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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 6th July,2020
Pronounced on: 6th November, 2020

\+ ARB. P. 208/2020

M/S LARSEN & TOUBRO LIMITED ... Petitioner
Through: Mr. R.V. Yogesh and Ms. Snigdha Singh, Advs.

versus

M/S NATIONAL HIGHWAYS AUTHORITY OF INIDA & ANR. ... Respondents
Through: Mr. Manish Bishnoi, Mr. Umang Raja and Mr. Anurag Sarda, Advs. for Respondent No. 1

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G E M E N T

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1. By this petition, under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), the petitioner prays for appointment of an arbitrator, on behalf of Respondent No. 1 (hereinafter referred to as "NHAI"), to arbitrate on the disputes between the petitioner and NHAI.

Facts

2. On 25th February 2014, an Engineering Procurement and Construction (EPC) Contract (hereinafter referred to as "the Contract") was executed between the petitioner and NHAI, for development, maintenance and management of National Highway (NH) 8, over a stretch of approximately 6.745 km. The petitioner alleges that, owing to reasons not attributable to the petitioner, the contracted work could not be completed within the stipulated time, and was finally completed after a delay of 15 months. The petitioner further alleges that, as a consequence, it suffered various losses, which were duly brought to the notice of NHAI. Though the representative of NHAI had, purportedly, computed the admissible claims of the petitioner, the petitioner is not in agreement therewith. As a result, the petitioner asserts that disputes have arisen, between the petitioner and NHAI, which are arbitrable in nature.

3. Clauses 26.1 to 26.3 of the Contract provided for resolution of disputes, and read (to the extent relevant) thus:

> "**26.1 Dispute Resolution**
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> 26.1.1 Any dispute, difference or the controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so are notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.
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> 26.1.2 The Parties agree to use their best efforts for resolving Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal

business hours to all non-privileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either party may call upon the Authority's Engineer, or such other person as the Parties may mutually agreed upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contract are for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss an attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period over the Dispute is not amicably settled within 15 (fifteen) days of the meeting all the Dispute is not resolved as evidenced by the signing of written in terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

26.3 Arbitration

26.3.1 Any dispute, which is not resolved amicably as provided in clause 26.1 and 26.2 shall be finally settled by arbitration as set forth below:

i) The Dispute shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof. The Arbitral Tribunal shall consist of 3 Arbitrators, one each to be appointed by NHAI and the concessionaire. The third arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Residing Arbitrator. In case of failure of the twoArbitrators, appointed by the parties to reach upon a consensus within period of 30 days from the

appointment of the Arbitrator appointed subsequently, the Residing arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress.

ii) Neither party shall be limited in the proceedings in the Tribunal to the evidence or arguments before the other party/Independent consultant.

iii) Arbitration may be commenced during or after the Contract Period, provided that the obligations of NHAI and the Contractor shall not be altered by the reason of the arbitration being conducted during the Contract Period.

iv) If one of the parties failed to appoint its Arbitrator in pursuance of Sub-Clause (i) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Chairman of the Executive Committee of the Indian Roads Congress, shall appoint the Arbitrator. A certified copy of the order of the Chairman of the Executive Committee of the Indian Roads Congress making such an appointment shall be furnished to each of the parties.

v) Arbitration proceeding shall be held at Delhi, India, and the language of the Arbitration Proceedings and that of all documents and communications between the parties shall be English.

vi) The decision of the majority of Arbitrators shall be final and binding upon both parties. The expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings shall be borne by each party itself."

4. On 17th December, 2019, the petitioner wrote to NHAI, setting out its claims and seeking amicable resolution thereof, under Clause 26.2 of the Contract, by reference of the disputes to the Chairman of NHAI and the Chairman of the Board of Directors of the petitioner. According to the petitioner, it had duly nominated Mr. R. Ranganathan as its representative in the said settlement effort.

5. No efforts having been made by NHAI for amicable settlement of the disputes within 21 days, and the disputes remaining unsettled after 30 days, the petitioner wrote, on 20th January, 2020, to NHAI, pointing out that, under Clause 26.3 of the Contract, it was open to either party to refer the dispute to arbitration. In accordance with Clause 26.3.1, the petitioner stated that it had appointed Dr. T. R. Seshadri as its arbitrator. The NHAI was, therefore, requested to nominate an arbitrator so that, thereafter, the two arbitrators could appoint the Presiding Arbitrator.

6. The petitioner avers that, as NHAI defaulted in appointing its arbitrator, the petitioner, in accordance with Clause 26.3.1(iv) of the Contract, wrote on 24th February, 2020, to the Secretary General of the Indian Roads Congress (IRC) (as there was no post of "Chairman, Executive Committee" in the IRC), for appointment of the arbitrator on behalf of NHAI.

7. No response was received from the IRC, and no arbitrator was appointed by it, on behalf of the NHAI. The petitioner wrote, on 27th April, 2020, to the IRC, with a copy marked to NHAI, stating that, as

there was default, in the matter of appointment of an arbitrator on behalf of NHAI, both by NHAI as well as by the IRC, the petitioner was moving this Court under Section 11 of the 1996 Act.

