A NORTHERN RAILWAY ADMINISTRATION, MINISTRY OF RAILWAY, NEW DELHI

v.

PATEL ENGINEERING COMPANY LTD.

(Civil Appeal No. 5067 of 2008)

B AUGUST 18, 2008

[DR. ARIJIT PASAYAT, P. SATHASIVAM AND AFTAB ALAM, JJ.]

C *Arbitration and Conciliation Act, 1996 – s. 11 and 11(6) – Appointment of arbitrators – Scope of – Held: Court has to ensure first that the remedies provided are exhausted – It may ask to do what has not been done – Terms of agreement has to be given effect – Chief Justice or any person or institution* D *designated by him is to take necessary measures unless agreement on appointment procedure provides other means for securing appointment – It is not mandatory to appoint the named arbitrator – Due regard is to be given to the qualifications required for arbitrator by the agreement and other considerations to secure appointment of independent and impar-* E *tial arbitrator, otherwise appointment would be vulnerable – On facts, High Court did not consider the said requirement, hence, the appointment set aside – Matters remitted back to it, to make fresh appointments.*

F **With regard to the appointment of arbitrator under s. 11(6) of the Arbitration and Conciliation Act, 1996, this Court in** *Ace Pipeline Contracts (P) Ltd v Bharat Petroleum Corpn. Ltd.* **2007 (5) SCC 304 and the** *Union of India v Bharat Battery Mgf. Co. (P) Ltd.* **2007 (7) SCC 684, gave different** G **views. In *Bharat Battery's* case the earlier decision in** *Ace Pipeline's* case **was not brought before the Bench, as such there was some confusion. Thus, the present appeals have been referred to the larger bench.**

Disposing of the appeals, the Court

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HELD: 1. With regard to the appointment of arbitrator, sub-sections (3) to (5) of section 11 of the Arbitration and Conciliation Act, 1996 refer to cases where there is no agreed procedure. Sub-section (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are (i) party fails to act as required under agreed procedure or (ii) parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (iii) person including an institution fails to perform any function entrusted to him or it under the procedure. The third contingency does not relate to the parties to the agreement or the appointed arbitrators. [Para 9] [223,H; 224,A-C]

2. The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him *to take the necessary measures".* This expression has to read alongwith requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. [Para 10] [224,D-E]

3. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is not mandatory for the Chief Justice or any person or institution designated by him to

A appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. The expression 'due regard' means that proper attention to several circumstances have been focussed. B The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken. C [Paras 11 and 12] [224,F-G; 225,A-B]

4. The High Court does not appear to have focussed on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent D and impartial arbitrator. Appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, E the appointment becomes vulnerable. In the circumstances, the appointment made in each case is set aside and the matters are remitted to the High Court to make fresh appointments keeping in view the parameters indicated above. [Para 13] [225,B-D]

F *Ace Pipeline Contracts (P) Ltd. v Bharat Petroleum Corpn. Ltd.* 2007 (5) SCC 304; *Union of India v Bharat Battery Mgf. Co. (P) Ltd.* 2007 (7) SCC 684 – referred to.

Case Law Reference

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2007 (5) SCC 304	Referred to. Para 2
2007 (7) SCC 684	Referred to. Para 2

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5067 of 2008

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From the final Judgment and Order dated 11.05.2006 of the High Court of Delhi at New Delhi in AA No. 189 of 2005 A

WITH

C.A. Nos. 5068, 5069, 5071-5076 & 5078-5085 of 2008

B. Dutta, Vikas Singh, ASGs., Narish N. Salve, N. Roy, Asha G. Nair, Rajni Ohri, Anil Katiyar, Sunil Roy, D.S. Mahra, Sanjay Kapur, Shuibhra Kapur, Rajiv Kapur, Arti Singh, Vivek Kishore, Ruchi Gaur Narula, Sangeeta Bharti, Arvind Kumar, Rekha Pandey, Rakesh Gagr, V. Bhandari, M. Yunus Malik, D.S. Mahra, A. Tarique for the Appellant. B C

