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

+ Date of Decision: 14.07.2011

% ARB.P. 470/2009 & ARB. P. 471/2009

BHUPENDER LAL GHAI ..... Petitioner
Through: Mr. D.S. Chadha, Advocate

versus

CROWN BUILDTECH PRIVATE LIMITED D+ ..... Respondent
Through: Mr. Sunil Narula, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : **No**
2. To be referred to Reporter or not? : **Yes**
3. Whether the judgment should be reported in the Digest? : **Yes**

VIPIN SANGHI, J. (Oral)

I.A. Nos.5824/2011 & 8248/2011 in Arb. P. No.470/2009 AND I.A. Nos.5823/2011 & 8249/2011 in Arb. P. No.471/2009

1. The applications, i.e. I.A. No.5824/2011 and I.A. No.5823/2011 had been jointly filed by the parties, duly signed by the parties and their respective counsels and also supported by the affidavits of the

petitioner and Mr. Surendra Vasudeva, authorized representative of the respondent, with the prayer that the Court may allow the payment of additional fee to the learned sole Arbitrator in accordance with the Delhi High Court Arbitration Centre (Arbitrators Fees) Rules to be shared equally, after deducting the amount of Rs.2 lacs, which was the lump sum fee fixed by the court in two cases, including the present. The need for hearing detailed submissions of the learned counsel and for passing this order has arisen, as the respondent has sought to withdraw its consent and sought to allege bias against the learned Arbitrator.

2. The parties entered into two contacts dated 23.02.2007 which contain arbitration agreements in clauses 43 and 37 respectively. The arbitration agreements provide for resolution of the disputes arising out of the respective agreements through a Sole Arbitrator. As disputes arose between the parties, the two arbitration agreements were invoked by the petitioner. Since the parties could not agree on the name of the sole Arbitrator in terms of the arbitration agreements in two agreements in question, the petitioner preferred Arb. Pet. No.470/2009 and Arb. Pet. No. 471/2009 in this Court, which were disposed of by the Court on 15.02.2010 appointing Mr. Justice Ajit Prakash Shah, retired Chief Justice of this Court as the sole Arbitrator. The Court fixed consolidated lumpsum fee of Rs.2 lacs in both the cases.

3. The proceedings in the two cases started before the learned Arbitrator. It appears that extensive evidence was recorded before him, which was partially common and partially distinct.

4. On 14.01.2011, the parties appeared before the learned Arbitrator and agreed that the Arbitrator be paid his fee in accordance with the Delhi High Court Arbitration Centre (Arbitrators fees) Rules, after deducting the amount of Rs.2 lacs already paid to him. After the passing of the said order, the petitioner approached the Delhi High Court Arbitration Centre, communicating to the centre the said order, and requesting them to inform as to what is the balance fee to be paid by each of the parties.

5. On 07.02.2011, the Delhi High Court Arbitration Centre communicated to the petitioner its view that since the fee had been fixed by this Court by a judicial order, the same could be modified only by the Court and could not be modified by the Arbitration Centre in its administrative capacity. It is only thereafter that the present applications i.e. I.A. No.5824/2011 and I.A. No.5823/2011 were preferred, as aforesaid.

6. These applications came up before the Court on 08.04.2011. On the said date, counsel for the respondent stated that the respondent was not willing to pay any additional fee to the learned Arbitrator. The Court observed that the said statement was contrary to the joint

application moved by the parties. Consequently, the counsel for the respondent Mr. Sunil Narula as well as the respondent, Mr. Surendra Vasudeva were required to remain present in Court.

7. These applications were adjourned from time to time, and no substantive orders were passed by the Court on these applications. In the meantime, the respondent moved an application under Section 13 of the Act before the arbitral tribunal on 18.04.2011 making allegations of personal bias against the learned Arbitrator. By this stage, the trial before the learned Arbitrator stood completed, and the learned Arbitrator had fixed 5th and 6th May, 2011 for hearing arguments in the two matters.

