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

Decided on 15th January, 2021

+ **ARB.P. 234/2020**

VALECHA ENGINEERING LIMITED Petitioner

Through: Mr. Rajeev Sharma, Mr. Abhishek Birthray, Ms. Somya Budholia, Mr. Prateek Seth, Mr. Rajat Krishna and Mr. Adeem Ahmed, Advs.

versus

**DELHI METRO RAIL
CORPORATION LIMITED**

..... Respondent

Through: Mr. Prashant Mehta and Ms. Neha Tanwar, Advs.

CORAM:

HON'BLE MR. JUSTICE C .HARI SHANKAR

JUDGEMENT (ORAL)

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15.01.2021

(Video-Conferencing)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), to refer certain disputes, which have arisen between the petitioner and the respondent, to arbitration.

2. Having heard Mr. Rajeev Sharma, learned counsel for the petitioner and Mr. Prashant Mehta, learned counsel for the respondent at length, I proceed to dispose of the present petition, the issue in the petition being limited.

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3. Consequent to a letter of award, dated 30th November, 2011, a contract, for constructing underground link tunnel between the All India Institute of Medical Sciences (AIIMS) and the Jai Prakash Narayan Apex Trauma Centre, was awarded to the petitioner by the respondent.

4. The Agreement provided for resolution of disputes between the parties, initially, by conciliation and thereafter, on failure of conciliatory process, by arbitration. Clause 17.9 of the Agreement, which provided for arbitration, reads thus:

"17.9. If the efforts to resolve all or any of the disputes through conciliation fails, then such disputes or differences, whatsoever arising between the parties, arising out of touching or relating to construction/manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration in accordance with the following provisions.

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator if the total value of the claims is upto Rs. 5 million and to a panel of three Arbitrators if total value of claims is more than Rs. 5 million. The Employer shall provide a panel of three arbitrators which may also include DMRC officers for the claims upto Rs. 5 million and a panel of five Arbitrators which may also include DMRC officers for claims of more than Rs. 5 million. The Contractor shall have to choose the sole Arbitrator from the panel of three and/or one Arbitrator from the panel of five in case three Arbitrators are to be appointed. The Employer shall also chose one Arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The Arbitrator(s) shall be appointed within a period of 30 days from the date of

receipt of written notice/ demand of appointment of Arbitrator from either party. Neither party shall be limited in the proceedings before such arbitrators) to the evidence of arguments put before the Engineer for the purpose of obtaining his decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator(s) on any matter, whatsoever, relevant to dispute or difference referred to arbitrator/s. The arbitration proceedings shall be held in Delhi only. The language of proceedings, that of documents and communication shall be English.

(b) The Employer at the time of offering the panel of Arbitrator(s) to be appointed as Arbitrator shall also supply the information with regard to the qualifications of the said Arbitrator nominated in the panel along with their professional experience, phone nos. and addresses to the contractor.

(c) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be shall be binding on all parties.”

(Emphasis supplied)

5. According to the petitioner, failure, on the part of the respondent, to fulfil certain obligations, cast on it under the aforesaid contract, resulted in prejudice to the petitioner and delay in completion of the contract. The petitioner issued a notice of demand, to the respondent, on 23rd May, 2018, raising several demands, for being recompensed itself for losses suffered by the petitioner owing to alleged default on the part of the respondent.

6. The communication also put the respondent on notice that in the event of default on the part of the respondent, to pay the alleged outstanding differences of the petitioner within 28 days, the petitioner

would seek reference of the dispute to the Conciliator, in accordance with Clause 17.9 of the Agreement.

7. The respondent, in response to the request, appointed one Mr. S.N. Yadav as Conciliator *vide* letter dated 19th December, 2018. It is not in dispute that formal discussions, between the parties, were held by the Conciliator on 9th January, 2019, 22nd January, 2019, 18th February, 2019, 14th March, 2019 and 4th October, 2019, but to no avail. Ultimately, on 30th October, 2019, the Conciliator declared the conciliation process as having been failed.

8. On 18th November, 2019, the petitioner addressed a notice to the respondent, calling on the respondent to provide a panel of three arbitrators, in accordance with Clause 17.9(a) of the Agreement.

