

A M/S DAKSHIN SHELTERS PVT. LTD.
v.
GEETA S. JOHARI
(Special Leave Petition (c) No. 33448 of 2011)

B FEBRUARY 21, 2012

[R.M. LODHA AND H.L. GOKHALE, JJ.]

Arbitration and Conciliation Act, 1996 – s.11 – Appointment of arbitrator – Agreement between the parties – Disputes arose out of the agreement – Respondent issued notice to petitioner invoking arbitration clause in the agreement and nominated a former High Court Judge on her behalf and called upon the petitioner to nominate its arbitrator – Petitioner raised objections – Respondent filed application before High Court for appointment of arbitrator/ arbitrators – Designate Judge appointed a Sr. Advocate as arbitrator on behalf of the petitioner – This was opposed by the Petitioner – Petitioner submitted that instead, a retired High Court Judge, stationed in Hyderabad, may be appointed as arbitrator – Respondent did not agree to substitution of the arbitrator appointed by the Designate Judge on behalf of the petitioner and further submitted that opportunity was given to the petitioner to nominate its arbitrator by notice but it failed to avail of the opportunity, and thus ceased to have any right to appoint arbitrator in terms of the arbitration clause in the Agreement – Held: From the petitioner's reply to the notice, it is clear that it declined to appoint its arbitrator as according to it there was no question of appointment of arbitrator by either of the parties and there being no arbitral dispute, there was no occasion for resolution of dispute as provided in the Agreement – The stance of the petitioner amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent – The petitioner's right to appoint its arbitrator in terms of the Agreement got extinguished once

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it failed to appoint the arbitrator on receipt of the notice – It cannot be said that the Designate Judge committed any error in nominating a Sr. Advocate as an arbitrator on behalf of the petitioner. A

A Development Agreement-cum-General Power of Attorney was executed between the parties. Certain disputes arose out of that agreement. On December 10, 2010, the respondent issued a notice to the petitioner invoking arbitration clause in the above agreement and nominated a former Judge of the High Court of Andhra Pradesh on her behalf and called upon the petitioner to nominate its arbitrator. By reply dated January 10, 2011, the petitioner raised objections to this request. B C

Respondent thereafter invoked Section 11 of the Arbitration and Conciliation Act, 1996 and filed application before the High Court requesting the Chief Justice or the Designate Judge to appoint arbitrator/arbitrators. D

The Designate Judge appointed a Sr. Advocate as an arbitrator on behalf of the petitioner. This was opposed by the Petitioner. The petitioner submitted that instead of the senior advocate as appointed by the designate Judge, a retired High Court Judge, stationed in Hyderabad, may be appointed as arbitrator. Limited notice was issued to the respondent in this regard subject to deposit of Rs 1 lakh by the petitioner in the Registry towards costs. The respondent did not agree to substitution of the arbitrator appointed by the Designate Judge on behalf of the petitioner and further submitted that once an opportunity was given to the petitioner to nominate its arbitrator by notice dated December 10, 2010 and it failed to avail of the opportunity, it ceased to have any right to appoint the arbitrator in terms of the arbitration clause in the Development Agreement. E F G

Dismissing the Special Leave Petition, the Court H

A HELD: 1. On the disputes having arisen between the parties, the notice was sent by the respondent to the petitioner on December 10, 2010. The petitioner did respond to the above notice within 30 days of its receipt by sending its reply on January 10, 2011. Various pleas
 B were raised in that reply and ultimately, the petitioner responded by stating "it is stated that the question of appointment of Arbitrator does not raise either from your side or from our side. There is no arbitral dispute to be decided by the arbitrator." From the above response, it
 C is clear that the petitioner declined to appoint its arbitrator as according to it there was no question of appointment of arbitrator by either of the parties and there being no arbitral dispute, there was no occasion for resolution of dispute as provided in the Development Agreement. The
 D stance of the petitioner amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent. In view of the above, it cannot be said that the Designate Judge committed any error in nominating a Sr. Advocate as an arbitrator on behalf of the petitioner. [Paras 14, 15, 16 and 17] [547-H; 548-D-G]
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Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd (2007) 7 SCC 684 : 2007 (8) SCR 993 – relied on

F *National Highways Authority of India and another vs. Bumihiway DDB Ltd. (JV) and others* (2006) 10 SCC 763 : 2006 (6) Suppl. SCR 586 – held inapplicable

G 2. The petitioner's right to appoint its arbitrator in terms of clause 25 of the Development Agreement got extinguished once it failed to appoint the arbitrator on receipt of the notice dated December 10, 2010. There is no merit in the submission of the petitioner that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator. The impugned order does not suffer from any infirmity. The amount of
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Rs. One lakh deposited by the petitioner in the Registry of this Court shall be paid to the respondent. [Paras 18, 19] [549-C-D]

Case Law Reference:

2007 (8) SCR 993 relied on Para 10

2006 (6) Suppl. SCR 586 held inapplicable Para 11

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 33448 of 2011.