8. On 30th April, 2020, the petitioner received an e-mail from NHAI, stating that Mr. Prabhat Krishna had been appointed, by NHAI, as its arbitrator, on 23rd March, 2020, and that the appointment had been accepted by Mr. Prabhat Krishna *vide* communication dated 14th April, 2020. The email also enclosed the request letter dated 23rd March, 2020, from NHAI to Mr. Prabhat Krishna, and the response, dated 14th April, 2020, of Mr. Prabhat Krishna thereto.

9. On 8th May, 2020, the IRC wrote to the petitioner, informing the petitioner that NHAI had, *vide* letter dated 30th April, 2020, addressed to the Ministry of Road Transport and Highways (hereinafter referred to as "the Ministry"), informed that it had appointed Mr. Prabhat Krishna as its nominee arbitrator.

10. The petitioner contends that the appointment, by NHAI, of Mr. Prabhat Krishna as its arbitrator, on 23rd March, 2020, was illegal, as, once the petitioner had approached the IRC, NHAI had forfeited his right to appoint an arbitrator. The IRC having also failed to appoint an arbitrator, till the filing of the present petition by the petitioner before this Court, it is contended that the NHAI, and the IRC, were not entitled to appoint any arbitrator, and that the arbitrator, on behalf of the NHAI, would have to be appointed by this Court. There has, contends the petitioner, been "failure", on the part of the NHAI, as well as the IRC, to act in accordance with the arbitration agreement

between the petitioner and NHAI. Reliance has been placed, for the said purpose, by the petitioner, on the judgement of the Supreme Court in ***Datar Switchgear v. Tata Finance Ltd***[1], as well as of this Court in ***Punj Lloyd v. Petronet MHB Ltd***[2].

Rival Submissions

11. Having elaborated the above facts, Mr. R. V. Yogesh, learned counsel for the petitioner submits that, but for Clause 26.3.1(iv), which obligated the petitioner to approach the IRC on NHAI failing to appoint an arbitrator within 30 days of the petitioner doing so, the petitioner would have approached this Court at that stage itself. As such, submits Mr. Yogesh, once 30 days from the date of receipt of the notice from the petitioner, informing NHAI of the appointment of arbitrator by it, had expired, the right of NHAI to appoint its arbitrator stood forfeited. Mr. Yogesh submits that NHAI could not legitimately take advantage of Clause 26.3.1(iv) to appoint its arbitrator after 30 days, from the date of receipt of notice from the petitioner, had expired. Mr. Yogesh also places reliance on ***Walter Bau AG v. Municipal Corporation of Greater Bombay***[3].

12. Mr. Yogesh has also drawn my attention to Clause 2.4 of the "Guidelines for Empanelment and Nomination of Arbitrators, Presiding Arbitrators, Dispute Review Experts, Member/Chairman of

[1] **(2000) 8 SCC 151**
[2] **2006 (3) RCR (Civil) 836**
[3] **(2015) 3 SCC 800**

Dispute Review Board and Conciliators etc.", as contained in the procedure followed by the IRC, which reads as under:

> "On receipt of the request for appointment of an arbitrator for a particular work, the Secretary General, IRC will prepare a short list of five arbitrators from among the list maintained in the IRC Secretariat and put up along with their information to the High Powered Committee for nomination. The nomination of Arbitrator may be considered within 30 days from the date of receiving the complete details and prescribed processing fee. If urgent meeting of HighPoweredCommittee cannot be held, the matter may be decided by circulation or telephonic consent to be ratified at the next meeting. A standing order of the Executive Committee of the IRC is needed to authorize the High Powered Committee to nominate a person from the empanelled list."

13. Arguing for NHAI, Mr. Manish Bishnoi, learned Counsel submits, *per contra*, that NHAI did not lose its right to appoint an arbitrator, till the filing of the present petition before this Court by the petitioner, as per the law laid down in ***Datar Switchgear***[1]. He submits that the principle enunciated in the said decision is not dependent on the wording of the arbitration clause. Drawing attention to para 10 of the report in ***Walter Bau AG***[3], Mr. Bishnoi submits that this decision, too, does not help the petitioner. He draws attention to the fact that the arbitration clause, in the contract between the petitioner and NHAI, does not stipulate that the right, of NHAI, to appoint its arbitrator, stood forfeited on expiry of 30 days from receipt of notice by the petitioner. In any event, submits Mr. Bishnoi, no prejudice has resulted to the petitioner, as would merit interference by this Court. Mr. Bishnoi has placed reliance on para 10 of the report in ***Walter Bau AG***[3].