8. The premise on which the application under Section 13 was filed was that the respondent's counsel had sent a communication to the respondent on 15.04.2011, wherein it was alleged that the learned Arbitrator had acted with bias during the proceedings held on 28.03.2011 and 29.03.2011.

9. This application was entirely based on the communication sent by the respondent's counsel Mr. Narula, and it was alleged that on 28.03.2011, when the application of the respondent for recalling of the witness was listed for arguments, the learned Arbitrator without hearing the same, announced that he had already passed the order in respect of the said application, despite the fact the said witness had

categorically submitted during the cross-examination that he would be able to produce certain documents later on. It was alleged that the learned Arbitrator did not hear the plea of the respondent's , and did not appreciate the importance of the documents required to be produced, and without affording any opportunity of hearing, dismissed the application without giving any reasons. It was also alleged that the respondent's lawyer had raised objections, but the learned Arbitrator did not pay any heed to the same.

10. It was also alleged that during the cross-examination of the respondent's witness on 28.03.2011 and 29.03.2011, the learned Arbitrator discriminated, and arbitrarily wanted to change the rules in the middle of the proceedings. According to the respondent, initially, it had been directed during the course of examination of the claimants' witness, that all questions to be put to the witness be first framed on the computer screen, and then only the same would be answered by the witness. However, the learned Arbitrator changed the rules at time of cross-examination of the respondent's witness, by stipulating that the witness should first answer the questions put to him, and then the said questions be framed alongwith answers, on the computer screen. It was also alleged that the respondent had raised objections in this regard. However, the learned Arbitrator brushed aside those objections on the ground that the claimant was a senior citizen and he would require to be given liberal preference.

11. It was alleged that the learned Arbitrator was not concerned about the specific provisions contained in Section 18 of the Act, which obliges the Arbitrator to treat the parties equally irrespective of age factor. It was also alleged, on the basis of communication of Mr. Narula, that during the proceedings on 28.03.2011 and 29.03.2011, the learned Arbitrator was very courteous to the claimant, but was very hostile to the respondent's representative and its counsel. It was also alleged that upon the respondent's counsel saying that he would not raise any objection to any question being asked by the claimants counsel, in the afore alleged scenario, the learned Arbitrator lost his temper, packed up his files and threatened to walk out of the proceedings. According to the respondent, even prior to the aforesaid dates, the learned Arbitrator had shown partisan approach. The aforesaid allegations were said to be the basis for raising suspicion in the mind of the respondent as to the impartiality of the learned Arbitrator.

12. The allegations made in the said application were replied to, and vehemently opposed by the claimant. The learned Arbitrator passed an order on 12.05.2011 rejecting the allegations made by the respondent/claimant vide a detailed order. He also recorded about, what he called unjustified and objectionable behaviour of Mr. Sunil Mittal, Advocate who had appeared and argued the application for recusal moved by the respondent/applicant, as Mr. Mittal had leveled

wild and baseless allegations against the Arbitrator and had deliberately provoked the Arbitrator to such an extent that he had contemplated walking out of the proceedings. The learned Arbitrator also recorded that Mr. Mittal had crossed all bounds of decency and professional ethics and etiquette in trying to attack the Arbitrator's integrity causing him great pain and anguish.

13. On account of the said conduct of the respondent's counsel, the learned Arbitrator deemed it appropriate to recuse himself from the proceedings. Not only that, he also expressed his desire to return the fee of Rs.2 lacs received by him, and he stated that he had already deposited the cheques with the Arbitration Centre, and the parties may collect the same from the Coordinator.

14. The matter came up before the Court on 30.05.2011. After noticing the aforesaid order passed by the learned Arbitrator on 12.05.2011, and after hearing the learned counsels, this Court was of the, prima facie, view that the conduct of Mr. Mittal, Advocate and of the respondent tantamounted to criminal contempt of court under the Contempt of Courts Act. Accordingly, on that aspect, the matter was referred to the appropriate bench, after obtaining orders of Hon'ble the Chief Justice.

