Bipromasz Bipron Trading Sa vs Bharat Electronics Limited(Bel) on 8 May, 2012

Equivalent citations: AIRONLINE 2012 SC 456

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO.19 OF 2011

Bipromasz Bipron Trading SA ...Petitioner

VERSUS

Bharat Electronics Limited (BEL) …Respondent

O R D E R

SURINDER SINGH NIJJAR, J.

1. In this petition, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") read with paragraphs 2 and 3 of the appointment of the Arbitrators by the Chief Justice of India Scheme, 1996, the petitioner seeks reference of the disputes to an independent and impartial sole Arbitrator. In terms of the arbitration agreement, the petitioner has issued the necessary notice and the respondent has not agreed for such appointment of an independent arbitrator.

2. It appears that the respondent is not opposing the petition on the ground that the disputes cannot be referred to arbitration. The only objection raised by the respondent is that the disputes have to be referred to the Chairman and Managing Director of the respondent or his nominee, in terms of the arbitration clause 10 of General Terms and Conditions of Purchase Order (Foreign). The aforesaid arbitration clause reads as under:-

> "Arbitration – All disputes regarding this order shall be referred to B E L Chairman & Managing Director or his nominee for arbitration who shall have all the powers conferred by the Indian Arbitration & Conciliation Bill 1996 or any statutory modification thereof in force."

3. In view of the above, reference need only be made to the skeletal facts necessary for adjudicating the issues raised by the parties.

4. On 6th October, 2008, the respondent issued a Purchase Order (PO) to the petitioner through which it sought to purchase the materials/goods, namely, Hydraulic Motor, Actuating Cylinder, EL Motor EDM, Converter and GYRO Unit.

5. The purchase order was issued along with a printed Annexure IV of "General Terms and Conditions of Purchase Order (Foreign)". As noticed above, the relevant arbitration clause is contained in the aforesaid general terms and conditions. The petitioner claims that fifth item, as stated above, was GYRO Unit EK.2.369.113.CE in 174 Nos. The entire agreed terms of sale by the petitioner was against 100% payment through Letter of Credit through the State Bank of India, Trade Finance CPC, 16, Whannels Road, Egmore, Chennai, India, to the petitioner and the said Letter of Credit was to be opened immediately after getting confirmation regarding readiness of the stock with the petitioner. The GYRO Unit (174 in Nos.) were to be provided by the petitioner to the respondent as per the aforesaid agreement and the petitioner took immediate steps to supply the said units to the respondent. The petitioner made huge investments in that regard and procured required materials. The specifications of GYRO Units, as per the specifications, did not stipulate, expressly or impliedly, the type of damping. While the entire process was going on, the respondent issued a letter dated 5th June, 2009 to the petitioner stating that as per the respondent's directives, all pending supplies as on that date, from the petitioner were to be "put on hold" and directed the petitioner not to dispatch any pending items including those for which Letter of Credit had been established until further communication from the respondent. After the aforesaid communication, the respondent did not issue any communication to the petitioner for supply of the said goods till 3rd December, 2009. In response to the aforesaid communication, the petitioner sent 10 units of GYRO Stabilizers along with the Certificate which was issued by the Russian Company (manufacturer) for a lot of 24 units. It appears that the respondent, on the basis of the inspection report dated 17th November, 2009, rejected two GYRO Units (out of total

10) on the ground that the same were defective. The defects pointed out were that "Turret not moving in 'Auto' mode" and "vibration in elevation observed in Turret". The other 8 Units were accepted. The petitioner, therefore, called for payment of 8 accepted GYRO Units and assured the rectification of two rejected units. Through the communication dated 28th December, 2009, the respondent claimed that the goods supplied by the petitioner were not of Russian Origin and, therefore, all the 10 GYRO Units supplied by the petitioner were rejected. The orders were to be cancelled and no more supply of GYRO Units were to be permitted with electrical damping. The petitioner claims that the action of the respondent firstly stopping all the supplies of the petitioner and secondly rejecting the 10 GYRO Units, subsequently supplied, is arbitrary, extra contractual, illegal and without any basis whatsoever.

6. The petitioner claims that 10 GYRO Units were rejected on the baseless ground that certain corruption cases had come to light against certain other companies. The respondent, therefore, stopped receiving supply from various companies including the petitioner and directly contacted the Russian manufacturer company and obtained the said units from them through another Russian

Exporter company to frustrate the purchase order of the petitioner. It is claimed that the objection taken by the respondent are frivolous and without any basis.