14. Arguing in rejoinder, Mr. Yogesh relies on the judgement of the Supreme Court in ***U.O.I. v. Premco-DKSPL (JV)***[4], to re-emphasise his submission that NHAI had forfeited its right to appoint an arbitrator. The reliance, by Mr. Bishnoi, on para 10 of the report in ***Walter Bau AG***[3], submits Mr. Yogesh, is misconceived, as the observation of the Supreme Court, in the said para, is merely incidental, which does not decide the issue in controversy. Apropos the letter dated 8th May, 2020, of IRC to the petitioner, Mr. Yogesh submits that the communication was of no relevance, as any appointment, by NHAI, of its nominee arbitrator, after the petitioner had approached the IRC, was contrary to the terms of the contract between the petitioner and NHAI, as well as to the Rules and procedure of IRC itself. Mr. Yogesh has also placed reliance on the decision in ***Antrix Corporation Ltd v. Devas Multimedia Private Ltd***[5], and has also drawn attention to the reasoning, in ***Walter Bau AG***[3], for distinguishing ***Antrix Corporation Ltd***[5].

Written Submissions

15. Written submissions were also filed by learned Counsel for both parties.

16. Besides reiterating the submissions advanced orally at the bar, the written submissions of the petitioner emphasised the use of the word "shall", in Clause 26.3.1(iv) of the Contract, denoting its

[4](2016) 14 SCC 651
[5](2014) 11 SCC 560

mandatory nature. As such, it is submitted, any appointment of its arbitrator, by NHAI, after the expiry of 30 days from the receipt of notice from the petitioner, would be non est in law. The submission of Mr. Bishnoi, based on para- 9 of ***Datar Switchgear***[1], that, till the petitioner moved the present petition, NHAI could appoint its nominee arbitrator at any time, he submits, is incorrect, for various reasons. Firstly, unlike the present case, the arbitration agreement in ***Datar Switchgear***[1] did not require appointment of the arbitrator, by one party, within 30 days of receipt of notice from the other. This requirement was derived, by the Supreme Court, by a conjoint reading of sub-sections (3), (4) and (5) of Section 11. Secondly, the notice, in ***Datar Switchgear***[1], did not call on the other party to appoint an arbitrator but merely sought invocation of the arbitration clause. *Au contraire*, in the present case, the petitioner had specifically called on NHAI to appoint its arbitrator, *vide* its communication dated 20th January, 2020. Thirdly, there was no secondary institutional mechanism for appointment of the arbitrator in the event of failure of the other party to do so, in ***Datar Switchgear***[1]. Extrapolating the principle enunciated in ***Datar Switchgear***[1] to a situation in which the contract provided for recourse to a secondary institutional mechanism for appointment of the arbitrator, on failure of the opposite party to appoint the arbitrator within the stipulated time after receipt of notice, Mr. Yogesh submits that, once the petitioner had taken recourse to the alternate mechanism provided in the arbitration clause, NHAI's right to appoint the arbitrator stood extinguished.

17. The written submissions of NHAI reiterate the submission that ***Datar Switchgear***[1] extinguishes the right of the respondent, to appoint the arbitrator, only on the petitioner moving the Court under Section 11 (6). So long as the respondent appointed the arbitrator prior to the petitioner moving the Court, NHAI contends that such appointment cannot be interfered with. It is also contended that the principle enunciated in ***Datar Switchgear***[1] is not dependent on the wording of the arbitration clause. Para 19 of the judgement, it is emphasised, is based on Section 11 (6), and not on the particular wording of the arbitration clause between the parties. This position, it is submitted, also emerges on a reading of para 11 of the judgement. Limiting the application of the principle in ***Datar Switchgear***[1] on the basis of the wording of the arbitration clause in any particular case, it is submitted, would lead to anomalous results. For the same reason, the fact that the contract between the petitioner and NHAI provided for recourse to the IRC, before approaching this Court, would also make no difference to the applicability of the law enunciated in ***Datar Switchgear***[1]. It is further contended, in this context, that the forfeiture of the right of the respondent, to appoint the arbitrator, as postulated in ***Datar Switchgear***[1], flows from the act of the petitioner in approaching the Court under Section 11 (6), and not from the default of the respondent in appointing the arbitrator in terms of the agreement with between the parties.

18. NHAI has sought, further, to contend that, once it had appointed an arbitrator, any grievance regarding the constitution of the Arbitral Tribunal would have to be agitated, by the petitioner, by way of

proceedings under Section 13 of the 1996 Act, and not by means of the petitioner under Section 11 (6) which was, for the said reason, not maintainable. Essentially, therefore, the petitioner seeks setting aside of the appointment, by NHAI, of its arbitrator, which cannot be claimed in a petition under Section 11 (6). Reliance has been placed, for this purpose, on the judgement of the Supreme Court in ***Antrix Corporation Ltd***[5] and of this Court in ***Lanco Infratech v. Hindustan Construction Corporation***[6]**.**Reliance has also been placed on ***NHAI v. Bumihiway DDB Ltd***[7], to contend that the petitioner was not entitled to prefer the present petition without, in the first instance, moving the IRC for appointment of a Presiding Arbitrator.

Analysis

19. The procedure for constituting the Arbitral Tribunal, as contemplated by Clause 26.3.1 of the Contract, may be outlined thus:

(i) The Arbitral Tribunal would consist of three arbitrators.

(ii) One arbitrator, each, is to be appointed by the petitioner and by NHAI.

(iii) The first party, appointing its arbitrator, would issue a notice, to the other party, intimating it of such appointment. The second party is required to appoint its arbitrator within 30 days of receipt of such notice.

