of the Corporation as aforesaid shall act as the arbitrator”. Such a condition interferes with the power of the Chief Justice and his designate under Section 11(8) of the Act to appoint a suitable person as arbitrator in appropriate cases. Therefore, the said portion of the arbitration clause is liable to be ignored as being contrary to the Act. But the position will be different where the arbitration agreement names an individual (as contrasted from someone referred to by designation) as the Arbitrator. An example is an arbitration clause in a partnership deed naming a person enjoying the mutual confidence and respect of all the parties, as the Arbitrator. If such an arbitration agreement provides that there shall be no arbitration if such person is no more or not available, the person named being inextricably linked to the very provision for arbitration, the non-availability of the named arbitrator may extinguish the very arbitration agreement. Be that as it may.”

19. In view of the above, this Court is unable to accept the

contention that this Court would not have jurisdiction to appoint an Arbitrator, where the designated authority has failed to appoint the arbitrator prior to the party moving this Court under Section 11(6) of the A&C Act. Sub-clause (c) of Clause 4.5 of the SCC to the extent that it provides that the matter would not be referred to Arbitration, if it is not possible for a person appointed by IRC to act as an Arbitrator, is in violation of the provisions of the A&C Act. This is because, the A&C Act expressly provides for a recourse to a party in case an arbitrator is not appointed as per the procedure set out under the Arbitration Agreement.

20. This Court is also of the view that such a clause would not control the operation of the Arbitration Agreement. The parties having agreed, in unambiguous terms, to refer the disputes and differences to Arbitration. It cannot thereafter, include a term which makes the said agreement to arbitrate contingent at the discretion of any one party/authority.

21. Having stated the above, this Court is also of the view that the stipulation that the Arbitrator would be “*a retired Government servant of a Chief Engineer level*” clearly expresses the agreement between the parties that the Arbitrator would be a senior qualified engineer and the said agreement between the parties is required to be adhered to. TASPL had also prayed that an Arbitrator be appointed from the panel of IRC. The panel of Arbitrators as available on the website of IRC was also handed over to this Court, during the course of hearing. Thus, this Court considers it apposite to appoint an Arbitrator from the

said list.

22. Accordingly, Mr M.S. Sodhi, ADG (Retd.) BRO (Mobile No. 9414038390) is appointed as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties falling within the scope of the Arbitration Clause as set out above. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

23. The parties are at liberty to approach the Arbitral Tribunal for further proceedings.

FEBRUARY 19, 2021
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VIBHU BAKHRU, J

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