Ashok Desai, P. Krishnamoorthy, Ratnakar Dash, Ashish Dholakia, Adarsh Praiyadarshini, Sumita Hazarika, Wills Mathews, G.K. Jose, D.K. Tiwari, M.K. Michael, P.K. Ghosh, Amlan Ghosh, Ajit Kumar Panda, T.S. Ahuja, Arun Arora, K.G. Bhagat, Vineet Bhagat, Manohar Saingh Bakshi, Manju Bhagat, Ehraz Zafar, Debasis Misra and Ajit Kumar Pande for the Respondents. D

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. Leave granted in all the Special Leave Petitions E

2. Noticing two different views in two decisions of this Court in *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* (2007 (5) SCC 304) *and Union of India v. Bharat Battery Mfg. Co. (P) Ltd.* (2007 (7) SCC 684) the matter has been referred to a larger Bench and that is how these cases are before us. F

3. In both the decisions the question related to appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the 'Act'). In *Bharat Battery's* case (supra) the earlier decision in *Ace Pipeline's* case (supra) was apparently not brought before the Bench as a result of which there appears to be some confusion. As noted above, the scope and ambit of Section 11(6) of the Act relating to appointment of arbitrator falls for consideration in these cases. G H

A 4. The stand of Mr. Harish N Salve appearing for some of the parties in these appeals and Mr. B. Dutta, Additional Solicitor General is that the true scope and ambit of Section 11(6) has to be considered in the background of Section 28(3) and Section 34 of the Act. According to them, the agreed procedure referred to in sub-section (2) of Section 11 has an exception in sub-section (6) i.e. where the agreed procedure fails. Where there is no agreed procedure, sub-sections (3), (4) and (5) of Section 11 apply. It is pointed out that there are three clauses in sub-section (6) of Section 11. Clause (c) relates to failure to perform function entrusted to a person including an institution and also failure to act under the procedure agreed upon by the parties. In other words, Clause (a) refers to parties to the agreement. Clause (c) relates to a person who may not be party to the agreement but has given consent to the agreement. It is also pointed out that there is a statutory mandate to take necessary measures, unless the agreement on the appointment procedure provided other means for securing the appointment. It is, therefore, submitted that before the alternative is resorted to agreed procedure has to be exhausted. The agreement has to be given effect and the contract has to be adhered to as closely as possible. Corrective measures have to be taken first and the Court is the last resort. It is also pointed out that while appointing an Arbitrator in terms of sub-section (8) of Section 11, the Court has to give due regard to any qualification required for the Arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is pointed out that both these conditions are cumulative in nature. Therefore, the Court should not directly make an appointment. It has to ensure first that the provided remedy is exhausted and the Court may ask to do what has not been done.

5. In response, Mr. Ashok Desai, learned senior counsel appearing for some of the parties who have sought for appointment of Arbitrator submitted that the expression 'due regard' relates to some of the factors which have to be considered and

it is not mandatory that the qualifications and the considerations as referred to in sub-section (8) of Section 11 perforce have to be applied. It is a question of degree of the parameters of consideration.

6. With reference to the earlier scheme under the Arbitration Act, 1940 (in short the 'Old Act') it is stated that the party is forced to move the Court because of request being refused to appoint named Arbitrator and, therefore, the Court in terms of sub-section (8) of Section 11 is not constrained to appoint any arbitrator.

7. Section 11 reads as follows:

"Appointment of arbitrators-

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies 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

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), 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 Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or subsection (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration the reference to "Chief Justice in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(*b*) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to, the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the court referred to in that clause, to the Chief Justice of that High Court."

8. The crucial sub-sections are sub-sections (2), (3), (4), (5) and (6).

9. Sub-sections (3) to (5) refer to cases where there is no

A agreed procedure. Sub-section (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary
B measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are (i) a party fails to act as required under agreed procedure or (ii) the parties or the two appointed arbitrators fail to reach an agree-
C ment expected of them under that procedure or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators.

D 10. The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him *to take the necessary measures*" (underlined for emphasis). This expression has to read alongwith requirement in sub-section (8) that the Chief Justice or the person or
E an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

11. A bare reading of the scheme of Section 11 shows
F that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not man-
G datory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

12. The expression 'due regard' means that proper atten-
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tion to several circumstances have been focussed. The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

13. In all these cases at hand the High Court does not appear to have focussed on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.

14. The appeals are disposed of accordingly.

N.J. Appeals disposed of.