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[6]**217 (2015) DLT 373.**
[7]**(2006) 10 SCC 763**

(iv) In the event of failure, by the second party, to appoint its arbitrator within the said period of 30 days, the arbitrator for the second party would be appointed by the Chairman of the Executive Committee of the IRC.

(v) These two arbitrators would choose the third arbitrator, who would be the Presiding Arbitrator .

(vi) In case the two arbitrators, appointed by the parties, do not appoint the Presiding Arbitrator within 30 days of the appointment of the second arbitrator, the Presiding Arbitrator would be appointed by the Chairman of the Executive Committee of the IRC.

20. The petitioner nominated its arbitrator and intimated NHAI, accordingly, *vide* letter dated 20th January 2020. The petitioner was intimated, regarding the appointment of Mr. Prabhat Krishna, by the respondent, as its arbitrator, only *vide* communication dated 30th April, 2020. Even assuming Mr. Prabhat Krishna was appointed as arbitrator, by the respondent, on 23rd March, 2020, that appointment would, nevertheless, be beyond the period of 30 days stipulated in Clause 26.3.1 (i) of the Contract. Clearly, therefore, there was failure, on the part of the respondent, in appointing its arbitrator, within the meaning of Clause 26.3.1 (i).

21. The residuary course of action, contemplated by Clause 26.3.1 (iv), in the event of the second party failing to appoint its arbitrator within 30 days of receipt of notice, from the first party, is by way of

recourse to the Chairman of the Executive Committee of the IRC, who was required, then, to appoint the arbitrator for the second party.

22. The petitioner wrote, on 24th February, 2020, to the Secretary General of the IRC, to appoint an arbitrator on behalf of NHAI. The IRC, admittedly, never appointed an arbitrator on behalf of NHAI, and contented itself by informing the petitioner, *vide* letter dated 8th May, 2020, that NHAI had appointed its arbitrator. Mr. Yogesh contends that the IRC was entirely unjustified in having abdicated its responsibility, to appoint the arbitrator on behalf of NHAI in this fashion.

23. I agree.

24. The IRC has a specific procedural dispensation, framed by itself, to be followed when approached for appointment of an arbitrator. Clause 2.4 of the "Guidelines for Empanelment and Nomination of Arbitrators, Presiding Arbitrators, Dispute Review Experts, Member/Chairman of Dispute Review Board and Conciliators etc.", *supra*, as framed by the IRC for its own guidance, requires the IRC to prepare a short list of five arbitrators, from the list maintained by the IRC Secretariat, and put up the five shortlisted names before the High Powered Committee of the IRC, which is required to nominate the arbitrator from the said list within 30 days, after having been so authorised by a standing order of the Executive Committee of the IRC. As to why the IRC did not choose to adopt the procedure, in the case of the petitioner, is anybody's guess. Suffice it to state that there was complete failure, on the part of the IRC, to

nominate the arbitrator on behalf of NHAI, as requested by the petitioner. Such a failure has been held, by the Supreme Court in ***Walter Bau AG***[3], to be fatal.

25. Section 11(6) of the 1996 Act postulates that, where there is failure, on the part of a party, to act as required by the procedure stipulated in the agreement for appointment of the arbitrator, the appointment shall be made, in the case of domestic arbitration, by the High Court, "unless the agreement on the appointment procedure provides other means for securing the appointment". In the present case, there was failure, on the part of NHAI, in appointing its arbitrator, as required by the procedure stipulated in Clause 26.3.1 (iv) of the Contract, within 30 days of receipt of the notice, dated 20th January, 2020, from the petitioner. "Other means for securing the appointment", within the meaning of Section 11 (6) of the 1996 Act, were provided in Clause 26.3.1(iv), by way of recourse to the Chairman of the Executive Committee of the IRC. The petitioner approached the Secretary General of the IRC, in the absence of any Chairman of the Executive Committee thereof. No dispute, regarding whether the Secretary General of the IRC could substitute himself in place of the Chairman of the Executive Committee, has been raised before me in the present case, and I proceed, therefore, on the premise that the recourse, to the Secretary General of the IRC, by the petitioner, was in accordance with Clause 26.3.1(iv) of the Contract. As already noted hereinabove, the IRC failed to appoint any arbitrator. The resort, by the petitioner, to the "other means of securing the appointment", as provided by Clause 26.3.1 (iv), was, therefore, rendered abortive.

26. Clause (c) in Section 11 (6) provides that where, under the appointment procedure agreed upon by the parties, an institution fails to perform any function, entrusted to it under the procedure, the appointment would, in the case of domestic arbitrations, have to be made by the High Court. The IRC having failed to perform the function entrusted to it by Clause 26.3.1(iv), the petitioner approached this Court.