7. The petitioner also claims that the order dated 5th June, 2009 putting on hold the supplies that were to be made by the petitioner was issued by the Ministry of Defence, under which the respondent is a Public Sector Undertaking. The aforesaid order was, however, set aside by the Delhi High Court in Writ Petition (Civil) No.821 of 2010 by an order dated 11th February, 2010. Thereafter, inspite of the efforts made by the petitioner, the respondent did not accept the plea that the purchase order did not contain any specific, express or implied condition for air damping. The petitioner also offered to supply 50 GYRO Units with Air damping to maintain good relations. The respondent, however, issued a letter dated 18th August, 2010 showing interest to accept 50 GYRO Units with Air Damping with condition that the payment will be made after the acceptance of the units by the respondent. According to the petitioner, this was contrary to the terms contained in the original purchase order. The petitioner, though not obliged as per the contract, started process of procuring GYRO with air damping but due to the short validity of the Letter of Credit, only 14 such units were supplied and the petitioner had to stop the procurement of the said unit due to the expiry of the Letter of Credit. Thereafter, the petitioner has sent a number of communications to the respondent to which there has been no response, hence, the petitioner claims that number of disputes which are mentioned in paragraph 14 (a) to (g) have arisen between the parties.

8. Vide notice dated 20th May, 2011, the petitioner requested the respondent to agree on a name of an independent and impartial sole arbitrator preferably a former Judge of this Court by mutual consent between the petitioner and the respondent.

9. The petitioner claims on the basis of the postal acknowledgement that the respondent received the aforesaid notice on or about 23rd May, 2011. The receipt of the notice has been acknowledged by the respondent by a letter dated 8th June, 2011. On 29th June, 2011, the authorised representative of the petitioner has sworn the necessary affidavit in Poland for filing of the present petition after the expiry of 30 days of the statutory period and the same were dispatched to the counsel at New Delhi.

10. In the meantime, the respondent replied by a communication dated 29th June, 2011 to the notice dated 20th May, 2011, stating that the Chairman-cum-Managing Director is a competent person as the petitioner has subscribed the contract which states the nominated arbitrator, and hence the correspondence between the parties has been placed before the Chairman-cum-Managing Director for appropriate action. The petitioner claims that the aforesaid reply was received on 1st July, 2011.

11. The respondent, in the detailed counter affidavit, accepts that certain disputes have arisen with regard to the supply of GYRO Units. It, however, claims that the reference of the disputes has to be made to the Chairman-cum-Managing Director of the respondent or his nominee for arbitration. Therefore, the prayer made in the petition for appointment of a sole arbitrator to adjudicate the dispute is contrary to the express clause in the contract and thus not maintainable. It is also the case of the respondent that prior to the filing of the petition before this Court, the

Chairman-cum-Managing Director, as sole arbitrator, has duly acted and exercised the power in appointing Mr. R. Chandra Kumar, General Manager (Kot), Bharat Electronics Ltd., District Pauri Garhwal, Kotdwara-246149, as the arbitrator and communicated by fax on 19th July, 2011 itself. It is denied that merely because the Chairman-cum- Managing Director is in control and supervision of the respondent Public Sector Undertaking would render him ineligible to be appointed as the arbitrator. The respondent having accepted the arbitration clause with open eyes cannot be permitted to avoid the same on the ground of perceived partiality. The petitioner in the rejoinder has emphasised that both the issues raised by the respondent are without any basis. The petitioner relies on the facts enumerated in paragraph 4 of the rejoinder. It is claimed that the arbitrator had not been appointed on 9th July, 2011 as claimed by the petitioner. The following facts have been highlighted as under:

> "20.05.2011 – Notice, through counsel was sent to the respondent seeking appointment of Arbitrator. 29.06.2011 – Petitioner sworn affidavit in Poland for filing of the petition for appointment of Arbitrator. 29.06.2011 – Respondent's sent reply to the advocate at New Delhi received on 1.7.2011 stating that the correspondence is being placed before the Chairman and Managing Director.

Note: Due to the new communication received, the fresh affidavit was needed and hence petition was with held to await fresh affidavit from Poland.

08.07.2011 – Petitioner sent further Notice to the respondent stating that the action shall not be proper.

21.07.2011 – The present petition seeking the appointment of Arbitrator was filed.

