



All disputes or differences whatsoever arising between the parties out of or relating to construction, meaning and operation or effect of this contract or the breach shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties

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3.1. According to the petitioner, the parties had never agreed for resolution of the dispute through the panel of Arbitrators of the Indian Council of Arbitration. But only the procedural rules i.e. Indian Council of Arbitration Rules of Arbitration (in short "the ICA Rules of Arbitration") was made applicable in the event of arbitration. With this interpretation, Mr. K.N. Choudhury, the learned senior counsel submits that when the contract was terminated on 28.1.2013 by the Gauhati Municipal Corporation (in short "the GMC"), at the risk and cost of the petitioner, the aggrieved contractor demanded appointment of arbitrator through their notice dated 8.4.2013 and since the GMC failed to respond to this notice within 30 days of the demand and in the meantime, the petition under Section 11(6) of the Arbitration Act was filed in the High Court on 4.6.2013, the right of the respondents to appoint the arbitrator as per the agreed procedure got extinguished. Therefore he submits that the retired Judge was rightly nominated as the arbitrator under Section 11(6) of the Arbitration Act. In support of his submission, the petitioner cites: (i) Dattar Switchgears Ltd. v. Tata Finance Ltd. reported in (2000) 8 SCC 151, (ii) Punj Lloyd Ltd. v. Petronet MHB Ltd. reported in (2006) 2 SCC 638 and (iii) Union of India v. Bharat Battery Manufacturing Co. (P) Ltd. reported in (2007) 7 SCC 684.

3.2. It is further argued by the petitioner that Clause 9.1.1.0 only provided for the procedure for conducting arbitration proceeding and the parties were free to agree on the arbitrator without entrusting adjudication responsibility to the Indian Council of Arbitration.

3.3. Mr. Choudhury submits that the parties had never agreed for intervention of the Indian Council of Arbitration and therefore when the notice was issued by the petitioner demanding appointment of arbitrator and there was no response to the notice from the GMC, the exercise of power under Section 11(6) of the Arbitration Act by the Court is justified.

3.4 The petitioner relies on C.M.C. Ltd. v. Unit Trust of India reported in (2007) 10 SCC 751 to contend that when the parties have agreed upon the procedure to be followed in conducting arbitration under Clause 9.1.1.0, they continue to retain the power to appoint the arbitrator/ Arbitral Tribunal and it is not obligatory therefore to abdicate the adjudicatory responsibility, to the Indian Council of Arbitration.

4. On the other hand, Mr. A.M. Buzarbaruah, the learned senior counsel submits that Clause 9.1.1.0 is consistent with the model clause for arbitration, recommended by the ICA Rules of Arbitration and therefore he contends that

incorporation of Clause 9.1.1.0 itself suggests that the parties had agreed to arbitration by the Indian Council of Arbitration. Therefore it is argued that the so called notice issued by the petitioner on 8.4.2013, where demand for arbitration by the Indian Council of Arbitration was not made, the lack of response to this notice by the GMC, do not lead to the consequences contemplated under Sub-Section (6) of Section 11 of the Arbitration Act. In other words, the respondent never forfeited the right to seek appointment of arbitrator, in accordance with the agreed terms.

5. The Supreme Court in *Iron & Steel Co. Ltd. v. Tiwari Road Lines* reported in (2007) 5 SCC 703 was interpreting Clause 13.1, which was *peri materia* with Clause 9.1.1.0 with which we are concerned in the present case. The Court held that the expression "shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration" appearing in Clause 13.1 is consistent with Sub-Section (2) of Section 11 of the Arbitration Act and this was declared to be the agreed procedure for resolution of dispute by arbitration, in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

6. If we apply the ratio of the decision on similar stipulation as in Clause 9.1.1.0, it must be held that Sub-Sections (3), (4) and (5) of Section 11 of the Arbitration Act can have no application and stage for invoking Sub-Section (6) of Section 11 is not arrived in this case. In the context of the *peri materia* clause, the Supreme Court referred to the legislative scheme and held that:-

"The legislative scheme of Section 11 is very clear. If the parties have agreed on a procedure for appointing the arbitrator or arbitrators as contemplated by sub-section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken straightway. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure for appointing the arbitrator as contemplated by subsection (2) of Section 11 of the Act or the various contingencies provided for in subsection (6) have arisen. Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by sub-section (2) and there is no allegation that any one of the contingencies enumerated in clause (a) or (b) or (c) of sub-section (6) had arisen, the application moved by the respondent herein to the City Civil Court, Hyderabad, was clearly not maintainable and the said court had no jurisdiction to entertain such an application and pass any order".

7. In a given case, when the parties have agreed for resolution of dispute by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration, the arbitration proceeding can commence only with a notice under Rule 15 of the ICA Rules of Arbitration but such notice is to be addressed to the Registrar of the Indian Council of Arbitration and also to the respondents. The statement of claim, points at issue and the relief sought with all other details

must accompany such notice together with the prescribed registration fee. But in the present case, the petitioner had not issued any notice as is contemplated by Rule 15 of the ICA Rules of Arbitration and therefore the stage contemplated under Sub-Section (6) of Section 11 of the Arbitration Act is yet to arrive in the instant case, for nomination of arbitrator by the Chief Justice or his designate. Thus the ratio of the three cases relied upon by the petitioner's lawyer will not apply to the facts of this case.

8. When this Court appointed the arbitrator to adjudicate the dispute on 3.12.2014, the Court felt that Clause 9.1.1.0 of the contract is broad enough to cover all exigencies, to appoint the arbitrator in the dispute arising out of the termination of contract. But on the earlier occasion the Court had not correctly considered the implication of Clause 9.1.1.0, which provided for adjudication by the arbitrators of the Indian Council of Arbitration. The Court was also swayed by Clause 4.1, which reflected that only the Courts at Guwahati will have jurisdiction to adjudicate any subject arising out of the contract including arbitration. It is seen now that the venue of arbitration can be decided by the parties under Rule 42 of the ICA Rules of Arbitration and if there is any issue pertaining to the venue, the same can always be decided in accordance with Rule 42.

9. In the above circumstances and having regard to the discussion made earlier, I am now of the opinion that appointment of arbitrator by the Court would not be justified in this case, as the exigencies specified in Sub-clause (a), (b) and (c) of Section 11(6) of the Arbitration Act is yet to accrue here. Thus this petition is found devoid of merit and the same is therefore dismissed. Hence the parties are at liberty to approach the Indian Council of Arbitration. No cost.