9. Mr. Rajeev Sharma, learned counsel for the petitioner, submits that as the respondent did not act in accordance with Clause 17.9(a) of the contract within a period of 30 days as stipulated therein, there was failure of the process contemplated in the contract for invocation of arbitration by the parties, resulting in the necessity of an arbitrator being appointed by this Court.

10. As against this, Mr. Prashant Mehta, learned counsel for the respondent, seeks to refute the aforesaid submission of Mr. Sharma, by reference, essentially, to a communication, dated 23rd June, 2020, from the petitioner to the respondent, which read thus:

“Ref: VEL/DMRC/AIIMS-01/49

Date: 23/06/2020

To,

Office of the Chief Project Manager-3,
Delhi Metro Rail Corporation Ltd.,
Gr. Floor, Mayur Vihar, phase -1,
Metro Station,
New Delhi 110091.

**Sub: Design and Construction of Road Tunnel, Ramps
and Grade Road between AIIMS and JPN Apex Trauma
Center by Cut & Cover method. (Contract no. AIIMS-01)**

Reg:- Application for appointment Arbitrator

**Ref:- Our letter No. VEL/DMRC/AIIMS-01/SBW/31
dated 18/11/2019**

Dear Sir,

We refer to our earlier letter dated 18 11 2019, wherein we
have requested for appointment of the arbitrator.

However now we understand that a new Dispute Resolution
Mechanism has been in prevalence recently in DMRC so you
may refer our dispute to this panel at the earliest in order to
achieve early resolution.

Kindly note that as all our records are in Delhi and in Covid
19 situation it may not be possible for us to present our case
now hence we shall revert to when possible.

Warm Regards,

Thanking you,

With Regards

**For VALECHA ENGINEERING
Sd/Seal
(AUTHORISED SIGNATORY)”**

11. Mr. Mehta submits that, having thus reopened the conciliatory avenue, by addressing the aforesaid communication dated 23rd June, 2020 to the respondent, the petitioner could not again seek to rely on its earlier communication dated 18th November, 2019. The counter affidavit filed by the respondent, to the present petition, gave serious exception to the fact that, having thus written to the respondent on 23rd June, 2020, requesting that the dispute be referred for settlement under the Dispute Resolution Mechanism, the petitioner, nevertheless, filed the present petition before this Court on 9th July, 2020.

12. Mr. Mehta submits that even after filing the present petition, the petitioner wrote, to the respondent, 30th July, 2020 and 5th August, 2020, seeking that the dispute be referred for amicable settlement to the Dispute Resolution Board of the DMRC.

13. Mr. Rajeev Sharma, learned counsel for the petitioner, however, points out that the petitioner had clearly stated in its communication that the request was made without prejudice to his right to invoke arbitration and its claim in the present petition pending before this Court.

14. On 12th August, 2020, the respondent wrote to the petitioner, providing a list of five arbitrators and calling on the petitioner to select an arbitrator out of the said list. This, submits Mr. Mehta, is in accordance with the protocol prescribed in Clause 17.9(a) of the Agreement between the parties.

15. Mr. Mehta submits that once the respondent had provided a list of arbitrators to the petitioner on 12th August, 2020, and called on the petitioner to choose an arbitrator from the said list, this petition was no longer maintainable. He relies, for the purpose, on the judgment of the Supreme Court in *Datar Switchgears Ltd. v. Tata Finance Ltd.*¹ He also submits that a mechanism, similar to that in the present case, was specifically held, by the Supreme Court in *Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*², to be in accordance with law and not to infract Section 12(5) of the 1996 Act or the earlier decisions of the Supreme Court in *Bharat Broadband Network Ltd. v. United Telecom Ltd.*³ and *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited*⁴. As such, submits Mr. Mehta, the present petition is not maintainable any further, and the petitioner would be required to select an arbitrator from the list of five arbitrators, provided by the respondent under cover of its letter dated 12th August, 2020.