26.07.2011 – Respondent sent email to the counsel of the petitioner at new attaching the letter of the counsel dated 26.7.2011 along with the letter of respondent dated 19.7.2011 stating the arbitrator had been appointed. The hard copy of the said letter was received by the counsel for the petitioner at New Delhi on 28.7.2011."

12. The petitioner further claims that no fax was ever sent by the respondent on 19th July, 2011, as no e-mail or postal communication was received by the petitioner in Poland in the whole month of July, 2011. It is further pointed out that neither the said fax nor email was sent to the counsel for the petitioner before 26th July, 2011. The petitioner further pointed out that a perusal of the copy of the letter dated 19th July, 2011 sent to the counsel for the petitioner at New Delhi itself indicates that the letter was faxed on 25th July, 2011 by MD's Office of the respondent to the concerned person of the respondent to communicate further. The petitioner further claims that mere passing of the order will not have any relevance as the same was not communicated to the petitioner till after the filing of the petition.

13. I have heard the learned counsel for the parties.

14. Mr. Viswanathan, learned senior counsel appearing for the petitioner submits that the disputes cannot be referred to CMD or his nominee as neither of them would be able to act impartially. In any event, the petitioner would always be under a reasonable apprehension that CMD or his nominee would be favorably inclined towards the respondent. He points out that CMD has been in control and supervision of the works of the respondent and, therefore, cannot be expected to be impartial in any dispute between the petitioner and the respondent. Similarly, any employee of the respondent would suffer from the same disability. In support of the submission, the learned counsel has relied on Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited[1], Denel (Proprietary) Limited Vs. Bharat Electronics Limited & Anr.[2], and Denel (Proprietary) Limited Vs. Ministry of Defence[3].

15. Mr. Viswanathan then submitted that the plea taken by the respondent that one Mr. R. Chandra Kumar, the General Manager, Bharat Electronics Limited was appointed as the sole arbitrator on 19th July, 2011 and communicated by fax on that date itself is without any basis. He submits that factually the aforesaid averment has not been proved. The affidavit filed by the respondent is not supported by any document including purported appointment letter dated 19th July, 2011. The said affidavit is completely silent as to whom the said communication was faxed, where it was faxed and what is the proof of same having been faxed. He further submits that, in fact, the said communication was sent to the advocate for the petitioner on e-mail on 26th July, 2011, attaching the letter of counsel which was also dated 26th July, 2011. Prior to that, no communication had been received by the petitioner or his counsel either by fax or otherwise stating that the arbitrator had been appointed. He emphasised that even the aforesaid appointment letter purportedly signed on 19th July, 2011 shows that it was faxed from Bangalore Office only on 25th July, 2011 to their Solicitor who in turn further communicated to the counsel for the petitioner on 26th July, 2011. Therefore, according to Mr. Viswanathan, it is unbelievable that the communication released from Bangalore office (Head quarter where the Chairman sits) could have been conveyed to the petitioner on 19th July, 2011, though the communication states “CC” to the petitioner but it was never sent to the petitioner. The aforesaid communication was sent by the Solicitor of the respondent to the petitioner’s counsel on e-mail on 26th July, 2011 and thereafter by way of postal communication. He, therefore, submits that even if it is assumed that the aforesaid letter was signed on 19th July, 2011, but it was certainly not communicated till after the filing of the present petition, therefore, the same would have no legal sanctity.

16. In support of the submission, the petitioner relies on Section 3(2) of the Arbitration Act, 1996 which provides that “The communication is deemed to have been received on the day it is so delivered”. He submits that without delivery of the communication dated 19th July, 2011, the same shall be of no effect.

17. Mr. Viswanathan further submits that apart from the Arbitration Act, as a general principle of law, it is settled that an order takes effect only when it is served on the person affected. In support of this submission, learned counsel relied on in the case of Bachhittar Singh Vs. State of Punjab & Anr. [4]and BSNL & Ors. Vs. Subash Chandra Kanchan & Anr.[5] and State of Punjab Vs. Amar Singh Harika[6]. On the basis of the above, he submits that the petition deserves to be allowed and the matter be referred to an independent and impartial arbitrator.