15. Learned counsel for the petitioner submits that the allegations made by the respondent/applicant in its application under Section 13

before the learned Arbitrator were absolutely baseless and wild. They are frivolous and are the figment of the respondent's imagination, not supported by the record. On the contrary, the record speaks otherwise. It is submitted that these allegations were made only to somehow scuttle the arbitration proceedings by getting the learned Arbitrator out of the way.

16. So far as the allegation of the respondent that the learned Arbitrator had rejected the respondent's application for recalling of witness without hearing the application, and by announcing that he had already passed an order in respect of the said application, is concerned, it is pointed out that the proceedings recorded on 28.03.2011 speak to the contrary. The proceedings recorded on the said date read as follows:

> "*Present:*
>
> *For the Claimant* — *Sh. D. S. Chadha, Advocate*
> *Sh. B.L.Ghai, Claimant.*
>
> *For the Respondent* — *Sh. Sunil Narula with Ms. Deepti Gupta Advocates.*
> *Mr. Surender Vasudev, Respondent.*
>
> *Application on behalf of respondent for recalling of witness Mr. Vinit Shukla.*
>
> ***I have heard the submissions of both the Ld. Counsel**. I do not see any ground to grant the prayer of the respondent for recalling the witness. Hence, the application is rejected.*
>
> *(A.P.SHAH)*
> *ARBITRATOR*
> *28.03.2011"*
>
> (emphasis supplied)

17. Copy of the proceedings filed on record show that the said order was signed by the petitioner, Mr. Bhupender Lal Ghai, the respondent's representative Mr. Surendra Vasudeva, the petitioners counsel Mr. D.S. Chadha, the respondent's counsels Mr. Sunil Narula and Ms. Deepti Gupta.

18. The submission of learned counsel for the petitioner is that if the said application had been disposed of even before hearing the counsels, the recording made by the tribunal would have been false, and the respondent and his counsel would not have signed the same. They would have, atleast, recorded their protest or demur in the said order while signing the proceedings. However, no such protest was raised either during the said proceedings, or soon thereafter. For the first time, the allegations were raised by filing the application on 18.04.2011, on the basis of an email communication sent by the respondent's counsel to the respondent on 15.04.2011. Mr. Chadha further submits that though the application for recusal was entirely premised on the communication stated to have been sent by Mr. Narula to the respondent, neither the said communication was filed alongwith the application, nor was the application was supported by the affidavit of Mr. Narula.

19. It is also pointed out that the learned Arbitrator has dealt with each and every allegations of bias alleged by the respondent/claimant

in his order dated 12.05.2011. So far as the allegation about rejection of application of the respondent for recall of witness is concerned, the learned Arbitrator has recorded that the respondent had made a complete volte face inasmuch, as, the counsel for the respondent, Mr.Narula had himself stated categorically in front of all the parties that he did not wish to add anything in oral submission to the said application. The learned Arbitrator also records the reasons for rejecting the application for recall of witness. He observed that the documents sought to be produced by the witness (who was sought to be recalled by the said application), were TDS certificates of Nilkamal Ltd. purportedly issued to the claimant. However, the respondent had already brought on record photocopies of two such TDS certificates, but it was seen that the same did not correspond to the claimant's Personal Account Number (PAN). Therefore, while deciding the application, the Arbitrator had exercised his judicial discretion in all fairness and only in order to meet the ends of justice. The learned Arbitrator also noted that the respondent even while arguing the application for recusal had not stated as to what would be the significance of such document. He also notes that at the time of dismissal of the application for recall of witness, no objection or protest, of whatsoever nature, was made by the counsel for the respondent against such dismissal.

