

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
(Original Side)

A.P. No. 252 of 2021

(Through Video Conference)

Reserved on: 14.03.2022
Pronounced on: 24.03.2022

India Power Corporation Ltd. (Formerly DPSC Ltd.)
...Petitioner

-Vs-

The Eastern Railway
...Respondent

Present:-

Mr. Samrat Sen,
Mr. Shounak Mitra,
Mr. Zulfiqar Ali, Advocates
... for the petitioner

Mr. S.N. Dutta, Advocate
... for the respondent

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE**

Prakash Shrivastava, CJ:

1. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator to resolve the dispute between the parties.
2. It is undisputed that the agreement dated 26th June, 2015 was executed between the parties which contain the following arbitration clause:

“33. Any dispute arising out of or in connection with this Agreement including matters relating to the rights and obligations of the parties arising out of or in connection with this Agreement or the breach or termination of it, shall be first

discussed in good faith among representatives of each party who are of appropriate authority within a period of 20 days from the date of notice by one party to another. If the dispute is not resolved by discussion within 20 days (or such longer period as may be mutually agreed), then any party may refer such matter to be finally resolved by arbitration conducted by a panel of three arbitrators appointed as per the provisions of the Arbitration and Conciliation Act, 1996. The appointment of all the three arbitrators shall be completed within 45 days of first reference of dispute by any party. The place of Arbitration shall be Kolkata. The place of jurisdiction shall be at Kolkata, West Bengal.”

3. The dispute had arisen between the parties, therefore, applicant had given the notice dated 30th May, 2021 under Section 21 of the Arbitration and Conciliation Act, 1996 (for short, ‘Arbitration Act’) invoking the arbitration clause and proposing the name of Hon’ble Justice Subhro Kamal Mukherjee (Retd.), Former Chief Justice of the Karnataka High Court as its nominee arbitrator and requesting the respondent to nominate its arbitrator in terms of Clause 33 of the Agreement. The record further reflects that earlier, some disputes had arisen between the parties, hence, the applicant had filed WP 5306(W) of 2018 which was disposed of by the order dated 28th November, 2018 directing the parties to take recourse to the arbitration clause. The respondent had sent the communication dated 13th March, 2019 purported to be in pursuance to the order of the High Court nominating a panel of four retired Railway Officers and requesting the applicant to suggest two names out of the said panel as its nominee. The applicant vide reply dated 05th April, 2019 had expressed its disagreement with the panel and rejected the proposal. The respondent even after the refusal by the applicant had proceeded

further and on 26th April, 2019 appointed three Arbitrators, i.e., one Presiding Arbitrator and two Co-Arbitrators out of the panel which was already rejected by the applicant. The respondent had requested the three Arbitrators to proceed with the arbitration proceedings. Out of the three nominated arbitrators by the respondent, two namely, Shri Shivaji Rakshit and Shri K. Gangopadhyay, had expressed their inability and had resigned vide communication dated 14th May, 2019 and 15th May, 2019, respectively. In spite of their resignation, the respondent had issued the communication dated 13th June, 2019 to the same panel of arbitrators to start the arbitration proceedings and publish the award at the earliest. Thereafter, on 17th July, 2019, the respondent substituted two arbitrators from the panel and appointed new Presiding Arbitrator and one new Co-Arbitrator vide communication dated 17th July, 2019. The applicant had sent the reply dated 31st July, 2019 taking the stand that the General Manager of the respondent had no authority to appoint the arbitrator and such appointment is contrary to the order of the High Court as also the Arbitration Clause 33 of the Agreement. Thereafter, applicant has approached this Court by way of present application under Section 11 of the Arbitration Act.

4. Submission of learned Counsel for the applicant is that the arbitrator is required to be appointed in terms of Clause 33 of the Arbitration Agreement and that a panel of arbitrators appointed by the respondent dehors the Arbitration Clause is in nullity and that the respondent cannot be permitted to raise the issue of applicability of General Condition of Contract for the first time at the stage of hearing of this application and that the Arbitration Clause contained in the

agreement is a standalone contract, therefore, arbitrator is to be appointed in terms of the said Clause. He has made a prayer for appointment of sole arbitrator to resolve the dispute. In support of his submission, he has placed reliance upon the judgments in the matter of **Walter Bau AG vs. Municipal Corporation of Greater Mumbai and Another** reported in (2015) 3 SCC 800; **Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.**, reported in 2019 SCC OnLine SC 1517 and **Dakshin Shelters Private Limited vs. Geeta S. Johari** reported in (2012) 5 SCC 152.

5. Submission of learned Counsel for the respondent is that the arbitrator is to be appointed in terms of the amended Clause (3)(b) of the General Conditions of Contract. He has further submitted that the appointment of panel of arbitrators has been made by the respondent in terms of the General Conditions of Contract, therefore, the appointment is valid. In support of his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Union of India and Another vs. M.P. Gupta** reported in (2004) 10 SCC 504; **Central Organisation for Railway Electrification vs. M/S ECI-SPIC-SMO-MCML (JV) A Joint Venture Company** reported in (2020) 14 SCC 712 and **Bharti Cellular Limited vs. Union of India and Others** reported in (2010) 10 SCC 174.