18. On the other hand, Mr. Bhat, learned counsel appearing for the respondent has submitted that the petitioner having agreed to the provisions of arbitration contained in Clause 10 of the general conditions cannot now be permitted to turn around and contend that someone else has to be appointed as an arbitrator, thus giving a go-by to the arbitration agreement. He submits that it is well settled that once the parties have agreed upon a named arbitrator, the parties cannot resile therefrom. In support of the submission, he relied on the judgment of this Court in the cases of Union of India & Anr. Vs. M.P.Gupta[7], You One Engineering & Construction Co. Ltd. & Anr. Vs. National Highways Authority of India (NHAI)[8], National Highways Authority of India & Anr. Vs. Bumihiway DDB Ltd.(JV) & Ors[9], Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited[10] and Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited[11].

19. He further submits that the present petition is not maintainable as even prior to the filing of the petition, the Chairman-cum-Managing Director had duly acted and exercised his powers and had appointed Mr. R. Chandra Kumar, General Manager (Kot) as the arbitrator. It is his claim that the appointment was made on 19th July, 2011 and the same was duly communicated by fax on 19th July, 2011 itself to the petitioner.

20. Mr. Bhat further submits that the order of the Managing Director came into force from the moment it was signed on 19th July, 2011. In support of this submission, he relies on the judgment of this Court in the case of Collector of Central Excise, Madras Vs. M/s M.M. Rubber & Co., Tamil Nadu[12]. According to the learned counsel, the aforesaid principle has been reiterated by this Court in Municipal Corporation of Delhi Vs. Qimat Rai Gupta & Ors.[13] On the issue of perceived partiality of the CMD or his nominee, Mr. Bhat submits that the petitioner cannot rely on the judgment of this Court in Denel (Proprietary) Limited (supra). The facts in the aforesaid case were different from the facts in the present case inasmuch as in Denel case (supra) this Court has directed the appointment of an independent arbitrator only on the ground that there was certain directions issued by the Ministry of Defence, Government of India and as such the Managing Director of BEL may not be in a position to independently decide the dispute between the parties. He further submits that in the event this Court accepts the submission of the petitioner then Chairman and Managing Director of any other Public Sector Undertaking, for example, Hindustan Aeronautics Limited or Bharat Earth Movers Ltd. may be appointed to arbitrate the dispute.

21. I have considered the submissions made by the learned counsel for the parties.

22. The first issue which needs to be addressed is as to whether the present petition is maintainable in view of the claim made by the respondent that Mr. R. Chandra Kumar had been appointed as the Sole Arbitrator on 19th July, 2011.

23. I am of the considered opinion that the aforesaid submission of Mr. Bhat can not be accepted in view of the provision contained in Section 3(2) of the Arbitration Act. Section 3 of the Act provides for different modes in which any written communication is deemed to have been received. Section 3(2) specifically provides as under:-

> "The communication is deemed to have been received on the day it is so delivered."

24. In view of the aforesaid provision even if the order appointing the Sole Arbitrator, Mr. R. Chandra Kumar, was made on 19th July, 2011, it would be deemed to be received only on the day it is delivered.

25. Apart from the aforesaid statutory provision, it is also settled that an official order takes effect only when it is served on the person affected. In the case of Bachhittar Singh Vs. State of Punjab & Anr. (supra), this Court has clearly enunciated the Principle of Law in the following words:-

> "Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

26. Similarly, in this case until the order was communicated to the petitioner, the Chairman-cum-Managing Director would have been at liberty to reconsider the matter and thus rendering the order only provisional in character. Similar question arose before this Court in the case of BSNL & Ors. Vs. Subash Chandra Kanchan & Anr. (supra) wherein it has been clearly observed as under:-

> "12. Evidently, the Managing Director of the appellant was served with a notice on 7-1-2002. The letter appointing the arbitrator was communicated to the respondent on 7-2-2002. By that time, 30 days' period contemplated under the Act lapsed. The Managing Director of the appellant was required to communicate his decision in terms of clause 25 of the contract."

27. In reaching the aforesaid conclusion, this Court relied on earlier judgment rendered in the case of State of Punjab Vs. Amar Singh Harika (supra), wherein this Court has held as follows:-

> "The first question which has been raised before us by Mr. Bishan Narain is that though the respondent came to know about the order of his dismissal for the first time on the 28th May 1951, the said order must be deemed to have taken effect as from the 3rd June 1949 when it was actually passed. The High Court has rejected this contention; but Mr. Bishan Narain contends that the view taken by the High Court is erroneous in law. We are not impressed by Mr. Bishan Narain's argument. It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order."