20. The allegation regarding equal treatment not being met to both

the parties was responded to by the learned Arbitrator in the following manner:

> "*The respondent has alleged that I was very courteous towards the claimant and that I was allegedly very hostile towards the respondent. It is alleged that I had told the respondent's witness that he should answer the questions first and only thereafter, the said questions shall be framed on the screen and that the same is allegedly in violation of Section 18 of the Act, i.e. "Equal treatment of parties". It is trite to mention that the claimant is a very old man, being 74 years and had genuine difficulty in understating questions put to him in English. Furthermore, there was a specific request by the claimant to the Arbitrator that the questions be kindly translated for his understanding. However, at that time, the respondent did not raise any objection to the said translation whatsoever and neither is it shown as to how the said translation for the claimant could have possible caused any prejudice to the respondent. In fact, it is not out of place to mention here that with respect to a few short questions the respondent's witness had himself volunteered to answer these questions without them being framed on the screen. However, the same now seems to be deliberately being blown out of proportion with an oblique motive. Although the said allegation is highly misleading and incorrect, yet even if assuming that the same is correct, there is not even the slightest averment to substantiate as to what prejudice has been caused to the respondent*."

21. He also observed that the allegation that the Arbitrator had objected to submission of documents by the respondent was vague, as no specific instance had been pointed out by the respondent. The said allegation was belied by the fact that the respondent had repeatedly taken a number of adjournments which had been granted by the

tribunal in the interest of justice. The said position is borne out from the record of the proceedings.

22. The learned Arbitrator also raised the question as to why the said application for recusal was being moved when the arbitration proceedings were about to be completed, when the proceedings had been pending before him for several months. If there had been a partisan attitude adopted by the learned Arbitrator, the same would have surfaced sooner and the respondent would have opposed it.

23. On the other hand, the submission of Mr. Narula is that he had sent an email communication to his client on 15.04.2011. He has filed on record a print out of the said email communication. He submits that there were various other documents which the respondent desired to produce and for that purpose, the recall of the witness was sought before the learned Arbitrator. Reference is made to paras 3, 4 and 5 of the application made for recalling of the witness, which read as follows:

> "*3. It submitted that the said witness in cross examination was questioned regarding the deduction of TDS on issue of cheques in favor of claimant towards payment of rent and issuance of cheques towards payments of rent etc. (e.g. Q. Nos.12, 13, 14, 15 & 17).*
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> *4. That the said witness in reply to the aforesaid questions had deposed that he would be able to produce the relevant material/documents, if reasonable time was given as he was not in possession of those details at the time of cross examination.*
>
> *5. In view of the aforesaid it is submitted that in the interest of justice it is necessary to recall the said witness with the relevant material/documents*".

24. Mr. Narula also submits that on account of the grievance of the respondent that the Arbitrator was not conducting the proceedings fairly, the respondent had withdrawn its consent to the enhancement of the fees of the learned Arbitrator.

25. After the passing of the order dated 12.05.2011 by the learned Arbitrator, the petitioner moved I.A. No.8248/2011 and I.A. No.8249/2011 under Section 15 read with Section 11 of the Act, firstly requiring the learned Arbitrator to reconsider the decision of recusal, and in the alternative to appoint a substitute sole Arbitrator to finally hear and decide the two arbitration cases.

26. In response to these applications, the submission of counsel for the respondent is that upon termination of the mandate of the learned Arbitrator under Section 15 of the Act, the appointment of the Arbitrator has to be in accordance with the prescribed procedure. He submits that under the arbitration agreements of the parties contained in clauses 43 and 37 respectively of the two agreements, it had been, inter alia, agreed that:

> Clause 43 in the agreement in relation to which Arb. Pet No.470/2009 was preferred
>
> "*All or any disputes that may arise with respect to the provisions of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties, shall be settled by mutual discussion, failing which the same shall be referred to arbitration. The arbitration proceedings shall*

be carried out by a sole Arbitrator, to be appointed by jointly by the Developer & Buyer, under the Arbitration and Conciliation Act, 1996".

Clause 37 in the agreement in relation to which Arb. Pet No.471/2009 was preferred

"*All or any disputes that may arise with respect to the provisions of this Sale Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties, shall be settled by mutual discussion, failing which the same shall be referred to arbitration. The arbitration proceedings shall be carried out by a sole Arbitrator, to be appointed by jointly by the Developer/Vendor & Vendee, under the Arbitration and Conciliation Act, 1996*".