16. Mr. Sharma contends, on the other hand, that, having invoked the arbitration clause *vide* notice dated 18th November, 2019 after exhausting the conciliatory mechanism provided in the contract, and the respondent having failed to appoint an arbitrator within 30 days of the said notice, the present petition was clearly maintainable under Section 11(6) of the 1996 Act. The pre-arbitration dispute resolution mechanism, which was thereafter devised by the respondent and in

¹ (2000) 8 SCC 151

² 2019 SCC OnLine SC 1635

³ (2019) 5 SCC 755

⁴ 2019 SCC Online SC 1517

respect of which communications were exchanged between the petitioner and the respondent, according to Mr. Sharma, can make no difference as no such mechanism was contemplated in the contract between the parties. Besides, submits Mr. Sharma, the petitioner had, in its communications, to the respondent, clearly stated that its request for referring the dispute for resolution under the said mechanism was without prejudice its claim in the present petition.

17. *Datar Switchgears Ltd.*¹, submits Mr. Sharma, has no application to the facts of this case, as the principles in that case were expressly enunciated in the context of the fact that the arbitration agreement in the said case did not contemplate appointment of the arbitrator within 30 days of issuance of notice by one party to the other. Where such stipulation is specifically contained in the contract between the parties, as in the present case, Mr. Sharma submits that ***Datar Switchgears Ltd.*¹** can have no application at all.

Analysis

19. There is no dispute about the fact that, prior to invoking the arbitration agreement with the respondent, as contained in Clause 17.9(a), the petitioner exhausted the provision for conciliation, contained in the Agreement. Equally, it is not in dispute that though Clause 17.9(a) of the Agreement, specifically, required the arbitrator to “be appointed within a period of 30 days from the date of receipt of written notice/demand of appointment of Arbitrator from either party”, the respondent did not take any action within 30 days of receipt of notice dated 18th November, 2019 from the petitioner. Section 11(6) ***ARB.P. 234/2020***

of the 1996 Act reads thus:

“(6) Where, under an appointment procedure agreed upon by the parties, –

(a) a party fails to act as required under that 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,

a party may request the Supreme Court, or, as the case may be, the High Court or any person or institution designated by such court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

20. The default on the part of the respondent, in appointing arbitrator or even in providing a panel of arbitrators to the petitioner within 30 days of issuance, by the petitioner, of its notice invoking arbitration on 18th November, 2019, in my opinion, clearly resulted in failure, on the part of the respondent, to act in accordance with the procedure for arbitration envisaged in the agreement between the petitioner and the respondent. Section 11(6) of the 1996 Act, therefore, directly applies.

21. The decision in *Datar Switchgears Ltd.*¹ is expressly inapplicable to the facts of the present case. I say so because, in para 14 of the report, the Supreme Court clearly observed thus:

“14. The above decision has no application to the facts of this case as in the present case, the Arbitrator was already

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appointed before the appellant invoked Section 11 of the Act. The Counsel for the appellant contended that the Arbitrator was appointed after a long lapse of time and that too without any previous consultation with the appellant and therefore it was argued that the Chief Justice should have appointed a fresh arbitrator. We do not find much force in this contention, especially in view of the specific words used in the Arbitration clause in the Agreement, which is extracted above. *This is not a case where the appellant requested and gave a notice period for appointment of arbitrator and the latter failed to comply with that requested.* The 1st respondent asked the appellant to make payment within a stipulated period and indicated that in the event of non-payment of the amount within fourteen days, the said notice itself was to be treated as the notice under the Arbitration clause in the Agreement. The amount allegedly due from the appellant was substantial and the 1st respondent cannot be said to be at fault for having given a larger period for payment of the amount and setting the dispute. It is pertinent to note that the appellant did not file an application even after the 1st respondent invoked Section 9 of the Act and filed a petition seeking interim relief. *Under such circumstances*, it cannot be said that there was a failure of the procedure prescribed under the contract.”

