

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(APPELLATE SIDE)**

Present:

**The Hon'ble Justice Subrata Talukdar
and
The Hon'ble Justice Krishna Rao**

IA No. CAN 2 of 2022

In

FMA 2760 of 2016

The Chairman, Indian Oil Corporation Ltd. & Ors.

Versus

M/s. Laltu Filling Station & Ors.

For the Appellants	: Mr. M.S. Yadav	Advocate
For the Respondents/Applicants	: Mr. Lakshmi Kanta Pal Mr. Surajit Roy	Advocates
For the State	: Mr. Naba Kumar Das	Advocate

Heard on : 27.04.2022

Judgment on : 22.12.2022

Krishna Rao, J.:-

The Chairman of Indian Oil Corporation Ltd. and Others have filed the instant application praying for appointment of substituted Arbitrator on the

ground that the Arbitrator appointed by this Court has resigned from acting as an Arbitrator for the reason that he is in acquaintance with the person closely related to the applicants.

Initially, the respondent M/s. Laltu Filling Station had filed a writ application being WP No. 24059 (w) of 2009 (M/s. Laltu Filling Station - versus- Union of India & Ors.) challenging the order of termination dt. 12.08.2008 as well as order of Appellate Authority dt. 03.12.2009.

The writ petition filed by the respondent was disposed of by the Hon'ble Single Bench comprising one of us (Subrata Talukdar, J.) on 06.04.2016 by setting aside the impugned orders and remanded the matter to the original Disciplinary Authority of IOCL for taking a fresh decision after seeking an opinion of the Statutory Authority under the 1976 and 1985 Act.

Being aggrieved and dissatisfied with the order passed by the Hon'ble Single Bench, the Indian Oil Corporation had preferred an appeal before the Hon'ble Division Bench of this Court being FMA No. 2760 of 2016 (The Chairman, IOCL & Ors. -vs- M/s. Laltu Filling Station & Ors.). The appeal preferred by the Indian Oil Corporation was disposed of by the Coordinate Bench of this Court on 18.06.2019 by passing the following order :

“Although, Clause 67 of the agreement as to the manner of appointment of an arbitrator is vitiated by the present Arbitration Amendment Act, 1996, but one thing is clear that the parties have agreed to have their disputes resolved through arbitration and we feel that the parties should avail such remedy in order to resolve their disputes. Learned Counsel for the parties have also agreed to have resolved the disputes through arbitration and not in the manner as prescribed in Clause 67 of the dealership agreement.

Under such circumstances, we appoint Mr. Ajay Krishna Chatterjee, Learned Senior Advocate, as a Sole Arbitrator to adjudicate the disputes between the parties. Mr. Chatterjee is requested to fix commensurate remuneration preferably on a consolidated basis at the first sitting of the arbitration proceeding in consultation with the parties to be shared by the parties in equal measure at the first instance, subject to the directions as to costs, charges and expenses of the arbitrator shall be borne by the parties in equal manner.

The learned arbitrator is requested to dispose of the reference preferably within a period of six months from the date of completion of pleadings.

Since we find that the learned single Judge while disposing of the writ petition has observed that the opinion of the statutory authority under the 1976 and 1985 Acts (supra) i.e. LMD may be required for the purpose of deciding as to whether the final order of termination was valid or not, it would be open for the learned arbitrator to seek such opinion of the statutory authority if the Arbitrator feels it necessary in order to decide the dispute between the parties.

However, we make it clear that the order of suspension shall however remain till the reference is completed, however, the letter of termination shall remain stayed and shall abide by the award.”

After the order passed by the Coordinate Division Bench, the order dt. 18.06.2019 was forwarded to the Learned Sole Arbitrator appointed by the Court and on receipt of the order, the Learned Sole Arbitrator had issued notices to the parties and had held two meetings, i.e. on 24.09.2019 and 20.01.2020. Subsequently, on 02.03.2020, the Learned Sole Arbitrator by way of communication had informed the respective parties that he is not in a position to act as an Arbitrator in the matter due to his acquaintance with the person closely related to the claimant.

After receipt of the communication dt. 02.03.2020, the Indian Oil Corporation has preferred the instant application being CAN 2 of 2022 in FMA 2760 of 2016 on 17.02.2022 praying for appointment of substituted/new Arbitrator.

Mr. M.S. Yadav, Learned Counsel appearing for the applicants, submits that as the Coordinate Division Bench of this Court while disposing of the appeal being FMA 2760 of 2016 had appointed an Arbitrator to adjudicate the dispute between the parties but the Learned Sole Arbitrator after two sittings had informed the parties that due to his personal difficulties, he is not in a position to continue the arbitration proceeding and resigned as an Arbitrator and as such this Court has the jurisdiction to appoint an Arbitrator.

