

WALTER BAU AG, LEGAL SUCCESSOR, OF THE
ORIGINAL CONTRACTOR, DYCKERHOFF & WIDMANN
A.G.

v.

MUNICIPAL CORPORATION OF GREATER MUMBAI &
ANR.

(Arbitration Case (Civil) No. 35 Of 2014)

JANUARY 20, 2015

[RANJAN GOGOI, J.]

Arbitration and Conciliation Act, 1996 – s. 11(6) – Petition under – Maintainability of – Arbitration clause – Agreed upon procedure contemplated appointment of the arbitrator by the second party within 30 days of receipt of notice from the first party – Upon failure by second party to appoint arbitrator on its behalf as per the agreement, matter referred to International Centre for Alternative Disputes Resolution (ICADR) for appointment of Arbitrator on behalf of the second party – Appointment of second arbitrator by ICADR – Petition u/s. 11(6) challenging the appointment made by ICADR on the ground that the same was not as per procedure contemplated u/s 5 and 35 of ICADR Rules – Maintainability of the petition challenged – Held: Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction u/s. 11(6), acceptance of such appointment as a fait accompli to debar the jurisdiction u/s. 11(6) cannot be countenanced in law – Appointment of the second arbitrator being contrary to the Rules, was not valid and hence non-est in law – Such appointment, therefore, will not inhibit exercise of jurisdiction u/s 11(6) and the petition is maintainable – Arbitrator appointed on behalf of the second party – International Centre for Alternative Disputes Redressal Rules, 1996 – rr. 5 and 35.

A Disposing of the petition, the Court

HELD: 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, 1996 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 appointment of the arbitrator on behalf of the respondent-Corporation is clearly contrary to the provisions of the Rules governing the appointment of Arbitrators by ICADR, which the parties had agreed to abide in the matter of such appointment. The option given to the respondent-Corporation to go beyond the panel submitted by the ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. Thus, the appointment of the arbitrator, by the respondent-Corporation, 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. Consequently, the present petition is allowed and Shri Justice S.R. Sathe, a retired judge of the Bombay High Court is appointed as the Arbitrator on behalf of the respondent-Corporation. [paras 9 and 10] [49-B-C, E-H; 50-D]

Antrix Corporation Limited versus Devas Multimedia Private Limited 2013 (6) SCR 453 = (2014) 11 SCC 560; *Pricol Limited versus Johnson Controls Enterprise Ltd. & Ors.* 2014 (14) SCALE 74; *Deep Trading Company versus Indian Oil Corporation and others* 2013 (2) SCR 470 = (2013) 4 SCC 35 – distinguished.

Datar Switchgears Ltd. Versus Tata Finance

Ltd. and another (2000) 8 SCC 151 – referred to. A

Case Law Reference

2013 (2) SCR 470	distinguished	para 7	
2013 (6) SCR 453	distinguished	para 8	B
2014 (14) SCALE 74	distinguished	para 8	
(2000) 8 SCC 151	referred to	para 9	

CIVIL ORIGINAL JURISDICTION :Arbitration Petition (Civil) No. 35 of 2014 C

Shamik Sanjanwala, Kailash Pandey, Ranjeet Singh, K. V. Sreekumar, for the Appellant.

Mukul Rohatgi, AG, Dhruv Mehta, J. J. Xavier, Ashish Wad, Anshuman Srivastava, Jayashree Wad (For J. S. Wad & Co.), for the Respondents. D

The Judgment of the Court was delivered by

RANJAN GOGOI, J. : 1. A works contract No.3AAA dated 20th December, 2000 was executed by and between the petitioner and the Municipal Corporation of Greater Mumbai (respondent No.1 herein) for execution of city tunnel rehabilitation works for the purposes of transporting the city's sewage. Disputes and differences having arisen between the parties under the said contract, the petitioner invoked the arbitration clause contained therein and by letter, dated 24th February, 2014, nominated one Shri R.G. Kulkarni as its Arbitrator. By the said communication, the petitioner called upon the respondent No.1 to appoint its Arbitrator within 30 days of the receipt of the aforesaid letter/notice. E
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2. The arbitration clause in the agreement between the parties would require to be specifically noticed and, therefore, is being extracted herein below: H