28. The aforesaid observations make it clear that an order passed by an authority can not be said to take effect unless the same is communicated to the party affected. The order passed by a competent authority or by an appropriate authority and kept with itself, could be changed, modified, cancelled and thus denuding such an order of the characteristics of a final order. Such an uncommunicated order can neither create any rights in favour of a party, nor take away the rights of any affected party, till it is communicated. The aforesaid proposition has been reiterated in the case of Laxminarayan R. Bhattad & Ors. Vs. State of Maharashtra & Anr.[14], wherein it has been held that "it is now well known that a right created under an order of a statutory authority must be communicated so as to confer an enforceable right." Similar view has been reiterated in Greater Mohali Area Development Authority & Ors. Vs. Manju Jain & Ors.[15], wherein it is observed as follows:-

> "24. Thus, in view of the above, it can be held that if an order is passed but not communicated to the party concerned, it does not create any legal right which can be enforced through the court of law, as it does not become effective till it is communicated."

29. Mr. Bhat on the contrary relied on the judgment of this Court in the case of Collector of Central Excise, Madras Vs. M/s M.M. Rubber & Co., Tamil Nadu (supra) and submitted that the order of the Managing Director came into force from the moment it was signed on 19th July, 2011. In Paragraph 12 of the aforesaid judgment, it is observed as follows:-

> "12. It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made : that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus paetentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time."

30. In my opinion, the aforesaid observations do not deviate from the observations made by this Court in Bachhittar Singh's case (supra) and reiterated consistently thereafter by this Court. The observations herein were made with regard to the exercise of power by the competent authority with regard to determination of the date from which the period of limitation was to be calculated to make an appeal. In that case, an order in favour of the respondent was passed by the Collector of Central Excise, as an adjudicating authority on 28th November, 1984. Its copy was supplied to the respondent on 21st December, 1984. The Central Board of Excise and Customs, however, in exercise of its powers under Section 35-e(1) directed the Collector on 11th December, 1985 to make an appeal to the Customs, Excise Board (Control) Appellate Tribunal against this order. The point at issue was

whether limitation under Section 35-e(3) of the Central Excise and Salt Act, 1944 for the order of the Board under Section 35-e(1) commenced from 28th November, 1984 or 21st December, 1984. The Appellate Tribunal rejected the Collector's application on the ground that it was beyond limitation period of one year commencing from 28th November, 1984. The aforesaid decision of the Appellate Tribunal was upheld by this Court with the observations made in Paragraph 12 above (supra). However, the aforesaid observation can not be read divorced from the observations made in Paragraph 13 and 18, which are as under:-

> "13. So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order. Therefore courts have uniformly laid down as a rule of law that for seeking the remedy the limitation starts from the date on which the order was communicated to him or the date on which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set aside. This is based upon, as observed by Rajmannar, C.J. in Muthia Chettiar v. CIT "a salutary and just principle". The application of this rule so far as the aggrieved party is concerned is not dependent on the provisions of the particular statute, but it is so under the general law.
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> 18. Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of suo moto power over the subordinate authorities' orders, the date on which such power was exercised by making an order are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the government is bound by the proceedings of its officers but persons affected are not concluded by the decision."

31. From the above, it becomes evident that the order dated 19th July, 2011 would be binding on the Chairman-cum- Managing Director for the purposes of working out the limitation, but so far as the petitioner is concerned, the relevant date would be the date when the order is communicated to the petitioner. The order made by a Statutory Authority or an Officer exercising the powers of that Authority comes into force so far as the Authority Officer is concerned, from the date it is made by the concerned Authority Officer. But, so far as the affected party is concerned, the order made by the Appropriate Authority would be the date on which it is communicated. In my opinion, Section 3(2) of the Arbitration and Conciliation Act, 1996, is a mere reiteration of the aforesaid general principle of law.

32. In view of the above, I am of the considered opinion that the reliance placed on the aforesaid judgment by Mr. Bhat is misplaced. In my opinion, the reliance placed by Mr. Bhat on the judgment in Municipal Corporation of Delhi (supra) is also misplaced as therein the Court has reiterated the principle laid down in Collector of Central Excise, Madras (supra); by observing as follows:-

> "26. A distinction, thus, exists in the construction of the word "made" depending upon the question as to whether the power was required to be exercised within the period of limitation prescribed therefor or in order to provide the person aggrieved to avail remedies if he is aggrieved thereby or dissatisfied therewith. Ordinarily, the words "given" and "made" carry the same meaning.
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> 27. An order passed by a competent authority dismissing a government servant from services requires communication thereof as has been held in State of Punjab v. Amar Singh Harika11 but an order placing a government servant on suspension does not require communication of that order. (See State of Punjab v.

