

**(2001) 05 DEL CK 0150**

**Delhi High Court**

**Case No:** Suit No. 1808 A-2000

M/s. Garg Associates

APPELLANT

Vs

D.D.A. and Another

RESPONDENT

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**Date of Decision:** May 3, 2001

**Citation:** (2001) 5 AD 986 : (2001) 92 DLT 298 : (2001) 59 DRJ 506 : (2002) 1 RAJ 450

**Hon'ble Judges:** Jiwan Dass Kapoor, J

**Bench:** Single Bench

**Advocate:** Mr. Rama Kapoor, for the Appellant; Mr. Sailesh Kapoor, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

J.D. Kapoor, J. (Oral)

1. Originally the petition was filed u/s 20 of the Arbitration & Conciliation Act, 1940 for directing the respondent to file the agreement and refer the disputes/claims of the petitioner to arbitration. However, pursuant to the objection raised by the respondents as to the maintainability of the petition, in view of the provisions of the Arbitration clause and the common judgment of the Supreme court in Thyssen Stahlunion GMBH vs. Steel Authority of India Limited and Rani constructions (P) Ltd. Steel Authority of India Limited reported in 1999 (9) SCC 333, the petition was amended as to having been filed u/s 11 of the Arbitration and Conciliation Act, 1996.

2. Facts in brief are that pursuant to invocation or arbitration by the petitioner on 18th of April, 1994, the Arbitrator was appointed after three years and only part of the claims were referred to him. The Arbitrator resigned on 8th of December 1997 by taking the plea that the work under the contract was partly carried out under his supervision. After his resignation no other Arbitrator was appointed. Vide notice dated 6th of March 2000 the petitioner called upon the respondent to appoint a new arbitrator and refer all his 17 claims for arbitration. Since the respondent failed to appoint the Arbitrator within 30 days of the notice instant petition was filed on 4th of August, 2000. However, Shri Ravinder, S.E. (Civil) Circle - 13 was appointed Sole

Arbitrator on 7th of November 2000 and he entered upon the reference on 13th of November 2000. He has also resigned vide letter dated 5th of March 2001 on account of having been promoted as Chief Engineer.

3. Question whether the right to appoint the Arbitrator u/s 11(6) of the 1996 Act continues even after 30 days of the service of notice by the aggrieved party was answered by the Supreme Court in 2000 (3) Arb. LR 447 (SC), Data Switchgears Limited vs. Tata Finance Limited & Anr., wherein the respondent made the appointment before the appellant filed the application u/s 11 but beyond 30 days. It was held that so far as Section 11(6) of 1996 Act 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. Thus in cases arising u/s 11, if the opposite party has not made any appointment within 30 days of the demand, the right to make appointment is not forfeited but continues and an appointment has to be made before the former files an application u/s 11(6) seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

4. The main objection of the respondents is that since the original petition u/s 20 of the 1940 Act was not maintainable and petition u/s 11(6) was filed only after appointment of the Arbitrator on 7th of November 2000, the right of the Engineer Member to appoint the Arbitrator had not ceased on 7th of November 2000 as till that date no petition u/s 11(6) was moved by the petitioner and further that it was only on the objection raised by the respondents on the basis of the judgment of the Supreme Court in Thyssen Stahlunion GMBH vs. Steel Authority of India Limited and Rani Constructions (P) Ltd. vs. Steel Authority of India Limited reported in 1999 (9) SCC 333 that the original petition was amended to the petition one filed u/s 11(6) of the 1940 Act.

5. According to Mr. Shailesh Kapoor, learned counsel for the respondent the amendment carried out in the petition does not relate back to the date of the original petition filed u/s 20 of the 1940 Act which obviously was not maintainable at the relevant time and the crucial date to consider whether the petition u/s 11 is maintainable or not is the 7th November, 2000, the date when the respondent had appointed the arbitrator.

6. Admittedly the amendment application was filed on 19th December, 2000. Learned counsel for the respondent has also relied upon Datar Switchgears's case (supra) that the date on which the right to appoint arbitrator is forfeited by the appointing authority is the actual date of filing of petition u/s 11(6) and not the date when the original petition which obviously was not maintainable was filed.

7. I am afraid aforesaid contention of Mr. Kapoor is wanting in substance for two reasons. Firstly the original petition filed by the petitioner though under the bona fide and legal belief that the provision of section 20 was attracted has to be deemed and treated as petition u/s 11 of the Act as reference of a particular provision in the title is not that much relevant as the contents of the petition and nature of relief sought there under are. Secondly any amendment allowed at any stage has to relate back to the date the suit or petition was filed unless it arises from subsequent events that may bar the claim by way of limitation or otherwise.

8. To say that the amendment related from the date when the amendment was allowed is incorrect. Once the amendment is allowed and amended petition or suit is filed, for all practical purposes as well as for the purpose of law the amended suit or petition has to be deemed to have been filed on the date of institution of the original suit of petition.

9. Here the petitioner wanted the appointment of an arbitrator because the respondent had failed to respond to his request. the amendment sought by the petitioner was of technical nature and necessitated because of the judgment of the Supreme Court in Rani Construction case. Thus the amendment, if any, was a formality and that too an idle one.

10. In the instant case the arbitrator was appointed after filing of the petition. It is given to understand that even the new arbitrator appointed on 13th November 2000 has resigned as he has been promoted as Chief Engineer. In order to avoid further delay in the matter and keeping in view the resignations of as many as two Arbitrators in the past, I deem if fit that an independent arbitrator should be appointed.

11. Accordingly Justice N.C. Kochhar, retired High Court Judge, is appointed as Arbitrator. Learned Arbitrator shall fix his own fees. A copy of this order as well as petition etc. be given dusty. The parties to appear before the Arbitrator on 26th May, 2001 at 11.00 A.M.

Petition stands disposed of.