
(2021) 01 DEL CK 0278

In the Delhi High Court

Case No : Arbitration Petition No. 86 Of 2021, Miscellaneous Application No. 851 Of 2021

C S Electric Ltd

APPELLANT

Vs

Jop Power

RESPONDENT

Date of Decision : 29-01-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 11(6), 12(2), 12(5), 14, 14(1), 14(2)

Citation : (2021) 01 DEL CK 0278

Hon'ble Judges : C. Hari Shankar, J

Bench : Single Bench

Advocate : Rahul Malhotra, Raman Kapur, Varun Kapur

Final Decision : Disposed Of

Judgement

C. Hari Shankar, J

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act"), to refer the dispute,

between the petitioner and the respondent, to arbitration.

2. Given the nature of the controversy, a brief recital of facts would suffice. On 3rd December, 2011, an Agreement was executed between the

petitioner and the respondent, whereunder the petitioner was required to supply Sandwich Bus Ducts to the respondent.

3. Article 15.3.1 of the Agreement dated 3rd December, 2011, provided for resolution of the disputes by arbitrator, which read thus:

"15.3.1 All disputes shall be resolved through Arbitration. The appointment of a sole arbitrator to be selected by the Supplier/ Manufacturer out of

the names 3 such notable persons to be given by "JOP" within a period of 30

days from the notice of reference of unresolved disputes between the parties. The jurisdiction of holding the proceedings of such arbitration shall be the state of Delhi. The applicable law will be Arbitration and Conciliation

Act, 1996. In case the Supplier/ Manufacturer fails to choose the name of an Arbitrator from the 3 names of Arbitrators suggested by JOP?

BOARD reserves its right to appoint an Arbitrator of its choice and the Supplier/ Manufacturer shall be bound by such Arbitrator and his award.

4. Disputes arose between the parties. Vide letter dated 14th June, 2014, the respondent appointed one Mr. K. Sunil as the arbitrator to arbitrate on

the disputes.

5. Contending that the learned arbitrator was not exercising its function with due diligence and he was unduly delaying the proceedings, the petitioner

filed OMP(T)(COMM) 1/2018 before the learned Additional District Judge (hereinafter referred to as learned ADJ), under Sections 14(1) and

14(2) of the 1996 Act, for termination of the mandate of Mr. K. Sunil. Vide order, dated 29th September, 2020, OMP(T)(COMM) 1/2018 was

allowed by the learned ADJ and mandate of Mr. K. Sunil, to arbitrate on the disputes between the petitioner and the respondent, was terminated, in

terms of Section 14 of the 1996 Act. This order has, admittedly, attained finality.

6. Pursuant to the termination of the mandate of Mr. Sunil, it became necessary to appoint a substitute arbitrator to arbitrate on the disputes between

the petitioner and the respondent.

7. The respondent, acting in accordance with the afore-extracted Clause 15.3.1 of the Agreement, proposed, vide letter dated 26th November, 2020

addressed to the petitioner, the names of three persons, out of which, the petitioner was requested to suggest one to appoint its arbitrator to arbitrate

on the aforesaid disputes. The petitioner responded only on 4th January, 2021, after the period of 30 days, stipulated in Clause 15.3.1 of the

Agreement, had expired, suggesting the name of Mr. O.P. Bhatia, one of three names, proposed by the respondent, to act as an arbitrator to arbitrate

on the disputes between the parties.

8. On the same day, the respondent wrote to the petitioner stating that it had already appointed Mr. G.K. Pharlía, also one of the three names,

proposed by the respondent in its communication dated 26th November, 2020, to arbitrate on the disputes.

9. Apparently, thereafter, Mr. Pharlia accepted his nomination as arbitrator and fixed hearing in the matter.

10. The petitioner, however, vide email dated 9th January, 2021, opposed the appointment of Mr. Pharlia as the arbitrator, stating that it had already

appointed Mr. Bhatia as arbitrator vide its communication dated 4th January, 2021.

11. It is in these circumstances that the petitioner has moved the present petition, requesting this Court to appoint an independent arbitrator, in exercise of its powers conferred by Section 11 of the 1996 Act.

12. Mr. Rahul Malhotra, learned counsel for the petitioner, first sought to argue that though the petitioner had not responded to the communication

dated 26th November, 2020, of the respondent, by selecting an arbitrator out of the three names, proposed in the said communication within the period

of 30 days stipulated in Clause 15.3.1 of the Agreement, the appointment, by the petitioner, of Mr. Bhatia as the arbitrator, as communicated to the

respondent on 4th January, 2021, ought to be treated as valid. For this purpose, Mr. Malhotra submitted that the period of 30 days stipulated in Clause

15.3.1 of the Agreement should only be regarded as directory and not mandatory. He, however, acknowledged candidly, on the last date of hearing

that he could not lay hands on any judicial authority, to support this submission.

13. In my view, the submission is not, ex facie, acceptable. The Supreme Court has, in U.O.I. v. PREMCO-DKSPL (JV(2)0 16) 14 SCC 651

specifically held that the covenants of the arbitration agreement are sacrosanct and have to be strictly enforced. The period of 30 days stipulated in

Clause 15.3.1, therefore, unquestionably bound the parties and on the expiry of 30 days from the communication dated 26th November, 2020,

addressed by the respondent to the petitioner, the petitioner's right to select an arbitrator out of the panel proposed by the respondent, stood

extinguished.