(Emphasis supplied)

22. The Supreme Court, therefore, was cautious in conditioning the law enunciated by it in *Datar Switchgears Ltd.*¹, with a caveat that it was *not considering* the case in which the notice invoking arbitration called on the respondent to appoint an arbitrator within a particular period, and the respondent failed to do so. Inasmuch as there was no stipulated period, within which the arbitrator was to be appointed by one party after receipt of notice from the other, and no such period was to be found in Section 11(6) of the 1996 Act, either, the Supreme Court went on to observe that merely by failing to appoint the arbitrator within 30 days of receipt of notice from the other side, the right of the respondent before it to appoint the arbitrator did not stand **ARB.P. 234/2020**

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eviscerated. It is in these circumstances that the Supreme Court held that *in the absence of any statutory or contractual stipulation, requiring appointment of the arbitrator by either party to the contract within 30 days of receipt of notice from the other*, the arbitrator could be appointed till such of filing of the petition before the Court under Section 11(6) of the 1996 Act. *Per contra*, in the present case, *the contract expressly prescribes a period of 30 days*, from the date of receipt of notice invoking arbitration by one party, for the other party to appoint the arbitrator. That period having elapsed, and the respondent having failed to appoint the arbitrator, Section 11(6) is clearly applicable and the judgment in ***Datar Switchgears Ltd.*¹** is, equally clearly, distinguishable.

23. Mr. Prashant Mehta seeks to submit, *apropos* the italicized observation in the paragraph above from ***Datar Switchgears Ltd.*¹**, that there is no distinction between the situation that obtained in that case and in this. In the present case, too, submits Mr Mehta, the notice invoking arbitration, dated 18th November, 2019, did not call on the respondent to appoint its arbitrator within 30 days. To my mind, this distinction cannot make ***Datar Switchgears Ltd.*¹** applicable to the facts of the present case. The notice dated 18th November, 2019 did not merely invoke Clause 17.9 of the Agreement, but extracted, *in extenso*, the entire Clause (as extracted in para 4 (*supra*)). Clause 17.9 required, in express and unmistakable terms, for “the Arbitrator(s) (to) be appointed within a period of 30 days from the date of receipt of written notice/demand of appointment of Arbitrator from either party”. It was hardly required for the petitioner, having extracted the said

Clause in full, to again call upon the respondent to appoint the arbitrator within 30 days. In fact, after extracting the Clause, the notice calls on the respondent to provide a list of five arbitrators “as per operation of this Clause”. The respondent, however, did not do so. Ergo, the facts in the present case are clearly distinguishable from the facts in **Datar Switchgears Ltd.**¹ and in fact, attract the exception engrafted in para 14 of the report in the said case.

23. The Supreme Court did, in certain later decisions, hold that, even where the notice invoking arbitration called on the opposite party to appoint its arbitrator within 30 days, the right to appoint the arbitrator continued till the first party approached the Court under Section 11(6) of the 1996 Act, notably in **Punj Lloyd Ltd. v. Petronet MHB Ltd.**⁵ and **U.O.I. v Bharat Battery Manufacturing Co. (P) Ltd.**⁶ in which, despite the notice invoking arbitration calling on the opposite party to appoint its arbitrator, the right of the opposite party to do so was held to stand forfeited only on the first party approaching the Court under Section 11(6), following **Datar Switchgears Ltd.**¹. *Those, however, were not cases in which a period for appointing of arbitrator, reckoned from the issuance of the notice invoking arbitrator, was contained in the arbitration agreement between the parties.* Where such a time period was contained in the arbitration agreement between the parties, the Supreme Court, in **U.O.I. v. Premco-DKSPL (JV)**⁷ held, in unmistakable terms, that “the terms of the agreement bind the parties unless they have chosen to repudiate

⁵ (2006) 2 SCC 638

⁶ (2007) 7 SCC 684

⁷ (2016) 14 SCC 651

the same”. In a similar vein, Arijit Pasayat, J., heading a bench of three Hon’ble Judges of the Supreme Court, observed, in *Northern Railway Administration v. Patel Engineering Co. Ltd.*⁸, that “a bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible”. This is no more than a judicial recapitulation of Section 11(6), for the applicability of which “failure”, on the part of a party, “to act as required under” the agreed procedure for appointment of the arbitrator, is the statutory *sine qua non*.