27. He, therefore, submits that the parties should first be directed to mutually agree upon an Arbitrator, and only if they are not able to so agree, this Court could appoint an Arbitrator in exercise of its power under Section 11 of the Act. In support of his submission, learned counsel for the respondent has placed reliance on the decision of the Supreme Court in ***National Highways Authority of India & Another v. Bumihiway DDB Ltd. (JV) & Others***, (2006) 10 SCC 763; ***Surender Pal Singh v. Hindustan Petroleum Corporation Ltd.***, 2010 (2) RAJ 258.

28. On the other hand, learned counsel for the petitioner has placed reliance on the decision of this Court in ***Haldiram Manufacturing Co. Ltd. v. SRF International***, 139 (2007) DLT 142, wherein it has been held that where no specific procedure for appointment of Arbitrator is

agreed upon, a petition to seek the appointment of Arbitrator could be filed without even sending a notice invoking the arbitration agreement.

29. Having heard the submissions of learned counsels for the parties and perused the record, I am of the view that the joint applications moved by the parties for enhancement of the fee of the learned Arbitrator, i.e. I.A. No.5824/2011 and I.A. No.5823/2011 deserve to be allowed. The said applications had been moved jointly by the respective parties and duly signed by them as well as their respective counsels. The applications had been moved in the light of their agreement recorded in the arbitration proceedings held on 14.01.2011. This was in recognition of the fact that the arbitral proceedings had progressed with considerable expense of time and effort of the Arbitrator. The respondent's only reason for opposing the applications, even after giving its consent, is stated to be the alleged bias of the learned Arbitrator. Therefore, it is necessary to examine this aspect of the matter.

30. A perusal of the records shows that the allegations contained in the respondent's application under Section 13(2) of the Act are either contrary to the record, or wholly vague and unsubstantiated. The first and foremost allegation against the Arbitrator was that the Arbitrator rejected the respondent's application for recall of the witness without any hearing of arguments, and despite the protest of the respondent's counsel. This position is not borne from the record. As noticed herein

above, the order passed on 28.03.2011 by the learned Arbitrator records that the application has been heard and rejected. This order was duly signed by the learned counsels and their respective clients without any protest or demur. No protest was lodged contemporaneously.

31. It is interesting to note that the application under Section 13(2) is entirely founded upon the email communication stated to have been sent by the respondent's counsel on 15.04.2011 to the respondent at its email address – crowncorporate@gmail.com. However, the application for recusal is not supported by the affidavit of the counsel for the respondent. In fact, that email communication was not even filed alongwith the application. It was not even produced before the arbitral tribunal at the time of arguments of the application. It is only now, for the first time, that the respondent has filed a copy of the said email communication with its reply. Even though the respondent's representative Mr. Vasudeva was present in the hearing held on 28.03.2011, and he had signed the arbitral proceedings on that date, he does not claim personal knowledge of the allegations made against the arbitral tribunal. The entire application is founded upon what Mr. Narula had to say in his communication.

32. The reason for rejecting the said application has been explained by the learned Arbitrator in his order dated 12.05.2011. Pertinently, though reply to I.A. No. 8248/2011 and I.A. No.8249/2011 was filed by

the respondent on 29.06.2011, the respondent does not even contend that the various factual assertions contained in the learned Arbitrator's order dated 12.05.2011 are incorrect or false.

33. The submission of Mr. Narula that there were various other documents apart from the two TDS certificates referred to in the order dated 12.05.2011 by the Arbitrator, which the respondent desired to produce, is neither here nor there. A perusal of the application moved by the respondent for recall of witness does not even disclose as to what documents the respondent intended to produce. The learned Arbitrator noted in his order dated 12.05.2011 that the respondent even while arguing the said application had failed to point out the significance of the documents that the respondent desired to produce. This recordal made by the learned Arbitrator has not been challenged in these proceedings. Even before me, the so-called documents, which the respondent may have desired to produce before the Arbitrator for recalling the witness, have not been placed.