Khemi Ram12.) What is, therefore, necessary to be borne in mind is the knowledge leading to the making of the order. An order ordinarily would be presumed to have been made when it is signed. Once it is signed and an entry in that regard is made in the requisite register kept and maintained in terms of the provisions of a statute, the same cannot be changed or altered. It, subject to the other provisions contained in the Act, attains finality. Where, however, communication of an order is a necessary ingredient for bringing an end result to a status or to provide a person an opportunity to take recourse to law if he is aggrieved thereby, the order is required to be communicated." These observations, in my opinion, do not support the submissions made by Mr. Bhat.

33. Keeping in view the aforesaid principle of law, the fact situation with regard to the making and the communication of the order dated 19th July, 2011 can now be examined. Even though the respondent claims that the order was sent by fax on 19th July, 2011, there is clear denial of the same by the petitioner. Prima facie, it would appear that even though the order may have been made on 19th July, 2011, it was served for the first time on the counsel of the petitioner by e-mail on 26th July, 2011. Therefore, prima facie, it would not be possible to accept the submission of Mr. Bhat that the petition would not be maintainable on the ground that the arbitrator had already been appointed at the time when the present petition was filed. The issue needs to be decided on the basis of the evidence produced by the parties, at the appropriate time.

34. I am also not much impressed by the submission made by Mr. Bhat that this Court is bound to appoint the Chairman-cum- Managing Director or its nominee as the arbitrator in view of the arbitration clause. However, it is necessary to consider the judgments relied upon by Mr. Bhat. In the case of Union of India & Anr. Vs. M.P.Gupta (supra), this Court observed that in view of the express provision contained in the arbitration clause that two Gazetted Railway Officers shall be appointed as arbitrators; a Former Judge of the Delhi High Court can not be appointed as the Sole Arbitrator. It must be noticed here that in the aforesaid case, no facts have been pleaded in justification of the plea for the appointment of an independent arbitrator in spite of the arbitration clause. In You One Engineering & Construction Co. Ltd. & Anr. Vs. National Highways Authority of

India (NHAI) (supra), Justice B.N. Srikrishna, sitting as a Chamber Judge in a petition under Section 11(6) has observed as follows:-

> "10. In my view, the contention has no merit. The arbitration agreement clearly envisages the appointment of the presiding arbitrator by IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6)."

35. In this matter also, there was no plea that the Arbitral Tribunal constituted under the arbitration clause was likely to be favorably inclined towards the respondent. This Court has merely reiterated the legal position that in normal circumstances, arbitrator has to be appointed in terms of the agreement of the parties contained in the arbitration clause.

36. In the case of National Highways Authority of India & Anr. Vs. Bumihiway DDB Ltd.(JV) & Ors. (supra), the question which was before this Court was again as to whether a presiding arbitrator could be appointed beyond the scope of the arbitration clause, by the High Court in a petition under Section 11(6). It was submitted on behalf of the appellant that when the arbitration agreement clearly envisages the appointment of the presiding officer by the IRC and there is no specification that the arbitrator has to be different person depending on the nature of the dispute, it is not open to ignore it and invoke the exercise of power under Section 11(6) of the Act. It was also submitted that the High Court was not justified in referring to the principle of hierarchy and ignoring the express contractual provision for appointment of the presiding arbitrator. Upon consideration of the rival submissions, this Court considered the questions of law which had arisen. The relevant question for the purposes of this case is "Whether an arbitration clause, which is a sacrosanct clause, can be rewritten by appointment of a judicial arbitrator when no qualification therefor is provided in the agreement?"

37. The answer to the aforesaid question was in the negative. It was held that the appointment made by the High Court was beyond the arbitration agreement which clearly envisages the appointment of the presiding arbitrator by IRC, there is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. It was emphasised that "if the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of the powers in Section 11(6)." The observations made by this Court in RITE Approach Group Ltd. Vs. Rosoboronexport[16], were reiterated, wherein this Court has clearly held that :-

> "In view of the specific provision contained in the `agreement specifying the jurisdiction of the court to decide the matter, this Court cannot assume the jurisdiction, and hence, whenever there is a specific clause conferring jurisdiction on a particular court to decide the matter, then it automatically ousts the jurisdiction of the other court."

