

**(2002) 12 DEL CK 0068**

**Delhi High Court**

**Case No:** AA No. 289 of 2001

Bhaskar Wires Private Limited

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision:** Dec. 13, 2002

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 11(4), 11(5), 11(6)

**Citation:** (2003) 102 DLT 870

**Hon'ble Judges:** C.K. Mahajan, J

**Bench:** Single Bench

**Advocate:** Rajiv Nayyar and Saran Suri, for the Appellant; V.S.R. Krishna, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

C.K. Mahajan, J.

By way of this petition, the applicant seeks appointment of an independent Arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 for adjudication of disputes and differences between the parties.

2. Pursuant to tender notice issued by respondent No. 1, the petitioner submitted its offer to respondent No. 2 for supply of 3000 M.T. of HTS wire of 3X3 mm strand (herein after called as Goods) as per specification IS:6006/1983. By letter dated 30.12.1997, the respondent No. 2 made a counter offer to the petitioner for supply of 3000 MT of HTS wire as per specification IS-1785 (Part I) 1983 and IS-6006 (1983) as per their terms and conditions. The petitioner accepted the offer vide letter dated 2.1.1998. Formal contract was sent to the petitioner by letter dated 18.2.1998 for making supplies in terms thereof. The contract contained an arbitration clause which provides for reference of disputes or differences to the sole arbitration of a Gazetted Railway Officer appointed to be the Arbitrator by the General Manager. The said contract was duly sealed, signed and executed by the petitioner and was

delivered to the office of respondent along with its letter dated 23.2.1998. In terms of said contract, the Railway Board issued release order upon the petitioner for supply of said 3000 Metric Tones of Goods in favor of Central Railway to the extent of 2000 Metric Tonnes and South Eastern Railway to the extent of 1000 Metric Tones. The respective Zonal Railways issued dispatch instructions from time to time for supply of Goods. The petitioner manufactured the goods in terms of instructions received. The Goods were required to be inspected by the concerned Sleeper Manufacturing Units. The concerned sleeper manufacturing units failed and neglected to carry out such inspections. The petitioner called upon the concerned sleeper manufacturing units to make financial arrangement for making payment of the Goods in terms of the contract, which they wrongfully and illegally failed and neglected to do so. In part compliance of aforesaid order placed by the Railway Board, the sleeper manufacturing units attached to the South Eastern Railway lifted only 36 Metric Tonnes of the Goods and the sleeper manufacturing units attached to the Central Railway lifted 1347 Metric Tonnes of the Goods. 1617 Metric Tonnes of the Goods were remain to be lifted by the said Zonal Railways. The respondents failed to fulfill their contractual obligations. Therefore, the contract could not be completed within the stipulated period. Disputes and differences arose between the parties. The petitioner invoked the arbitration clause by way of legal notice dated 1.12.2000. The respondents failed to appoint the Arbitrator. hence the present petition.

3. Notice was issued to the respondents by order dated 20th December, 2001. The respondents entered appearance on 9th July, 2002 and it was brought to the notice of the Court that an Arbitrator was appointed by the respondents on 7th March, 2002. Till date, no reply has been filed by the respondents.

4. Counsel for the respondents, however, resisted petition on the ground that in terms of arbitration agreement between the parties, Gazetted Officer of the Railway is required to be appointed as an Arbitrator. He states that this Court cannot appoint an independent Arbitrator in the first instance. He placed reliance on a decision of Kerala High Court in [Bel House Associates \(P\) Ltd. Vs. General Manager, Southern Railway](#), wherein the court held that the Court must implement the procedure agreed upon between the parties for appointment of an Arbitrator. He, however, conceded that Arbitrator was not appointed by the respondents within 30 days from the date of invocation of arbitration clause and prior to filing of the petition. The Arbitrator was appointed during the pendency of the petition.

5. Counsel for the petitioner contends that the respondents had no power to appoint an Arbitrator during the pendency of the petition as they had forfeited their right to do so. In support of his contention, he placed reliance on the decision of Supreme Court in Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. JT 2000 Supp. 2 SC 226 wherein the Supreme Court observed as under:-

"So far as cases falling u/s 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 u/s 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 u/s 11, that would be sufficient. In other words, in case arising u/s 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 u/s 11 seeking appointment of an Arbitrator. Only then the right of the opposite party ceases....."

6. I have heard learned counsel for the parties, perused the petition and considered the documents on record. I have also perused the decisions relied upon by counsel for the parties.

7. This Court in the case of B.W.L. Ltd. v. U.O.I. (AA No. 162/2001) decided on dated 10th May, 2002 had appointed an independent Arbitrator as the defendants failed to appoint an Arbitrator in terms of Arbitration clause within the statutory period of 30 days. This Court held that the respondent had forfeited its right to appoint an Arbitrator and appointed an Arbitrator.

8. In light of above, I am of the view that the decision relied upon by counsel for the respondent is of no help in view of the decision of Supreme Court in Datar Switchgears Ltd. and the decision of this Court in B.W.L. Ltd. (supra). The respondents have forfeited their right to appoint the Arbitrator as they failed to appoint Arbitrator within 30 days and in any case before filing of the petition.

9. Following the aforesaid decision of Supreme Court and this Court, the petition is allowed. The appointment of Mr. C.P. Tayal, Chief Track Engineer, by the respondent is revoked. Mr. Justice A.K. Srivastava (Retd) is appointed as an Arbitrator for adjudication of disputes and differences between the parties. The Arbitrator shall fix his own fee.

10. A copy of the order be sent to the Arbitrator for information.