27. Prior to the petitioner filing the present petition before this Court, but after the petitioner had approached the IRC, the NHAI, on 23rd March, 2020, appointed Mr. Prabhat Krishna as its arbitrator, and informed the petitioner, accordingly, *vide* e-mail dated 30th April, 2020. The petitioner contends that, once the period of 30 days, stipulated in Clause 26.3.1 (i) of the Contract had expired, and the petitioner had approached the IRC, the right of NHAI to appoint its arbitrator stood extinguished. NHAI, *per contra*, contends that its right, to appoint an arbitrator, subsisted till the petitioner filed the present petition before this Court and that, as it had appointed Mr. Prabhat Krishna as its arbitrator prior to the filing of the present petition, the appointment was in order. NHAI relies, for this purpose, on the judgement of the Supreme Court in ***Datar Switchgear***[1].

28. It becomes necessary, therefore, to carefully read ***Datar Switchgear***[1].

29. In ***Datar Switchgear***[1], the appellant (hereinafter referred to as "Datar") entered into a lease agreement with the respondent Tata

Finance Ltd. (hereinafter referred to as "Tata"), in connection with which certain disputes arose. Tata sent a notice, dated 5th August, 1999, to Datar, claiming an amount of ₹ 28,458,701/– and stipulating, in the alternative, that the notice be treated as one issued under Clause 20.9 of the lease agreement, which provided for arbitration to resolve disputes between the parties. Datar did not pay the demanded amount. Having waited for 30 days, Tata filed a petition, under Section 9 of the 1996 Act, before the High Court, on 26th October, 1999, seeking interim protection. On 25th November, 1999, Tata appointed a Sole arbitrator. Datar, thereupon, filed an Arbitration Application before the Chief Justice of the High Court of Bombay, praying for appointment of another arbitrator. Tata opposed the application. The learned Chief Justice dismissed the application of Datar as not maintainable, as a Sole arbitrator had already been appointed by Tata. Datar challenged the said decision, of the learned Chief Justice, before the Supreme Court.

30. Before the Supreme Court, Datar contended that Tata ought to have appointed the arbitrator within a reasonable time of receipt of the notice, dated 5th August, 1999. It was also contended that the lease agreement did not envisage unilateral appointment of the arbitrator by any party.

31. Observing that the application, before the learned Chief Justice of the High Court of Bombay must have been preferred by Datar under Section 11(6)(a) of the 1996 Act, the Supreme Court identified the question arising for consideration as "whether there was any real failure of the mechanism provided under the lease agreement" for

appointment of the arbitrator. Clause 20.9 of the lease agreement, which provided for arbitration, read as under:

> "It is agreed by and between the parties that in case of any dispute under thislease the same shall be referred to an arbitrator to be nominated by the lessor and the award of the arbitrator shall be final and binding on all the parties concerned. The venue of such arbitration shall be in Bombay. Save as aforesaid, the courts at Bombay alone and no other courts whatsoever will have jurisdiction to try suit in respect of any claim or dispute arising out of or under this lease or in any way relating to the same."

Before proceeding to the issue delineated by it, the Supreme Court noted, as "pertinent" (in para 10 of the report), the fact that no notice period was prescribed in the arbitration clause. In view thereof, the Supreme Court proceeded to observe, in para 11 of the report, that the question that arose was, in the circumstances, "whether for purposes of Section 11(6) the parties to whom a demand for appointment is made, forfeits his right to do so if he does not appoint an arbitrator within 30 days." Datar contended that, even if no specific time period for appointment of arbitrator was stipulated in Clause 20.9, Tata was required to appoint the arbitrator within a reasonable period, and default, on the part of Tata, in doing so, amounted to failure of the procedure contemplated under the lease deed.

32. The Supreme Court held thus, in para 14 of the report:

> "The above decision has no application to the facts of this case as in the present case, the arbitrator was already appointed before the appellant invoked Section 11 of the Act. The counsel for the appellant contended that the arbitrator was appointed after a long lapse of time and that too without any previous consultation with the appellant and therefore it

> was argued that the Chief Justice should have appointed a fresh arbitrator. We do not find much force in this contention, *especially in view of the specific words used in the arbitration clause in the agreement, which is extracted above.This is not a case where the appellant requested and gave a notice period for appointment of an arbitrator and the latter failed to comply with that request.* The 1st respondent asked the appellant to make payment within a stipulated period and indicated that in the event of non-payment of the amount within fourteen days, the said notice itself was to be treated as the notice under the arbitration clause in the agreement. The amount allegedly due from the appellant was substantial and the 1st respondent cannot be said to be at fault for having given a larger period for payment of the amount and settling the dispute. *It is pertinent to note that the appellant did not file an application even after the 1st respondent invoked Section 9 of the Act and filed a petition seeking interim relief. Under such circumstances, it cannot be said that there was a failure of the procedure prescribed under the contract.*"
>
> (Emphasis supplied)

33. Thereafter, the Supreme Court, after noting the reliance, placed by Datar on the judgement of this Court in ***B.W.L. Ltd v. M.T.N.L.***[8] and the judgement of the High Court of Andhra Pradesh in ***Sharma & Sons v. Engineer-in-Chief, Army Headquarters***[9] , observed, in para 17 of the report, that, in these cases, appointment of the arbitrator had not been made by the opposite party before filing of the application under Section 11. These cases were not, therefore, it was observed, directly in point. Thereafter, in para 18 of the report, the Supreme Court went on to observe thus:

> "In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. *Question is*

[8](2000) 85 DLT 84 : (2000) 2 Arb LR 190
[9](2000) 2 Arb LR 31 (AP)

> *whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?*"
>
> (Emphasis supplied)

34. Having framed the above query, the Supreme Court went on to answer it in the negative, in para 19 of the report, holding that the failure, on the part of Tata , in appointing the arbitrator within 30 days of receipt of the notice from Datar, would not result in forfeiture of the right, of Tata, to appoint an arbitrator, provided the arbitrator was appointed before Datar moved the learned Chief Justice under Section 11(6). Mr. Bishnoi, predictably, relies on this finding.