24. The reliance, by Mr. Mehta, on the communications between the petitioner and the respondent, commencing 20th June, 2020, in my view, cannot be of any help to the respondent. Section 11(6) of the 1996 Act, which became applicable in favour of the petitioner, on the expiry of 30 days, from 18th November, 2019, cannot be treated as having become inapplicable merely because the petitioner was agreeable to reference of the dispute to the pre-arbitration Dispute Resolution Mechanism devised by the respondent – incidentally after 18th November, 2019, when the notice invoking arbitration was issued by the petitioner. The petition also asserts, in this regard, that the petitioner moved this Court only after the expiry of over two weeks from the request dated 23rd June, 2020, for reference of the dispute to the pre-arbitration dispute resolution mechanism of the respondent. That apart, as already noticed hereinabove, detailed attempts at conciliation were undertaken prior to the petitioner issuing the notice invoking arbitration to the respondent on 18th November, 2019 and,

⁸ (2008) 10 SCC 240
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therefore, the pre-arbitral regimen, as contemplated by the contract, stood exhausted. The petitioner having waited for 30 days from 18th November, 2019 and, even after the notice dated 23rd June, 2020 having waited for two more weeks before moving the present petition, it is clear that the petition is maintainable before this Court.

25. That being so, the respondent had, by 12th August, 2020, already lost its right to act in accordance with the procedure prescribed in Clause 17.9(a) of the Agreement. That right continued only till the expiry of 30 days from 18th November, 2019. It could not be sought to be revived as late as on 12th August, 2020. The communication dated 12th August, 2020 from the respondent to the petitioner whereunder the respondent provided a list of arbitrators and called on the petitioner to select one from the said list, was, therefore, incompetent. It cannot, therefore, militate against the maintainability, or the merits, of the present petition.

26. In view thereof, there is no necessity for me to return any finding on the applicability on the judgment of the Supreme Court in *Central Organization for Railway Electrification*², as the said decision basically seeks to justify the procedure to be followed by the respondent under Clause 17.9(a) of the Agreement, and as I have already held hereinabove that the right of the respondent to act in accordance with the said procedure was exhausted much prior to 12th August, 2020, when the respondent decided to do so.

27. I may observe, in this regard, that the petition does not make

any reference to the communication dated 23rd June, 2020 from the petitioner to the respondent, seeking reference of the dispute to the pre-arbitration dispute resolution mechanism of the respondent. This is unfortunate, and could have been avoided. Mr. Sharma submits that the default was not deliberate. I am not inclined to enter into that controversy as, in my view, the right of the petitioner to invoke Section 11(6) of the 1996 Act stood crystallized as far back as on 18th December, 2019, when the period of 30 days from the notice, dated 18th November, 2019 from the petitioner to the respondent, invoking arbitration, had elapsed, with the respondent failing to act in accordance with Clause 17.9(a) of the Agreement.

28. In view thereof, the petition deserves to succeed.

29. This Court appoints Hon'ble Ms. Justice G. Rohini, former Chief Justice of this Court, as the arbitrator to arbitrate on the disputes between the parties. The contact details of the learned arbitrator are as under:

Flat No.1001, Tower -12,
Supreme Towers,
Sector-99
NOIDA-201304

Mobile Nos.8527027027 & 8826000333
Email ID: justicegrohini@gmail.com

30. The parties are directed to contact the learned arbitrator at the aforesaid contact details within 48 hours of receipt, from the Registry, of a copy of this judgment by e-mail.

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31. The fees of the learned arbitrator shall be fixed by the learned arbitrator in consultation with the parties. Mr Mehta contends that the DMRC has a fixed “fee schedule”. The arbitrator having been appointed by this Court under Section 11(6) of the 1996 Act, and not by the DMRC, the applicability of this schedule may be questionable. It is, however, left open to the DMRC to so urge before the learned arbitrator, and for the learned arbitrator to take a decision thereon.

32. The learned arbitrator will furnish the requisite disclosure under Section 12(2) of the 1996 Act, within a week of entering on reference.

33. This petition is, accordingly allowed in the aforesaid terms, with no orders as to costs.

C. HARI SHANKAR, J

JANUARY 15, 2021

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