34. I may at this stage itself note that, in any event, the circumstance of dismissal of the respondent's application for recall of the witness could not have, by itself, given rise to justifiable doubts as to the learned Arbitrator's independence or impartiality. A party may feel aggrieved by an order or award passed by an Arbitrator. An Arbitrator may, in fact, have erred in passing an order. But that, by itself, cannot be considered to be a circumstance which would give rise

to justifiable doubts regarding the independence or impartiality of the Arbitrator. A bona fide judgmental error either by a court or an Arbitrator even if committed, cannot, in normal circumstances, be construed as a circumstance giving rise to justifiable doubt about the independence or impartiality of the court or the Arbitrator. There has to be something more than that. Something more specific.

35. The learned Arbitrator has elaborately dealt with the allegation that the two parties were not being equally treated during the proceedings. The respondent has not questioned the factual recordal made by the learned Arbitrator which, even otherwise, appears to be perfectly reasonable and plausible.

36. The allegation that the Arbitrator raised objection to submission of every document tendered by the respondent has been rejected by the learned Arbitrator by observing that the allegation is vague as no specific instance has been pointed out by the respondent. Not only this statement of the learned Arbitrator has gone unrebutted before me, even before me, no specific instance in this regard has been pointed by the respondent.

37. Consequently, I am of the view that the learned Arbitrator was perfectly right in rejecting each and every allegation made by the respondent to allege bias against him. The issue raised by the Arbitrator as to why application was filed at such a belated stage of the

arbitration proceedings, when only arguments were left to be heard before making of the award, is a valid and germane question. To me, it appears from the conduct of the respondent and its counsel, who appeared before the Arbitrator on 05.05.2011, that the whole purpose was to somehow derail the arbitration proceedings; get the learned Arbitrator to resign, and; to prevent the Arbitrator from making the award. Consequently, I find absolutely no justification in the respondent withdrawing its consent to the raising of the fee of the learned Arbitrator, which, in any event, had been agreed to be paid only at the rates prescribed under the Delhi High Court Arbitration Centre (Arbitrators Fees) Rules.

38. The learned Arbitrator, out of his anguish and the hurt suffered by him, returned the cheques to the parties and they were left with the Coordinator of the Delhi High Court Arbitration Centre. In my view, the Arbitrator has to be paid for the work that he has done, and my request to the learned Arbitrator is to accept the fees and not to refund any part thereof. Otherwise, it would send a very wrong message to everyone – that one can ill-treat an Arbitrator; have him removed, and; also get refund of the fee paid to him for the work done by him.

39. The petitioner has collected and encashed the cheque. However, learned counsel for the petitioner pleads that the petitioner would be more than happy to pay the fees of the learned Arbitrator, including the enhanced fee. Learned counsel for the respondent submits that

the respondent has not encashed the cheque issued by the learned Arbitrator till date.

40. Consequently, I direct the petitioner to make payment of the fees of Rs.1 lac alongwith secretarial expenses received from the learned Arbitrator forthwith. The respondent is directed not to encash the said cheque issued by the learned Arbitrator. Subject to what is stated in the following paragraphs, the parties are also directed to make up the balance fee payable to the learned Arbitrator in terms of the Delhi High Court Arbitration Centre (Arbitrators Fees) Rules as stated hereinafter. For computation of fee, the two arbitration cases shall be treated as separate cases, and the amount shall be computed after deducting the amount of Rs.2 lacs which the learned Arbitrator is requested to retain.

41. Since the learned Arbitrator has tendered his resignation, and considering the circumstances in which he has resigned, as I am inclined to accept the same, and also considering the fact that another learned Arbitrator would need to be appointed to conclude the arbitration proceedings, it would be appropriate that 50% of the fee, computed in the aforesaid manner, is paid to the learned Arbitrator in each case. The said balance fees be paid to Mr. Justice A.P. Shah, Retd. Chief Justice, within two weeks from today.

