

**ARB-436-2023(O&M)****-1-****112+254****IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH****ARB-436-2023(O&M)****Date of decision:-03.07.2024**

M/s G.R. Builders

...Petitioner

Versus

M/s Metro Speciality Hospitals Pvt. Ltd. and another

...Respondents

CORAM : HON'BLE MR. JUSTICE SUVIR SEHGAL**Present** : Ms.Amrit Kaur Oberoi, Advocate with
Ms.Pallavi Maurya, Advocate
for the petitioner.Mr.Hemant Bassi, Advocate
for the respondents.

SUVIR SEHGAL, J.(ORAL)**CM-8632-CII-2024**

1. Application is allowed, as prayed for.
2. Procedural orders passed by the learned Arbitrator, are taken on record as Annexure A1, collectively.

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3. By way of instant petition filed under Sections 11 (6) and 11 (8) of the Arbitration and Conciliation Act, 1996 (for short "the Act")

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read with Scheme for appointment of Arbitrators by the Chief Justice by Punjab and Haryana High Court, 2003, petitioner has approached this Court for declaration that the Arbitrator appointed by the respondents has no jurisdiction to adjudicate the disputes and for appointment of an Arbitrator to determine the dispute between them.

4. Counsel for the petitioner submits that the respondents issued a letter of intent dated 19.03.2021, Annexure P1, to the petitioner to carry out civil and structure works for “Metro Cancer Building at Sector 16-A, Faridabad, Haryana”. Counsel submits that the work was completed within the stipulated period to the satisfaction of the respondents, but the respondents failed to make the entire payment against the final running bill dated 22.11.2022, Annexure P3, despite being reminded time and again. According to the counsel, an amount of Rs.3,40,07,068/- besides interest, etc. remains due and as a dispute arose between the parties, petitioner served a legal notice dated 07.04.2023, Annexure P5, invoking the Clauses 31.14 and 31.16 of the LOI, Annexure P1, requesting for appointment of a Retired Judge from the High Court of Delhi as an Arbitrator. By its reply dated 05.6.2023, Annexure P6, respondents appointed Mr. Justice S.N. Aggarwal, a Retd. Judge from the Madhya Pradesh High Court, without consent of the petitioner, to which the petitioner protested by sending a rejoinder, Annexure P7. After receiving a notice from the learned Arbitrator, petitioner filed objections dated 12.06.2023, Annexure P9, and approached the High Court of Delhi impugning his appointment. By referring to the procedural orders, Annexure A1, counsel for the



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petitioner asserts that the petitioner never participated in the proceedings before the learned Arbitrator, who deferred the proceedings to await the outcome of the petition challenging his appointment. She submits that during the pendency of the instant petition, learned Arbitrator has unfortunately expired in January, 2024.

5. Upon notice, petition has been contested by respondent No.1 by filing a reply wherein it has been submitted that due to the demise of the learned Arbitrator, his mandate stands terminated and procedure for substitution of the Arbitrator as contemplated in the Act has to be adopted. It has been submitted that the present petition is not maintainable. It has been further submitted that the Arbitrator was appointed on the request of the petitioner and after he entered upon the reference, petitioner submitted an application under Section 16 of the Act questioning his jurisdiction, which was pending at the time of his demise. Respondents have taken a stand that the petitioner had entered into two separate contracts with them for civil works and with respect to interior works and the petitioner has deliberately included the claim for interior works in the present claim although there is no arbitration clause in the second LOI. It has been claimed that the petitioner inflated the bills and has raised bogus invoice in connivance with the employees of the respondents and an FIR bearing No.0249 dated 15.09.2023 has been registered at Police Station Sector 17, Faridabad under Sections 120-B, 408, 420, 467, 468, 471 IPC against the petitioner, its associates as well as some employees of the respondents. Countering the stand of the respondents, petitioner has filed a rejoinder, which is taken on record.



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6. I have heard counsel for the parties and considered their respective submissions, besides examining the documents placed on the record with the pleadings.