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"Modified Sub-Clause 67.3	
<p style="text-align: center;">Arbitration</p> <p>Sub-clause 67.3 is modified to read as follows:</p> <p>Any dispute, in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to Sub-clause 67.1, shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute:</p>	
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E	<p>l) A dispute with and Indian contractor shall be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 or any statutory amendment thereof. The Arbitral Tribunal shall consist of 3 Arbitrators, one each to be appointed by the Employer and the Contractor. The third arbitrator shall be chosen by two arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the International Centre for Alternative</p>
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	<p>Dispute Resolution in India. For the purpose of this Sub-Clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridical person created under Indian Law as well as a Joint Venture between such a Contractor and a Foreign Contractor.</p>	<p>A B</p>
<p>II.</p>	<p>In case of a dispute with a foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of 3 Arbitrators one each to be appointed by the Employer and the Contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the parties, and shall act as presiding arbitrator. In case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the International Centre for Alternative Dispute Resolution in India. For the purposes of this clause 67, the term "Foreign Contractor" means a contractor who is not registered in India and is non juridical person created under India Law.</p>	<p>C D E F</p>
<p>III.</p>	<p>Neither party shall be limited in the proceedings before such tribunals to the evidence nor did arguments already put before the Engineer or the Board, as the case may be, for the purpose of obtaining</p>	<p>G H</p>

A		its/his said Recommendations/ decision. No such Recommendations/decision shall disqualify the Engineer or any of the members of the Board, as the case may be, from being called as a witness and giving evidence before the arbitrators or any matter whatsoever relevant to the dispute.
B	IV)	Arbitration may be commenced prior to or after completion of the works, provided always that the obligations of the Employer, the Engineer, the contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the works.
C	V)	If one of the parties fails to appoint its arbitrator in pursuance of Sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the International Centre for Alternative Dispute Resolution in India, both in cases of foreign contractors as well as Indian Contractors, shall appoint an arbitrator. A certified copy of the order of the International Centre for Alternative Dispute Resolution in India making such and appointment shall be furnished to each of the parties.
D	VI)	Arbitration proceedings shall be held at Mumbai, India, and the language of the arbitration proceedings and that of all
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	documents and communications between the parties shall be English.
VII	The decision of the majority of the arbitrators shall be final and binding upon both parties. The cost and the expenses of arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its case as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself."

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3. A reading of the aforesaid clause of the agreement would go to show that after one of the parties thereto invokes the arbitration clause; appoints its arbitrator and thereafter give notice to the other party to appoint its arbitrator, if the same is not done within 30 days or if the two arbitrators appointed by both sides fail to nominate a third arbitrator, the matter is to be referred to the International Centre for Alternative Dispute Resolution in India (for short "ICADR"). For appointment of the Arbitrator on behalf of one of the parties who has failed to so act or for appointment of the third arbitrator, as may be, ICADR is governed by certain norms contained in Rules 5 and 35 of the ICADR Rules, 1996 governing the procedure for appointment of Arbitrators. The same rules may be usefully extracted herein below:

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5. Appointment of arbitrators.- (1) Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator.

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(2) Where the arbitration agreement provides that each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the presiding arbitrator, and - a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

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(b) the appointed arbitrators fail to agree on the presiding arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the ICADR.

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(3) In an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the ICADR.

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(4) A decision by the ICADR on a matter entrusted to it by sub-rule (2) or sub rule (3) will be final and binding on the parties.

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(5) Upon receipt of a request under sub-rule (2) or sub-rule (3), the ICADR will-

(a) make the appointment as promptly as possible,

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(b) follow the procedure specified in rule 35,

(c) have regard to-

(i) any qualifications required of the arbitrator by the agreement of the parties

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<p>(ii) such considerations as are likely to secure the appointment of an independent and impartial arbitrator; and</p>	A
<p>(iii) in the case of appointment of a sole or presiding arbitrator in an international commercial arbitration, the advisability of appointing a person of a nationality other than the nationalities of the parties.</p>	B
<p>35. Services as appointing authority.- (1) On receipt of a request to appoint an arbitrator in pursuant of rule 5(2) or 5(3), the ICADR will follow the following procedure-</p>	C
<p>(i) the ICADR will communicate to each party a list containing the names, addresses, nationalities and a description of qualifications and experience of at least three individuals from the panel of arbitrators;</p>	D
<p>(ii) within thirty days following the receipt of the list, a party may delete any name to which he objects and after re-numbering the names in the order of his preference, return the list to the ICADR;</p>	E
<p>(iii) on receipt of the list returned by the party, the ICADR will appoint the arbitrator from the list taking into account the order of preference indicated by the parties;</p>	F
<p>(iv) if for any reason the appointment cannot be made according to the procedure specified in clauses (i) to (iii), the ICADR may appoint</p>	G

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the arbitrator from the panel of arbitrators.

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- (2) In appointing an arbitrator the ICADR will have regard to the matters referred to in rule 5(5)(c) and will carefully consider the nature of the dispute in order to include in the list, persons having appropriate professional or business experience, language ability and nationality.

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- (3) All appointments on behalf of the ICADR will be made by the Secretary-General and in his absence by such member of the Governing Council as is designated by the Chairperson:

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Provided that where the Secretary-General is to be appointed as the arbitrator, the appointment will be made by the Chairperson.