6. Having heard the learned Counsel for the parties and on perusal of the record, it is noticed that the Arbitration Agreement dated 26th June, 2015 and Arbitration Clause 33 noted above, has remained undisputed during the course of argument as also in the pleadings of the parties. In terms of the aforesaid Clause 33, after initial attempt to

resolve the dispute through discussion, either of the parties had the option to refer the dispute for resolution by arbitration conducted by the panel of three arbitrators appointed as per the provisions of Arbitration Act. Since no procedure for appointment of the panel of three arbitrators has been prescribed in Clause 33, therefore, Section 11(3) read with Section 11(4) of the Arbitration Act becomes applicable. In terms of Section 11(3) of the Arbitration Act, the applicant had sent the notice dated 30th May, 2021 invoking the Arbitration Clause and nominating its arbitrator and requesting the respondent to nominate their arbitrator but the respondent had failed to nominate its arbitrator. Hence, no error has been committed by the applicant in approaching this Court with a prayer for appointment of arbitrator under Section 11 of the Arbitration Act. So far as the plea raised by the learned Counsel for the respondent raised during the course of argument that the arbitrator is to be appointed as per the procedure prescribed in the General Conditions of Contract, it is noticed that at no earlier stage, such a plea was raised by the respondent. When the order dated 28th November, 2018 in WP 4306 (W) of 2018 was passed by this Court, at that time also, no such issue was raised and the Court had directed the parties to take recourse to arbitration by virtue of Clause 33 of the contract and to appoint Arbitral Tribunal in terms thereto by directing as under:

“Therefore, I direct the parties to take recourse to arbitration by virtue of Clause 33 of the contract and appoint Arbitral Tribunal in terms thereof to adjudicate the disputes between the parties. All such steps shall be taken by the parties within 8 (eight) weeks from the date hereof and the Arbitral

Tribunal would thereafter proceed with the matter in accordance with law.”

7. In the affidavit-in-opposition filed by the respondent in this AP also, no such plea has been raised that the General Conditions of Contract will apply or Clause 33 of the contract agreement will not be applicable for the appointment of arbitrator. In the absence of any such plea at the earlier stage or even before this Court in the pleadings, the respondent cannot be permitted to come up with a totally new oral objection during the course of hearing of the application. Hence, the reliance of learned Counsel for the respondent upon the judgment in the matter of **M.P. Gupta (Supra)**, **Bharat Cellular Limited (Supra)** and **Central Organisation for Railway Electrification (Supra)** are of no help.

8. Hon’ble Supreme Court in the matter of **Dakshin Shelters Private Limited (Supra)** has held that declining to appoint arbitrator in terms of agreement amounts to failure to appoint arbitrator, hence, the party’s right to appoint arbitrator under the arbitration agreement stands extinguished. In the present case also, the respondent had failed to appoint arbitrator in terms of Arbitration Clause 33 after receiving the request of the applicant vide notice dated 30th May, 2021, therefore, their right had extinguished.

9. In the matter of **Walter Bau AG (Supra)**, the Hon’ble Supreme Court has held that:

“10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law.

In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in *Datar Switchgears Ltd.* may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in *Datar Switchgears Ltd.*, is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law.”

10. Hence, unless appointment of arbitrator is ex facie valid and satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, such appointment cannot be accepted as fait accompli and does not come in the way of exercise of jurisdiction under Section 11 of the Arbitration Act. Similar is the view taken by the Hon’ble Supreme Court in the matter of Perkins Eastman (Supra) wherein the

Court had annulled the appointment of arbitrator made contrary to the law.

11. In view of the above factual and legal position, I am of the opinion that the appointment of the panel of arbitrator by the respondent Railways vide communication dated 13th June, 2019 as modified vide communication dated 17th July, 2019 cannot be give a seal of approval by this Court.

12. Hence, I am of the opinion that a case for appointment of the arbitrator under Section 11 of the Arbitration Act is made out. No argument has been advanced by the learned Counsel for the respondent to oppose the prayer of the Counsel for the applicant to appoint the sole arbitrator.

13. Hence, AP is disposed of by appointing Mr. Asish Sikder (Retd. District Judge), resident of Narikelbagan Mithapukur Road, Rajbati, Burdwan (Mobile No. – 8116560088) as the sole arbitrator to settle the dispute between the parties. His appointment is subject to obtaining his consent in terms of Section 12(1) in the form prescribed in Schedule VI of the Act.

14. Let this order be conveyed to the Arbitrator by the Registrar, Original Side forthwith.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

Kolkata
24.03.2022

PA(RB)