7. An examination of the procedural orders, Annexure A1 passed by the learned Arbitrator show that the petitioner never participated in the proceedings before the Arbitrator. Petitioner had challenged the appointment of the Arbitrator by filing a petition in the High Court of Delhi, which was pending when the learned Arbitrator unfortunately passed away. There is nothing on the record to show that an application under Section 16 of the Act was filed by the petitioner. Vide its objections dated 12.06.2023, Annexure P9, petitioner informed the learned Arbitrator that it intends to approach the competent Court and did not call upon the Arbitrator to rule on its jurisdiction. Therefore, it is evident that the petitioner never acquiesced to the jurisdiction of the Arbitrator appointed by the respondents. As a result of the unfortunate demise of the learned Arbitrator, the first prayer made by the petitioner in the instant petition for declaring that the Arbitrator had no jurisdiction to entertain the dispute has become infructuous and is put to rest.

8. Insofar as the prayer for appointment of Arbitrator is concerned, it is apposite to refer to the notice, Annexure P5, whereby the petitioner had invoked the arbitration clause. Para 17 of the notice, Annexure P5, reads as under:

“17. In terms of Clause 31.14 and 31.16 of the agreement (reproduced above), we on behalf of our client wish you to nominate a Retired Judge of High Court of Delhi as the Arbitrator



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on behalf of our client. You are, therefore requested to nominate and appointment (sic appoint) of the impartial and independent sole Arbitrator, the Arbitrator on your behalf and inform us of the same within a period of 15 (fifteen) days from the date of receipt of the present notice, failing which, our client shall be constraint to file appropriate proceedings in this regard, which please note.”

9. It is apparent from the above that the petitioner had called upon the respondents to appoint a former Judge of the High Court of Delhi as an Arbitrator. However, the respondents nominated a former Judge from another High Court as an Arbitrator. This Court therefore is of the opinion that the nomination made by the respondents cannot be said to be with the consent of the petitioner and the petitioner immediately by his protest letter, Annexure P7, opposed the appointment besides approaching the High Court of Delhi. At this stage, it would be pertinent to refer to the observations of the Supreme Court in **Walter Bau AG, Legal Successor, of the Original Contractor Dyckerhoff and Widmann AG Versus Municipal Corporation of Greater Mumbai and Anr. (2015) 3 SCC 800**, which are reproduced hereunder:

“9. While it is correct that in Antrix (supra) and Pricol Ltd. (supra), it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix (supra), appointment of the arbitrator, as per the ICC



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Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd. (supra), the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

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. (supra) 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



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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.(supra), 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. As petitioner had not acquiesced to the jurisdiction of the Arbitrator and the appointment of the Arbitrator was not with the consent of the petitioner, it cannot be held that Arbitrator was duly appointed. In this backdrop, the petition under Section 11 (6) ibid is maintainable and deserves to be entertained.

11. Registration of a criminal case against the petitioners on the allegation that he has raised bogus bills, etc. would not debar this Court from proceeding with the appointment of an Arbitrator in view of the Arbitration Clause in the LOI, Annexure P1. In **Swiss Timing Ltd. Versus Organising Committee, Commonwealth Games 2010, Delhi (2014) 6 SCC 677**, Apex Court has held that there is no inherent risk or prejudice to any party in permitting the arbitration to proceed since findings recorded by the Arbitral Tribunal are not binding in the criminal



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trial. The arguments raised by counsel for the respondents therefore does not hold any water and deserve to be rejected.

12. For the foregoing reasons, petition is allowed. Mr. Justice (Retd.) Ajay Tewari, a former Judge of this Court, r/o H.No. 3038, Sector 21-D, Chandigarh. #R-8, Third Floor, Green Park Extension, New Delhi, M: 9780008141 is requested to act as an Arbitrator to adjudicate the dispute between the parties, subject to compliance of statutory requirements.

13. Parties are directed to appear before the learned Arbitrator on the date, time and place to be fixed and communicated by the learned Arbitrator at his convenience. Liberty is granted to the parties to request the learned Arbitrator to hold proceedings at Faridabad.

14. Parties will be at liberty to raise all the pleas/defences before the Arbitrator.

15. Needless to mention that all the questions arising between the parties in this matter will remain open for determination in the Arbitral proceedings, and any observation made hereinabove will not be binding on the learned Arbitrator.

16. A request letter be sent to Mr. Justice (Retd.) Ajay Tewari alongwith a copy of this order.

17. Pending application, if any, stands disposed of.

(SUVIR SEHGAL)
JUDGE

03.07.2024

Brij

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No