42. So far as I.A. No.8248/2011 and I.A. No.8249/2011 are concerned, I am not inclined to direct the learned Arbitrator to

reconsider his decision to recuse. This Court has no reason to entertain any doubt about the independence and impartiality of the learned Arbitrator. However, after the acrimony generated by the respondent's counsel on 05.05.2011, it would not be appropriate that the matter is heard any further by the learned Arbitrator so as to preserve the honour and dignity of the learned Arbitrator.

43. The respondent may have succeeded in temporarily suspending the arbitration proceedings by its conduct and the conduct of its counsel. However, that cannot be allowed to scuttle the said proceedings and prevent the progress of the arbitration cases. The respondent should also bear exemplary costs for its conduct and the conduct of its counsel. Appropriate directions shall be issued in the operative part of this order in this regard.

44. The submission of Mr. Narula that the parties should again be required to agree upon a name of an Arbitrator in terms of the arbitration agreement contained in the two agreements, and that the Court should not appoint an Arbitrator straightaway, has no merit. The parties could not agree on the name of an Arbitrator even earlier. That is why, the aforesaid two petitions were preferred by the petitioner. There is a lot of acrimony between the parties, as is evident from the proceedings which have gone by before the Arbitrator as well as before this Court. Neither party has faith in the other. It is a foregone conclusion that they will not agree on anything – not even on the name

of an Arbitrator. Moreover, I.A. No. 8248/2011 and I.A. No.8249/2011 have been pending since May, 2011. Despite the pendency of these applications, the parties have not been able to agree on the name of an Arbitrator mutually. If the respondent was so minded, the respondent should have approached the petitioner for appointment of the substitute Arbitrator by suggesting names of the possible Arbitrator in the meantime. That has not been done by the respondent. Therefore, there is no force in the respondent's submission that parties should first be directed to mutually agree upon an Arbitrator.

45. Reliance placed by the respondent on the aforesaid decisions is wholly misplaced. They are cases where the arbitration agreement provided for specific procedure to be followed for constitution of the arbitral tribunal. It was in those circumstances that the Courts held that after the termination of the mandate of the arbitral tribunal, the Court should adopt the same rules for appointment of Arbitrator, as were applied earlier. Even that is not an absolute rule, as would be seen from the Supreme Court decision in ***UOI Vs. Singh Builders Syndicate****, (2009) 4 SCC 523;* and ***Ariba India P. Ltd. Vs. M/s Ispal Industries Ltd.,*** *O.M.P. No. 358/2010 decided on 04.07.2011* by this court.

46. This Court in ***Haldiram Manufacturing*** (supra) has held that where no specific procedure is prescribed for constitution of arbitral tribunal, a party could approach the Court by filing an application

under Section 11 even without invoking the arbitration agreement. The judgment is based on the reasoning that notice of a petition filed under Section 11 of the Act, when served upon the respondent, itself constitutes the notice invoking arbitration, and if the parties have to agree, nothing prevents them even after the filing of the petition, to so mutually agree on an Arbitrator.

47. In view of the aforesaid position, I allow the applications being I.A. No. 8248/2011 and I.A. No.8249/2011, and appoint Mr. Justice S.N. Dhingra, retired Judge of this Court to be the sole Arbitrator in both the cases. The learned Arbitrator is requested to complete the arbitration proceedings at the earliest, and preferably within the next four months. The proceedings shall continue from the stage left by the earlier Arbitrator. The fee of the newly appointed Arbitrator shall be paid @ 50% of the fee prescribed under the schedule of the Delhi High Court Arbitration Centre (Arbitrators Fee) Rules, in each case.

48. For its conduct, the respondent is subject to costs of Rs.2 lacs in both the cases. Out of the said amount, Rs.1 lac be paid to the petitioner, and the remaining Rs.1 lac be paid to the Advocates Welfare Fund. Costs be paid within two weeks.

49. Applications stands disposed of.

VIPIN SANGHI, J

JULY 14, 2011
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