14. The appointment of Mr. Bhatia, as suggested by the petitioner, on 4th January, 2021, cannot, therefore, pass muster, as it was effected beyond the

period of 30 days as stipulated in Clause 15.3.1 of the Agreement, and was, therefore, in violation of the terms of the Agreement between the parties.

15. Accordingly, the prayer of the petitioner, for approval of the appointment of Mr. Bhatia as the arbitrator to arbitrate on the disputes, is rejected.

16. Equally, however, I am of the opinion that the appointment of Mr. Pharlia as the sole arbitrator, as effected by the respondent, also cannot pass

legal muster. Mr. Raman Kapur, learned Senior Counsel appearing for the respondent, acknowledges that the appointment of Mr. Pharlia by the

respondent, was in exercise of the residuary authority conferred, by Clause 15.3.1, on the respondent, to select an arbitrator out of the panel suggested

by the respondent to the petitioner, consequent on default, by the petitioner, to select the arbitrator within 30 days of communication of the names by

the respondent.

17. There is no gainsaying the fact that Clause 15.3.1 of the Agreement does authorize the respondent, in the event of the petitioner failing to select an

arbitrator out of the panel proposed by the respondent within 30 days of communication of such proposal, to itself select one of the names from the

panel as the arbitrator to arbitrate on the disputes.

18. In my view, however, this residuary power, as conferred by Clause 15.3.1 (supra) is in the teeth of the law laid down by the Supreme Court in

Perkins Eastman Architects DPC v. HSCC (India) Ltd 2019 SCC Online SC 1517 and TRF Limited v. Energo Engineering Projects Ltd (2017) 8

SCC 377 read with Section 12(5) and Schedule VII to the 1996 Act. The Supreme Court has, in these decisions, clearly discountenanced conferment

of any authority, on either of the parties to the Agreement, either to act as arbitrator or to appoint the arbitrator to arbitrate on the disputes.

19. As such, the stipulation, in Clause 15.3.1 of the Agreement that in the event of failure, on the part of the supplier/manufacturer, i.e. the petitioner

to select a name out the panel, suggested by the respondent-JOP, within 30 days of the such suggestion, the JOP could appoint an arbitrator of its

choice out of the said panel, cannot, in my view, be sustained or be permitted to be enforced. This part of Clause 15.3.1 is, according to me, clearly

severable from the earlier part of the said clause and being contrary to the law laid down in Perkins Eastman 2019 SCC Online SC 1517 (supra), could

not have been invoked, or enforced, by the respondent.

20. Mr. Kapur has sought to place reliance on the judgment of the Supreme Court in Central Organisation for Railway Electrification v. ECI-SPIC-

SMO-MCML (JV) 2019 SCC OnLine SC 1635, to submit that the aforesaid residuary clause was not invalid. Having gone through the decision in

Central Organisation for Railway Electrification 2019 SCC OnLine SC 1635, I am unable to find anything, in the said decision, which would validate

such a residuary conferment of authority, as contained in Clause 15.3.1 in the agreement between the petitioner and the respondent. The arbitration

clause in Central Organisation for Railway Electrification 2019 SCC OnLine SC 1635 provided for the proposal of a panel of the names by Central

Organisation for Railway Electrification (hereinafter referred to as 'CORE'), to the respondent before the Supreme Court, out of which the

respondent was authorised to select any two. Once the respondent had selected two names out of the panel of four proposed by CORE, the Managing

Director of CORE was authorised to pick one of the said two names as the contractor nominee to arbitrate on the disputes. There was no conferment

of any residuary authority, on CORE, in the event of default by the respondent to suggest the names out of the panel of four, to itself select an

arbitrator of its own choice out of the said panel to arbitrate on the disputes. The situation that arises in the present case, therefore, was not before the

Supreme Court in Central Organisation for Railway Electrification 2019 SCC OnLine SC 1635 and, therefore, the said decision cannot be of any

assistance to the respondent.

21. In view thereof, I am of the opinion that respondent could not, in the face of law laid down in Perkins Eastman 2019 SCC Online SC 1517 and

TRF (2017) 8 SCC 377, have chosen an arbitrator out its choice, even out of the panel of three proposed by the respondent to the petitioner, to

arbitrate on the disputes, on the petitioner failing to exercise such choice within 30 days of suggestion of names by the respondent. The respondent

could, in such circumstances, have approached this Court, but did not choose to do so.

22. Resultantly, the appointment of Mr. Pharlina as arbitrator to arbitrate on the disputes between the parties must also be treated as without authority

of law.

23. The task of appointing arbitrator to arbitrate on the disputes between the parties, therefore, devolves on this Court.

24. In view thereof, this Court appoints Mr. Vijay Motwani, retired ADG (CPWD), as arbitrator to arbitrate on the disputes between the parties.

25. The contact details of the learned arbitrator are as under:

CII/153, Satya Marg,

Chanakyapuri,

New Delhi-110 021

Phone No.9811793440

Email ID: motwanivijayg@gmail.com

26. The parties are directed to contact the learned arbitrator within one week of communication of email by the Registry of this Court the copy of this order.

27. The fees of the learned arbitrator shall be fixed by the learned arbitrator in consultation with the parties.

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

29. Subject to the aforesaid directions, this petition stands disposed of.

IA 851/2021 (Section 151 CPC)

In view of the order passed in the petition, this application stands disposed of.