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**(2014) 02 MP CK 0027**

**In the Madhya Pradesh High Court**

**Case No : Arbitration Case No. 53/2012**

M/s. Dharmendra Singh

APPELLANT

Vs

Bharat Sanchar Nigam Ltd.

RESPONDENT

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**Date of Decision :** 12-02-2014

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11(6)

**Citation :** (2014) 2 MPHT 346 : (2014) 3 MPLJ 21

**Hon'ble Judges :** Alok Aradhe, J

**Bench :** Single Bench

**Advocate :** Shobha Menon, Sr. Advocate and Mr. Rahul Choubey, Advocate for the Appellant; S.P. Singh, Advocate for the Respondent

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## **Judgement**

Alok Aradhe, J.—With consent of the parties, the matter is heard finally. By means of this application u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), the applicant seeks appointment of an Arbitrator to arbitrate the dispute between the parties.

2. Facts giving rise to filing of the application briefly stated are that a Notice Inviting Tender was issued on 28-1-2009 for operation and comprehensive maintenance of Electro-mechanical Services for U.S.O.F. sites under Cluster No. 35 in Districts Dindori, Katni and Mandla. The bid submitted by the applicant was accepted and agreement was executed on 20-3-2009. On completion of the work, the applicant by a communication, dated 20-4-2012 requested the non-applicants to release the amount which according to the applicant was due to it. However, the applicant vide letter dated 21-5-2012 was apprised that it has not resorted to the specified procedure of conciliation and has put forward some claims, which are not admissible. The applicant submitted detailed statement of claim along with letter dated 22-8-2012 by which the applicant made a request to the non-applicants to appoint an Arbitrator. However, the communication sent by the applicant failed to evoke any response from the non-applicants. In the aforesaid factual background, the applicant has approached this Court.

3. Learned Senior Counsel for the applicant submits that from perusal of Clause 25 of the agreement, it is evident that resort to the conciliation is not mandatory and since despite receipt of communication dated 22-8-2012, the non-applicants have failed to appoint the Arbitrator, therefore, they have forfeited the right to appoint an Arbitrator. In support of aforesaid submission, learned Senior Counsel for the applicant has placed reliance on decisions of Supreme Court reported in *Dakshin Shelters P. Ltd. Vs. Geeta S. Johari*, and *Deep Trading Company Vs. Indian Oil Corporation and Others*, . It is also urged that at the time of deciding the application u/s 11(6) of the Act, the merits of the claim cannot be looked into. In this connection, reference has been made to order of the Supreme Court in the case of *Today Homes & Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust* and another, passed in Civil Appeal No. 4596/2013, dated 10-5-2013 and in the case of *I.T.I. Limited v. State of M.P.*, passed by the learned Single Judge of this Court in Arbitration Case No. 17/2010, dated 23-9-2010.

4. On the other hand, learned Counsel for the non-applicants has vehemently opposed the prayer for appointment of the Arbitrator on the ground that the applicant has not resorted to the procedure prescribed under Clause 25 of the agreement and, therefore, the application is premature. It is further submitted that details of dispute have not been furnished by the applicant and in fact, the dispute between the parties has not arisen and, therefore, the question of appointing an Arbitrator in the facts and circumstances of the case does not arise.

5. I have considered the respective submissions made by learned Counsel for the parties. In the case of *Punj Lloyd Ltd. v. Petronet, MHB Ltd.*, (2006) 2 SCC 638 , the Supreme Court has held that if a party who has a right to appoint an Arbitrator, fails to do so, it loses the right to appoint Arbitrator after the expiry of the period prescribed in the notice. Similar view has been taken in the case of *Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd.*, , and in *Deep Trading Company* (supra). In *Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited*, , the Supreme Court has held that on failure of the authority to appoint an Arbitrator, the Court should normally adhere to the terms of the arbitration clause. A deviation can be made in exceptional cases or where both the parties agree for a common name. Similar view has been taken in *Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd.*, . It is equally well-settled in law that at the time of deciding an application u/s 11(6) of the Act, the Court cannot consider the merits of the claim set-up by a party.

6. In the backdrop of aforesaid well-settled legal position, I may advert to the facts of the case. The relevant extract of Clause 25 of the agreement reads as under:--

(i) If the contractor considers that he is entitled to any extra payment or compensation in respect of the works over and above the amounts admitted as payable by the B.S.N.L. or in case the contractor wants to dispute the validity of any deductions or recoveries made or proposed to be made from the contract, the contractor shall forthwith give notice in writing of his claim, in this behalf to

the Engineer-in-Charge within 30 days from the date of disallowance thereof for which the contractor claims such additional payment or compensation or disputes the validity of any deduction or recovery. The said notice shall give full particulars of the claim, grounds on which it is based and detailed calculations shall not be entitled to raise any claim nor shall the B.S.N.L. be in any way liable in respect of any claim by the contractor unless notice of such claim shall have been given by the contractor to the Engineer-in-Charge in the manner and within the time as aforesaid. The contractor shall be deemed to have waived and extinguished all his rights in respect of any claims not notified to the Engineer-in-Charge in writing in the manner and within the time aforesaid.

(ii) The Engineer-in-Charge shall give his decision in writing on the claims notified by the contractor within 30 days of the receipt of the notice thereof. If the contractor is not satisfied with the decision of the Engineer-in-Charge, the contractor may within 15 days of the receipt of the decision of the Engineer-in-Charge submit his claims to the conciliating authority named in Schedule "F" for conciliation along with all details and copies of correspondence exchanged between him and the Engineer-in-Chief.

7. From perusal of Clause 25 of the agreement, it is evident that recourse to conciliation is not mandatory. So far as the contention raised by learned Counsel for non-applicants that the dispute between the parties has not arisen, cannot be accepted, as from the communication dated 21-5-2013, it is evident that the certain claims set-up by the applicant have been rejected by the non-applicants as not admissible. The applicant, thereafter, had made a request for appointment of an Arbitrator which has failed to evoke any response. No exceptional circumstances have been pointed out by the parties nor any common name has been suggested by parties to enable this Court to deviate from the procedure agreed by parties for appointment of Arbitrator. Clause 25(vi) of the agreement provides that the dispute between the parties shall be referred for adjudication through the Arbitrator by the Sole Arbitrator to be appointed by the Chief Engineer, Bharat Sanchar Nigam Limited. In view of aforesaid clause as well as in view of law laid down in ACE Pipeline Contracts (P) Ltd. (supra), and I deem it appropriate to direct the Chief Engineer, Bharat Sanchar Nigam Limited to appoint an Arbitrator within a period of 30 days from the date of receipt of certified copy of the order passed today. Accordingly, the application is allowed.

C.C. as per rules.