38. In Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited (supra), a three Judge bench of this Court reiterated the general principle as

noticed in the judgments relied upon by Mr. Bhat. At the same time, it is emphasised that in exercise of its powers under Section 11(6) of the Act, the Court has to take into consideration the provision contained in Section 11(8) of the Act. The aforesaid provision requires that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have due regard to any qualifications required of 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 also observed that a bare reading of the Scheme of Section 11 shows that the emphasis is on the term of the agreement being adhere to and /or give effect to as closely as possible. But it is not mandatory 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.

39. In Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited (supra), this Court whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure, has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same. In Paragraph 45 of the aforesaid judgment, it is observed as follows:-

> "45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by Northern Railway Admn., where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons."

40. In view of the aforesaid observations, it would not be possible to reject the petition merely on the ground that this Court would have no power to make an appointment of an arbitrator other than the Chairman-cum-Managing Director or his designate. This Court would have the power to appoint a person other than the named arbitrator, upon examination of the relevant facts, which would tend to indicate that the named arbitrator is not likely to be impartial. In this case, the petitioner had clearly pleaded that the named arbitrator is a direct subordinate of the CMD and employee of the respondent. CMD is the controlling authority of all the employees, who have been dealing with the subject matter in the present dispute and also controlling authority of the named arbitrator. Apprehending that the CMD, who had been dealing with the entire contract would not act impartially as an arbitrator, the petitioner had issued a notice on 20th May, 2011. In this notice, it was pointed out that while the entire process of the performance of the contract was going on, the

CMD had issued a letter on 5th June, 2009 to the petitioner stating that as per the company's directives, all pending supplies as on that date were "put on hold". After the aforesaid communication, no communication was issued to the petitioner for supply of the goods as per the Purchase Order dated 3rd December, 2009. Even subsequently, there were difficulties when a further lot of 24 units were supplied. The detailed submissions made by the petitioner have been noticed in the earlier part of the judgment.

41. Keeping in view the aforesaid facts, I am of the opinion that it would not be unreasonable for the petitioner to entertain the plea that the arbitrator appointed by the respondent would not be impartial. The CMD itself would not be able to act independently and impartially being amenable to the directions issued by the Ministry of Defence. In similar circumstances, this Court in the case of Denel (Proprietary) Limited Vs. Bharat Electronics Limited & Anr. (supra), this Court observed as follows:-

> "21. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the Company against whom the dispute is raised (the respondents). In addition to that, the said Managing Director of Bharat Electronics Ltd. which is a "government company", is also bound by the direction/instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the purchase orders, it is not in a position to settle the dues only because of the directions issued by the Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties."

42. In my opinion, the facts in the present case are similar and, therefore, a similar course needs to be adopted.

43. In exercise of my powers under Sections 11(4) and 11(6) of the Arbitration and Conciliation Act, 1996 read with Para 2 of the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, I hereby appoint Hon'ble Mr. Justice Ashok C. Agarwal, Retired Chief Justice of the Madras High Court, r/o No. 20, Usha Kiran, 2nd Pasta Lane, Colaba, Mumbai 400 005, as the sole arbitrator, to adjudicate the disputes that have arisen between the parties, on such terms and conditions as the learned sole arbitrator deems fit and proper. Undoubtedly, the learned sole arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

44. The Registry is directed to communicate this order to the sole arbitrator forthwith to enable him to enter upon the reference and decide the matter as expeditiously as possible.

45. The Arbitration Petition is accordingly disposed of.

.....J. [Surinder Singh Nijjar] New Delhi;

May 08, 2012.

CORRIGENDUM PARA NO.39, LAST LINE OF PARA, FOR (EMPHASIS SUPPLIED), READ (THE LINE STANDS DELETED)

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[1] (2009) 8 SCC 520
[2] (2010) 6 SCC 394
[3] (2012) 2 SCC 759
[4] AIR 1963 SC 395
[5] (2006) 8 SCC 279
[6] AIR 1966 SC 1313
[7] (2004) 10 SCC 504
[8] (2006) 4 SCC 372
[9] (2006) 10 SCC 763
[10] (2008) 10 SCC 240
[11] (2009) 8 SCC 520
[12] 1992 Supp.(1) SCC 471
[13] (2007) 7 SCC 309
[14] (2003) 5 SCC 413
[15] (2010) 9 SCC 157
[16] (2006) 1 SCC 206