35. As a bare reading of para 19 of the report in ***Datar Switchgear***[1] would reveal that the reliance thereon, by Mr. Bishnoi, is misplaced. Para 19 of the report read thus:

> "So far as cases falling under Section 11(6) are concerned – such as the one before us – no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, **therefore**, *so far as Section 11(6) is concerned*, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the

observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

(Underlining and bold emphasis supplied; italics in original)

36. A conjoint reading of paras 14 and 19 of the report in ***Datar Switchgear***[1] makes it more than amply clear that the Supreme Court held the right of Tata to appoint the arbitrator could not to have been forfeited on the expiry of 30 days from the receipt of the notice, dated 5th August, 1999, issued by Datar because, firstly, the arbitration clause, in the lease deed between Datar and Tata, did not stipulate any period within which Tata was to appoint the arbitrator after receipt of notice from Datar; secondly, neither did Datar, in its notice dated 5th August, 1999, call upon Tata to appoint the arbitrator within any specific time period (though, in the absence of any time period having been specified in the arbitration clause, even if Datar had stipulated any such time period within which Tata was to appoint its arbitrator, that may not have made much difference, in my view) and, lastly, whereas Section 11(4) and 11(5) stipulated 30 days as the time within which the arbitrator was to be appointed, no such time period was to be found in Section 11(6). It was in these circumstances that the Supreme Court held that, till the filing of the petition under Section 11(6) before the High Court by Datar, the right of Tata to appoint the arbitrator could not be said to have been forfeited. Essentially, therefore, what the Supreme Court held was that, in the absence of any stipulation as to time period within which Datar was required to appoint the arbitrator, contained either in the arbitration clause in the lease deed or in Section 11(6), the argument, of Datar, that Tata was

required to have appointed the arbitrator within a "reasonable period of 30 days" from receipt of the notice dated 5th August, 1999 issued by Datar, was not sustainable in law.

37. It is clear that ***Datar Switchgear***[1] can have no application, whatsoever, to a case in which the arbitration clause, in the agreement between the parties, specifically stipulated the time period within which the recipient of the notice invoking arbitration, issued by the other party, was required to appoint the arbitrator. This position stands underscored by the following words, contained in para 23 of ***Datar Switchgear***[1]:

> "*When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure.* Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still *the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.*"
>
> (Emphasis supplied)

38. ***Datar Switchgear***[1], if anything, therefore, militates against the stands canvassed by Mr. Bishnoi, as it accords pre-eminence to the covenants of the contract between the parties, and mandates strict adherence thereto.

39. In this context, Mr. Bishnoi also sought to submit that the arbitration clause, in the contract between the petitioner and NHAI, did not forfeit, expressly, the right of NHAI to appoint an arbitrator,

on the expiry of 30 days from receipt of notice from the petitioner. I am unable to accept this submission. Contractual covenants, though they command absolute and implicit compliance, cannot be construed in a manner akin to statutory edicts. They have to be reasonably construed, in such a way as would further the manifest intention of the contracting parties. Clause 26.3.1(iv) clearly states that, on failure of either party, to appoint its arbitrator, under Clause 26.3.1(i), within 30 days of receipt of the notice of the appointment of the arbitrator by the other, the Chairman of the Executive Committee of the IRC *shall* appoint the arbitrator. The use of the word "shall" is reflective of the mandatory nature of this clause. To hold that, even after the expiry of 30 days from receipt of notice from the first party, regarding appointing of an arbitrator by it, the second party would continue to retain the right to appoint its arbitrator, would amount to reducing, to a redundancy, the specification of 30 days expressly engrafted into this Clause, and would also militate against the express intent thereof. Where the contract has expressly stipulated time period of 30 days, within which the second party could appoint its arbitrator after receipt of notice from the first party, applying the law enunciated in para 23 of ***Datar Switchgear***[1], the right to appoint the arbitrator would stand transferred to the IRC, which would necessarily require extinguishing of such a right in the hands of NHAI. To reiterate, Clause 26.3.1 (i) cannot, in my view, be reasonably construed as retaining, with NHAI, the right to appoint its arbitrator, despite the expiry of 30 days from the date of receipt of notice from the petitioner, intimating the NHAI of the appointment of its arbitrator by the petitioner. Once the period of 30 days had expired, Clause 26.3.1(iv) vested the right, to appoint

the arbitrator on behalf of NHAI, with the IRC. The use of the word "shall" in Clause 26.3.1(iv) amounts to express evisceration by contractual dispensation, of the right of NHAI to appoint its arbitrator, once 30 days, from the date of receipt of notice from the petitioner, had expired. The contention of Mr. Bishnoi, to the contrary, is therefore rejected.