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4. The respondent Corporation having failed to respond to the notice dated 24th February, 2014 of the petitioner, an approach was made to the ICADR by the petitioner on 19th May, 2014. On the basis thereof, the ICADR by its letter dated 3rd June, 2014 called upon the respondent Corporation to make appointment of an Arbitrator from a panel of three names that was furnished to the respondent Corporation or to independently appoint an arbitrator. The respondent Corporation pursuant to the said communication of the ICADR appointed Mr. Justice (Retd.) A.D. Mane as its arbitrator by communication dated 3rd July, 2014. Thereafter, this application/petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”) was filed on 21st August, 2014.

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5. Mr. Shamik Sanjanwala, learned counsel appearing for the petitioner has submitted that the arbitration clause in the agreement read with Rules 5 and 35 of the ICADR Rules embody a procedure that was agreed upon by the parties with regard to appointment of the arbitrator(s). Clearly and evidently, the appointment of Mr. Justice A.D. Mane by the respondent Corporation is contrary to the procedure agreed upon inasmuch as under the relevant Rules governing the ICADR, the said Body was required to communicate the respondent Corporation a panel of three names and it is from the said panel that the respondent Corporation was required to name its Arbitrator. The Rules do not contemplate an alternative procedure giving the respondent Corporation liberty to appoint an Arbitrator of his choice once the respondent Corporation failed to appoint its arbitrator within the agreed upon period of thirty days from the receipt of the notice from the petitioner. The appointment of Mr. Justice A.D. Mane as Arbitrator is, therefore, non-est, leaving it open for this Court to exercise its powers under Section 11(6) of the Act to appoint an Arbitrator on behalf of the respondent Corporation. It is also pointed out that the petitioner has a serious basis to question the impartiality and independence of the arbitrator purported to be appointed by the respondent Corporation.

6. Mr. Mukul Rohatgi, learned Attorney General, appearing for the the respondent Corporation, on the other hand, has submitted that the present petition would not be maintainable inasmuch as an Arbitrator has already been appointed and any exercise of power under Section 11(6) of the Arbitration Act, at this stage, would operate as an ouster of the said Arbitrator. It is

A submitted that the remedy of the petitioner, if any, lies
elsewhere and under different provisions of the Arbitration
Act and not by way of an application under Section 11(6)
thereof. Reliance has been placed on the decision of this
Court in **Antrix Corporation Limited versus Devas**
B **Multimedia Private Limited** [(2014) 11 SCC 560] and
another recent pronouncement of this Court dated 16th
December, 2014 in **Pricol Limited versus Johnson**
Controls Enterprise Ltd. & Ors. [Arbitration Case (Civil)
C NO.30 of 2014].

7. Alternatively, it has been urged by Mr.Rohatgi that as the
appointment of Mr. Justice A.D. Mane was made before the
present application/petition was filed in this Court, the said
D appointment would be valid in law. It is submitted that the
requirement of appointment within 30 days of receipt of a notice
is only in cases covered under Section 11(4) and 11(5) of the
Arbitration Act, whereas in cases falling under Section 11(2)
read with Section 11(6) of the Arbitration Act, so long the
E appointment is made before the concerned aggrieved party
moves the Court under Section 11(6), such appointment will not
be invalidated. In this regard, reliance has been placed on **Datar**
Switchgears Ltd. Versus Tata Finance Ltd. and another
F [(2000) 8 SCC 151] and **Deep Trading Company** versus
Indian Oil Corporation and others [(2013) 4 SCC 35].

8. While it is correct that in Antrix (supra) and Pricol
Limited (supra), it was opined by this Court that after
G 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
H sight of. In Antrix (supra), appointment of the Arbitrator,

as per ICC Rules, was as per the alternative procedure A
agreed upon, whereas in Pricol Limited (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. B

9. 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 C
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 second party within 30 days of receipt of a
notice from the first party. While the decision in Datar D
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 E
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 F
in the matter of such appointment. The option given to the
respondent Corporation to go beyond the panel submitted
by the 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 A.D. Mane is non- G
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 H

A 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
B procedure which required the appointment made by the
respondent Corporation to be from the panel submitted by
the ICADR. The said appointment, therefore, is clearly
invalid in law.

10. Consequently, we allow the present petition and
C appoint Shri Justice S.R. Sathe, a retired judge of the
Bombay High Court as the Arbitrator on behalf of the
respondent Corporation. Both the Arbitrators shall now name
the third Arbitrator forthwith whereafter the arbitration
D proceedings will be held and concluded as expeditiously
as possible. The terms of appointment of Shri Justice S.R.
Sathe as the Arbitrator on behalf of the respondent
Corporation will be settled in consultation with the
respondent Corporation.

E 11. The arbitration petition is disposed of in the above
terms.

Kalpana K. Tripathy

Petition disposed of