Mr. Yadav, Learned Counsel for the applicants, submits that as on the earlier occasion while disposing of the appeal, the Coordinate Division Bench of this Court has appointed the Arbitrator and as such this Court has the jurisdiction to appoint a new Arbitrator in place of the earlier Arbitrator who has resigned by communication dt. 02.03.2020.

Per contra, the Learned Counsel for the respondent/writ petitioner submits that the application filed by the applicants is not maintainable under law as the applicants have not complied with the provisions of Section 15 (2) of the Arbitration and Conciliation Act.

Mr. Lakshmi Kanta Pal, Learned Counsel appearing for the respondent/writ petitioner, submits that the applicants ought to have appointed an Arbitrator in terms of Section 11 of the Arbitration and Conciliation Act and without following the procedure, the applicants have filed the instant application and as such this Court has no jurisdiction to appoint an Arbitrator directly without being following the procedure lays down under the Act of 1996.

Mr. Pal submits that there is no failure on the part of the party concerned as per the Arbitration Agreement to fulfill the obligation in terms of Section 11 of the Act so as to attract jurisdiction of the Chief Justice under Section 11 (6) of the Act for appointing a substituted Arbitrator. It is further contended that Section 11 (6) of the Act has application only when a party for the person concerned had failed to act in terms of the Arbitration Agreement.

Mr. Pal submits that as per Section 15 (2), a substituted Arbitrator can be appointed according to the rules that were applicable for the appointment of Arbitrator originally. He further submits that the appointment of substituted Arbitrator must be done according to the original agreement or provision applicable to the appointment of Arbitrator at the initial stage.

Heard the Learned Counsel for the respective parties, perused the order passed by the Hon'ble Single Bench as well as the Coordinate Bench of this Court and the materials on record.

Admittedly, the respondent/writ petitioner has filed writ petition challenging the order passed by the applicants and the Appellate Authority wherein the licence of the respondent was terminated. The Hon'ble Single Bench after setting aside both the orders remanded the matter to the concerned authority but the applicants herein being aggrieved with the said order preferred an appeal. In the appeal, the Hon'ble Division Bench after considering Clause 67 of the Agreement between the parties, had appointed

an Arbitrator. Now the Arbitrator has resigned and therefore stopped down from performance of his duties as an Arbitrator.

Clause 67 of the Agreement reads as follows :

“67. Any dispute or difference of any nature whatsoever or regarding any right, liability, act admission or account of any of the parties hereto arising out of or in relation to this Agreement shall be referred to this sole arbitration of the Director Marketing of the Corporation, or of some Office of the Corporation who may be nominate by the Director Marketing. The Dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the Corporation or that he has to deal with the matters to which the contract relates or that in the course of his duties as an Officer of the Corporation he had expressed views on all or any of the matters in dispute or difference. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Director Marketing as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as arbitrator in accordance with the terms of the Agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. 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. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the Agreement subject to the provisions of the Arbitrator Act, 1940. or any statutory modification of or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.”

As per Clause 67, it is specifically mentioned that any disputes or differences of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties thereto arising out of or in any relation to this agreement shall be referred to the Sole Arbitrator of the Director (Marketing) of the Corporation or some officers of the Corporation who may be nominated by the Director (Marketing).

Clause 67 empowers the Director (Marketing) of the Corporation to appoint an Arbitrator. But the applicants have not followed Clause 67 of the Agreement and instead of appointing an Arbitrator in terms of Clause 67, the applicants have filed the instant application.

To decide the issue whether the application filed by the applicants is maintainable, Section 11 and Section 15 of the Arbitration and Conciliation Act are to be explained.

Section 11 and Section 15 read as follows :

“11. Appointment of arbitrators. — (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

[(3-A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purpose of this Act:

Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purpose of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule :

Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.]

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.]

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree [the appointment shall be made on an application of the party in accordance with the provision contained in sub-section (4).]

(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,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6-A) [***]

[(6-B) The designation of any person or institution by the Supreme Court or as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]

(7) [***]

[(8) [The arbitral institution referred to in sub-sections (4), (5) and (6)], before appointing an arbitrator, shall seek a disclosure in

writing from the prospective arbitrators in terms of sub-section (1) of Section 12, and I have due regard to -

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.]

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, [the arbitral institution designated by the Supreme Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) [***]

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.

(12) Where the matters referred to in sub-sections (4), (5), (6), (7) and (8) and arise in an international commercial arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3-A).

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

Explanation.- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitration (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.].”