From the Judgment & Order dated 09.09.2011 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Arbitration Application No. 41 of 2011.

Pallav Shishodia, Annam D.N. Rao, Neelam Jain , K.K. Kota for the Petitioner.

Shyam Divan, Y. Rajagopala Rao, V. Vismain Rao, Hitendra Nath Rath for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. We have heard Mr. Pallav Shishodia, learned senior counsel for the petitioner and Mr. Shyam Divan, learned senior counsel for the respondent.

2. A Development Agreement-cum-General Power of Attorney (for short "Development Agreement") was executed between the parties on February 7, 2006. Certain disputes arose out of that agreement. On December 10, 2010, the respondent issued a notice to the petitioner invoking arbitration clause in the above agreement and nominated a former Judge of the High Court of Andhra Pradesh – Justice P.L.N. Sharma -on her behalf and called upon the present petitioner to nominate its arbitrator.

3. By reply dated January 10, 2011, the petitioner communicated to the respondent that since the Development

A Agreement has been cancelled by her, there was no question for resolution of disputes between the parties by the Arbitrator. The reply sent by the petitioner necessitated the invocation of Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the Act") by the respondent and an application was made
B before the High Court of Andhra Pradesh requesting the Chief Justice or the Designate Judge to appoint the arbitrator/ arbitrators to decide the disputes arising out of the above agreement.

C 4. On hearing the parties, the Designate Judge by his order dated September 9, 2011 appointed Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner (respondent therein). It was further observed in the order that the arbitrator nominated by the applicant (present respondent) and the arbitrator appointed by the Designate
D Judge on behalf of the petitioner (respondent therein) are required to appoint the third arbitrator before entering into reference.

E 5. The order dated September 9, 2011 is under challenge in this Special Leave Petition.

6. On December 16, 2011, a limited notice was issued by this Court to the respondent. The order issuing notice reads as follows:

F "Mr. Pallav Shishodia, learned senior counsel for the petitioner submits that instead of senior advocate, who has been appointed as arbitrator by the designate Judge, a retired High Court Judge, stationed in Hyderabad, may be
G appointed. He further submits that the petitioner is willing to bear the expenses, if limited notice is issued to the respondent.

H Issue notice limited to the above, returnable in five weeks subject to deposit of Rs. one lakh by the petitioner in the Registry towards costs.

In the meanwhile, further proceedings before the arbitrators shall remain stayed.” A

7. In compliance of the above order, the petitioner has deposited Rs. 1 lakh in the Registry of this Court towards the costs of the respondent. B

8. After service, respondent has entered appearance through Mr. Y. Rajagopala Rao, advocate-on-record. Mr. Shyam Divan, learned senior counsel appearing for the respondent, at the outset, submitted that the respondent was not agreeable to the substitution of arbitrator appointed by the Designate Judge on behalf of the petitioner. C

9. Mr. Pallav Shishodia, learned senior counsel for the petitioner vehemently contended that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator. He referred to the suit filed by the petitioner against the respondent challenging the cancellation of the Development Agreement. He also submitted that the respondent made an application under Section 8 of the Act but that came to be dismissed. In backdrop of these facts, Mr. Pallav Shishodia submitted that when the petitioner received the notice dated December 10, 2012, it was communicated by the petitioner to the respondent in its reply dated January 10, 2011 that there was no question for appointment of arbitrator and the disputes between the parties could not be decided by the arbitrator. Learned senior counsel, thus, submitted that the petitioner had not failed to appoint the arbitrator as contemplated under Section 11(4) of the Act. D
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10. Mr. Shyam Divan, learned senior counsel for the respondent, on the other hand, submitted that once an opportunity was given to the petitioner to nominate its arbitrator by notice dated December 10, 2010 and it failed to avail of the opportunity, it ceased to have any right to appoint the arbitrator in terms of the arbitration clause in the Development Agreement. In support of his submission, Mr. Shyam Divan G
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A relied upon the decision of this Court in *Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd.*¹.

B 11. Mr. Pallav Shishodia, learned senior counsel for the petitioner, in rejoinder, referred to the decision of this Court in *National Highways Authority of India and another vs. Bumihway DDB Ltd. (JV) and others*². He particularly referred to paragraphs 37 and 38 of the above decision.