40. The following passage, from ***Premco-DKSPL (JV)***[4] re-emphasises this legal position:

> "8. In the aforesaid facts and circumstances it did not lie in the mouth of the respondent contractor that the appellants had committed a default and had forfeited their right to appoint arbitrators as per the terms of the agreement. The learned Judge failed to read the relevant clause of the agreement properly and therefore wrongly placed reliance upon the judgment in ***Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151***. *In that case this Court had extracted the relevant terms of agreement in para 9 which showed that there was no stipulation of any time-limit like that of 60 days in the present case.The terms of the agreement bind the parties unless they have chosen to repudiate the same. Relevant terms, if provided, will be material for deciding when the right of a party to appoint the arbitrator will suffer forfeiture and when the other party would be entitled to give notice and on failure, move application under Section 11(6) of the Act. Such terms deserve respect of the parties and attention of the Court*."
>
> (Emphasis supplied)

41. Mr. Bishnoi, however, relies on the judgement of an Hon'ble Single Judge of the Supreme Court (Ranjan Gogoi, J., as he then was), in ***Walter Bau AG***[3].

42. The arbitration clause, in ***Walter Bau AG***[3], contained the following covenant:

> "If one of the parties fails to appoint its arbitrator in pursuance of sub-clauses (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 an appointment shall be furnished to each of the parties."

43. Paraphrasing this clause, the Supreme Court observed, in para 3 of the report, as under:

> "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 gives 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")."
>
> (Emphasis supplied)

Thus, though the arbitration clause, between the parties did not specifically, and in express terms, forfeit the right of the second party, to appoint its arbitrator even after 30 days, from the date of receipt of notice from the first party, had expired, the Supreme Court understood the clause as mandating reference to the ICADR for appointment of the arbitrator on behalf of the defaulting party, once the said period of 30 days had expired. This, again, discountenances the submission, of Mr. Bishnoi, that, in the absence of any express forfeiture, by the arbitration clause, of the right of NHAI to appoint its arbitrator on the

expiry of 30 days from the date of receipt of notice from the petitioner, such a right was deemed to continue to subsist.

44. In the case before the Supreme Court, the appellant Walter Bau AG (hereinafter referred to as "Walter") issued a notice, dated 24th February, 2004, to the respondent (hereinafter referred to as "the Municipal Corporation"), informing the Municipal Corporation that it had appointed one Mr. R. G. Kulkarni as its arbitrator, and calling on the Municipal Corporation to do likewise. The Municipal Corporation having failed to respond within the period of 30 days contemplated in the afore-extracted arbitration clause, Walter approached the ICADR on 19th May, 2014. The ICADR, *vide* letter dated 3rd June, 2014, called upon the Municipal Corporation to appoint an arbitrator from a panel of three names furnished by it, *or to independently appoint an arbitrator*. Availing the second option, the Municipal Corporation appointed Hon'ble Mr. Justice A. D. Mane, a learned retired Judge of the High Court of Bombay, as its arbitrator, *vide* communication dated 3rd July, 2014. Walter approached the High Court of Bombay, under Section 11(6) of the 1996 Act, on 21st August, 2014.

45. Before the High Court, as well as before the Supreme Court, it was sought to be contended, by the Municipal Corporation, that, as the municipal Corporation had appointed its arbitrator on 3rd July, 2014, before Walter filed its Section 11(6) petition in the High Court, nothing survived for consideration. Reliance was placed, for the purpose, on ***Datar Switchgear***[1].

46. The findings of the Supreme Court in para 10 of the report, on which Mr. Bishnoi relies, read thus:

> "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 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 the second party within 30 days of receipt of a notice from the first party.* While the decision in ***Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151*** 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 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 by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by 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 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 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.***, is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law."
>
> (Italics and underscoring supplied)

47. It is clear, from a reading of the above passage from ***Walter Bau AG***[3], that the main ground, on which the Supreme Court rejected

the submission of the Municipal Corporation, was that the procedure adopted by the ICADR was contrary to its own rules. Once the reference had been made to the ICADR, the Supreme Court held that the ICADR could not throw the ball back into the court of the Municipal Corporation, by giving it the option to appoint its own independent arbitrator. To that extent, the controversy before the Supreme Court in ***Walter Bau AG***[3] was somewhat different from that which arises in the present case. Even so, the italicised words, in para 40 of the report (as extracted hereinabove), indicate that the Supreme Court reiterated, yet again, the position, emanating from the contract, that the Municipal Corporation was required to appoint its arbitrator within 30 days of receipt of notice from Walter.

48. Mr. Bishnoi seeks to capitalise on the underscored sentences, from the afore-extracted passage. He submits that the sentences amount to an acknowledgement, by the Supreme Court, that the 30 day notice period, stipulated in the arbitration clause between the parties (extracted in para 42 *supra*) was not sacrosanct and, extrapolating this legal position to the facts of the present case, even if NHAI had defaulted in appointing its arbitrator within 30 days of receipt of notice from the petitioner, it nevertheless retained the right to appoint the arbitrator till the filing of the Section 11 petition, by the petitioner, before this Court.