15. Termination of mandate and substitution of arbitrator.— (1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

An analysis of the Scheme of Section 11 which relates to appointment of Arbitrators so that in terms of Sub-Section (1) thereof, a person of any nationality can be appointed as an Arbitrator unless there is a contract between the parties. Sub-Section (2) lays down that the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators. This is subject to the provisions contained in Sub-Section (6). Sub-Section (3) lays down that if there is no agreement between the parties in an arbitration with three Arbitrators, each party shall appoint one Arbitrator and the two arbitrators appointed by the parties shall appoint a 3rd Arbitrator who shall act as the Presiding Arbitrator. Sub-Section (4) lays down that if a party failed to appoint an Arbitrator within 30 days from the date of receipt of request to do so from the other party or two arbitrators failed to agree on the 3rd Arbitrator within 30 days from the date of their appointment, then the Chief Justice or any person or institution designated by him can be approached for appointing an Arbitrator or 3rd Arbitrator as the case may be. The procedure prescribed in Sub-Section (4) also applies to a case

involving appointment of a Sole Arbitrator. Sub-Section (6) enumerates the contingencies in which a party may request the Chief Justice or any person or institution designated by him. The agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in Section 6 are : *(i) If the party failed to act as required under the agreed procedure or, (ii) the parties or the two appointed arbitrators failed to reach an agreement expected of them under such procedure, or (iii) a person including any institution failed to perform any person interested to him or it under the procedure.* Sub-Section (8) requires that in appointing an Arbitrator, the Chief Justice or any person or institution designated by him shall have due regard to any qualification required of the Arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent or impartial Arbitrator.

Section 15 specifies the additional circumstances in which the mandate of an Arbitrator shall terminate and also provides for substitution of an Arbitrator. Sub-Section (1) of Section 15 lays down that in addition to the circumstances referred to in Sections 13 and 14, the mandate of an Arbitrator shall terminate when he withdraws from office for any reason pursuant to agreement of the parties. Sub-Section (2) of Section 15 postulates appointment of a substituted Arbitrator in accordance with the rules that were applicable to the appointment of the original Arbitrator.

In the case reported in (2006) 6 SCC 204 (*Yashwith Construction (p) Limited vs. Simplex Concrete Piles India Limited & Anr.*), the Hon'ble

Supreme Court held that after resignation of the Arbitrator appointed by the Managing Director of the respondent company, another Arbitrator was appointed by him in accordance with the arbitration agreement. At that stage, the petitioner filed an application under Section 11 (5) read with Section 15 (2) of the Act and prayed that the Chief Justice of the High Court may appoint a substituted Arbitrator to resolve the dispute between the parties.

The Learned Chief Justice dismissed the application and held that Section 15 (2) refers not only to statutory rules framed for regulating appointment of Arbitrator but also to the contractual provisions for the said appointment.

In the case reported in (2005) 8 SCC 618 (S.B.P. and Company - versus- Patel Engineering Limited & Anr.), the Constitution Bench of the Hon'ble Supreme Court held that Section 15 (2) of the Act is applicable not only to the cases of appointments under the statutory rules or rules framed under the Act but also the agreement between the parties for appointment of Arbitrator. The Hon'ble Supreme Court while approving the decision of the High Court held that :

"...The term "rules in Section 15 (2) obviously referred to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the party concerned as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11 (6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. When Section 15 (2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the

arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It only means that appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts. Since here, the power of the Managing Director of the respondent is saved by Section 15 (2) of the Act and he has exercised that power on the terms of the arbitration agreement, we see no infirmity either in the decision of the learned Chief Justice or in that of the Division Bench....”

In the case reported in (2016) 1 SCC 721 (Huawei Technologies Company Limited -versus- Sterlite Technologies Limited), the Hon’ble Supreme Court held that it is incumbent on the petitioner to give notice and explore the possibility of naming an Arbitrator by mutual consent and only on failure thereof the present application under Section 11 (6) of the Act should have been filed. The above recourse is required to be followed by virtue of the provisions of Section 15 (2) of the Act in terms of the decision passed by the Hon’ble Supreme Court in Yashwith Construction (P) Limited (supra). In the case reported in (2016) 3 SCC 619 (Shailesh Dhairyawan - versus- Mohan Balkrishna Lulla), the Hon’ble Supreme Court held that the plaintiff/respondent when applied vide Notice of Motion No. 2245 of 2012 in Suit No. 1927 of 2007 for appointment of substituted Arbitrator, the Notice of Motion was dismissed by an order dt. 20.09.2013 stating that an appointment can only be made for a substitute Arbitrator under Section 11 (5) of the Arbitration Act and not by Notice of Motion for disposal of suit.

After considering the legal position enumerated under the Arbitration and Conciliation Act, 1996 as well as the judgments of the Hon’ble Supreme Court as referred to above, this Court finds that the applicants without

taking recourse to Section 15 (2) of the Act of 1996 have filed the instant application in the disposed of appeal praying for an appointment of new Arbitrator.

In view of the above, this Court is of the considered view that the application filed by the applicants is not maintainable under law, accordingly, **CAN 2 of 2022** stands **dismissed**.

However, the dismissal of the instant application will not preclude either of the parties to take appropriate recourse for appointment of new Arbitrator in accordance with law.

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Subrata Talukdar, J.)

(Krishna Rao, J.)