C 12. We must immediately observe that the judgment of this Court in *National Highways Authority*² relied upon by Mr. Pallav Shishodia has no application to the controversy involved in the present matter. The main question in *National Highways Authority*² related to the process of appointment of arbitrator to be followed on resignation or termination of mandate of an arbitrator and one of the questions framed by this Court for D determination was whether on resignation of one of the arbitrators, the statutory provision that comes into play was Section 15(2) or Section 11(6) of the Act. The other three questions noted in para 20 of the Report have also no bearing on the question with which we are concerned in the present E matter.

13. The arbitration clause in the Development Agreement between the parties reads as follows:

“25: Arbitration:

F 25.1 Tribunal: Disputes relating to this Agreement or its interpretation shall be referred to the arbitration of an arbitral tribunal, consisting of three arbitrators (Tribunal), one each to be appointed by the parties hereto and the third to be appointed by the two arbitrators so appointed. G The award of the Tribunal shall be final and binding on the parties. The arbitration proceedings will be held only in

1. (2007) 7 SCC 684.

H 2. (2006) 10 SCC 763.

Secunderabad and the courts situated in the Ranga Reddy District alone shall have the territorial jurisdiction to entertain the dispute. The provisions of Arbitration and Conciliation Act shall comply to the arbitration procedures. A

25.2 Powers of Tribunal: The Tribunal shall be at liberty to (1) proceed summarily (2) avoid all rules, procedures and/or evidences that can be lawfully avoided by the mutual consent and/or directions by the parties and (3) award damages along with the final award against the party not complying with any interim award or order passed by the Tribunal. The Tribunal shall: B C

(a) Make the award in English and within four months from the date of appointment with the right to give extension of not more than one month at a time on emergent grounds but the total extensions shall not be more than four months. D

(b) Conduct the proceedings from day-to-day and for about 5 hours per day save for initial sittings.

(c) Not grant to either of the parties any extension of time and/or adjournment except on grounds beyond their control and only for such periods as be of the absolute minimum. E

(d) The Tribunal shall be entitled to pass interim award granting interim relief to the parties. F

25.3 Mechanism and Procedure: The procedure to be followed shall be decided by the Tribunal. The directions/award of the Tribunal shall be final and binding on the parties." G

14. On the disputes having arisen between the parties, the notice was sent by the respondent to the petitioner on December 10, 2010. Paragraph 4 of the said notice reads as under: H

A "I do hereby invoke the Arbitration Clause in the agreement
bearing Doc. No. 2778 of 2006 and appoint Hon'ble Mr.
Justice P.L.N. Sharma, a retired Judge of A.P. High Court,
r/o Gandhi Nagar, Hyderabad as arbitrator within a week
B from the date of receipt of this notice to adjudicate all
claims, disputes, differences, restitutions, restorations
whatsoever in law and in equity, in terms of the registered
Development Agreement cum GPA document registered
as Doc. No. 2778 of 2006, failing which I shall be
C constrained to initiate appropriate legal action under
Section 11 of the Arbitration Act for appointment of
arbitrator on your behalf as well as you shall be solely
responsible fro all costs and consequences."

15. The petitioner did respond to the above notice within
30 days of its receipt by sending its reply on January 10, 2011.
D Various pleas were raised in that reply and ultimately, the
petitioner responded by stating "it is stated that the question
of appointment of Arbitrator does not raise either from your side
or from our side. There is no arbitral dispute to be decided by
the arbitrator."

E 16. From the above response, it is clear that the petitioner
declined to appoint its arbitrator as according to it there was
no question of appointment of arbitrator by either of the parties
and there being no arbitral dispute, there was no occasion for
F resolution of dispute as provided in the Development
Agreement. The stance of the petitioner amounted to failure on
its part to appoint its arbitrator on receipt of the request to do
so from the respondent.

G 17. In view of the above, it cannot be said that the
Designate Judge committed any error in nominating Mr. D.V.
Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of
the petitioner. The order of the learned Single Judge is in
conformity with the decision of this Court in *Bharat Battery
Manufacturing Co. (P) Ltd.*¹ wherein this Court stated as
H follows:

“Once a party files an application under section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.”

18. The petitioner’s right to appoint its arbitrator in terms of clause 25 of the Development Agreement got extinguished once it failed to appoint the arbitrator on receipt of the notice dated December 10, 2010. There is no merit in the submission of the learned senior counsel for the petitioner that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator.

19. The order impugned in the present Special Leave Petition does not suffer from any infirmity. Special Leave Petition is, accordingly, dismissed with costs. The amount of Rs. one lakh deposited by the petitioner in the Registry of this Court shall be paid to the respondent.

B.B.B. Special Leave Petition dismissed.