49. The argument, though attractive, is unacceptable. The observation, by the Supreme Court, that "the decision in ***Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151*** *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" or, for that matter, its later observation, in the same passage, that "the appointment of Shri Justice A.D. Mane made beyond 30 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.***" cannot be regarded as declarations of the law, under Article 141 of the Constitution of India, in a manner contrary to the law as declared in ***Datar Switchgears Ltd***[1]. Nor, in my opinion, can these observations be read as extending *the contractually stipulated period of 30 days* from the date of receipt of notice by the first party, within which the second party was to appoint its arbitrator, till the date of filing of the Section 11(6) petition by the first party. A judgement is an authority only for what it decides, and not for what may logically appear to flow from it.[10] In any event, the Supreme Court having itself regarded this factor as irrelevant to the determination of the controversy before it, and having held in favour of Walter on an entirely different ground, the reliance, by Mr. Bishnoi, on these observations, cannot be treated as justified.

50. In fact, the afore-extracted passage from ***Walter Bau AG***[3] would, if anything, militate against the stand adopted by Mr. Bishnoi. The Supreme Court declared the appointment of the arbitrator, by the Municipal Corporation in that case, to be invalid, as the appointment

[10]Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697; Laxmi Devi v. State of Bihar, (2015) 10 SCC 241

was not in accordance with the procedure of the ICADR, who had been approached by Walter consequent on default, by the Municipal Corporation, to appoint the arbitrator within 30 days of receipt of notice from Walter. Extending the said *ratio decidendi* to the present case, once NHAI had defaulted in appointing its arbitrator within 30 days of receipt of notice from the petitioner, and the petitioner had, thereafter, approached IRC, IRC was required to appoint the arbitrator in accordance with the procedure formulated by it, as extracted in para 11 *supra*. The IRC, therefore, defaulted in its obligations, by failing to appoint an arbitrator, on behalf of NHAI, allowing NHAI to appoint the arbitrator, and merely communicating the fact to the petitioner on 8th May, 2020. For this reason, too, the appointment of Mr. Prabhat Krishna, as its arbitrator, by the NHAI, was invalid.

51. The alternative submission, of Mr. Bishnoi, that, once NHAI had appointed to its arbitrator, such appointment could be challenged, by the petitioner, only under Section 13, and not by way of a petition under Section 11 (6) of the 1996 Act, is also fully answered by ***Walter Bau AG[3]***. An identical plea was raised, by the Municipal Corporation, before the Supreme Court in that case, and was rejected in para 9 of the report. Paras 7 and 9 of the report in ***Walter Bau AG[3]***, which speak for themselves, and need no paraphrasing, read thus:

> "**7.** Mr Mukul Rohatgi, learned Attorney General, appearing for 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 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 Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560*** and another recent pronouncement of this Court dated 16-12-2014 in ***Pricol Ltd. v. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177.***
>
> **9.** While it is correct that in ***Antrix*** and ***Pricol Ltd***, it was opined by this Court that after 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 sight of. In ***Antrix*** , appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in ***Pricol Ltd***, 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."

These words apply, *mutatis mutandis*, to the present case.

52. Even otherwise, it is fundamental that an illegal or invalid act cannot result in a *fait accompli*, disabling a court of law from granting relief.

Conclusion

53. In view of the fact that the arbitration clause, in the contract between the petitioner and NHAI, required NHAI to appoint its arbitrator within 30 days of receipt of notice from the petitioner, and defaulted in doing so, I am of the opinion that the appointment, by NHAI, of Mr. Prabhat Krishna, as arbitrator, on 23rd March, 2020, was invalid. The said appointment, therefore, is quashed and set aside.

54. NHAI, as well as the IRC, having, therefore, defaulted in appointing the arbitrator on behalf of NHAI, this task devolves, by virtue of Section 11(6)(a) and (c), on this Court. Accordingly, this Court appoints Hon'ble Mr. Justice Pradeep Nandrajog, former Chief Justice of the High Court of Rajasthan and an eminent retired Judge of this Court, as the arbitrator on behalf of NHAI, in place of Mr. Prabhat Krishna.

55. Dr. Seshadri and Hon'ble Mr. Justice Nandrajog would, therefore, proceed to appoint the Presiding Arbitrator, in accordance with the arbitration clause in the contract between the petitioner and NHAI, whereafter the Arbitral Tribunal, thus constituted, would proceed to arbitrate on the disputes between the parties.

56. Inasmuch as the appointment of Hon'ble Mr. Justice Pradeep Nandrajog, as the learned arbitrator on behalf of NHAI, is being made by this Court, in exercise of its jurisdiction under Section 11 (6) (a) and (c) of the 1996 Act, the learned Arbitrator would not be bound by the fee schedule stipulated in the contract, and would be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act. The fees would be equally borne by the parties.

57. The petition is allowed in the aforesaid terms and to the aforesaid extent, with no orders as to costs.

C. HARI SHANKAR, J.

NOVEMBER 06, 2020
HJ