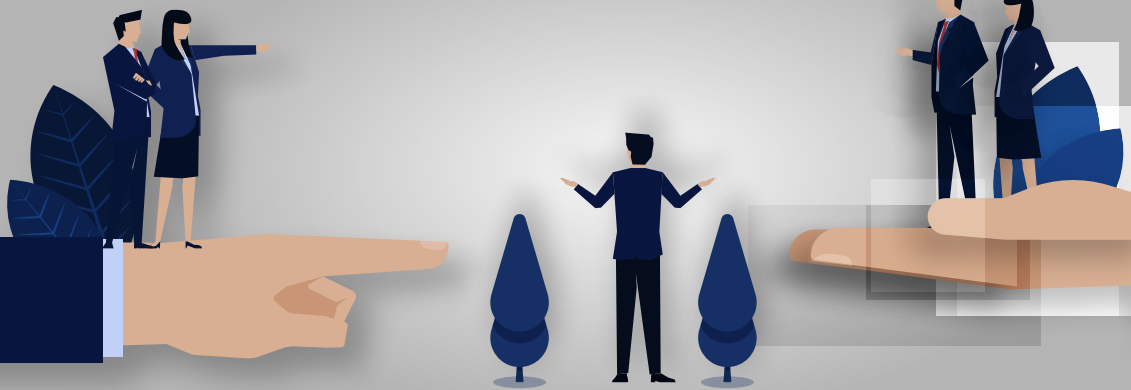


June 2024



High Court of Delhi holds that it has power to appoint sole arbitrator in deviation from the arbitration agreement which provides for three arbitrators¹

Brief Facts

M/S Twenty-Four Secure Services Pvt. Ltd. (“**Petitioner**”) filed a petition (“**Petition**”) under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“**Act**”) before a Single Judge of the High Court of Delhi (“**Court**”) seeking appointment of a sole arbitrator.

The dispute between the parties arose under a Service Agreement dated 20 November 2020 (“**Service Agreement**”) in relation to the pending payments and arrears thereunder. The Petitioner *vide* notice dated 3 June 2023 invoked arbitration as per Clause 7 of the Service Agreement. The Respondent *vide* reply dated 1 July 2023 refused the existence of any dispute between the parties; however, it nominated Justice H.R. Malhotra (Retd.) as an arbitrator. Despite various reminders/emails from the Petitioner, no action with respect to the appointment of the third arbitrator was taken by the Respondent.

As per Section 11(6) of the Act, upon parties’ failure to arrive at a consensus, they may pray for necessary measures to be taken by the court to secure appointment of the tribunal. The Petitioner filed the Petition seeking appointment of a sole arbitrator. The Respondent’s contention was that the Petition ought to be dismissed as it was premature and against the procedure of appointment of the arbitral tribunal agreed between the parties.

Issue

Whether the Petition could be dismissed on grounds of it being premature?

Judgment

The Court rejected the grounds raised by the Respondent and held that the Petition was not premature as:

Firstly, Clause 7 in the Service Agreement stipulated:

“...dispute or difference by the either Party then the matter will be referred to arbitration by Sole Arbitrator where parties agree on the appointment of such arbitrator but where parties are unable to agree on such sole arbitrator, the matter will be referred to arbitration by three (3) arbitrators in which event, each party is to appoint an arbitrator and two arbitrators appointed by the Parties shall appoint the third arbitrator....”

Thus, only if there was no consensus between the parties on the appointment of the sole arbitrator, then the disputes would be referred to a three-member tribunal for which, each party was to appoint an arbitrator and the two arbitrators so appointed shall appoint the third arbitrator.

Secondly, the parties were unable to agree on the sole arbitrator or to constitute a three-member tribunal. Thirdly, the Court relied on the decision of the Supreme Court in **Union of India v. Singh Builders Syndicate**,² which upheld the appointment of a sole arbitrator, in distinction from the arbitration agreement which provided for a tribunal of three members. The Supreme Court recognised the validity of such appointment under circumstances where consensus could not be reached.

Consequently, the Petition was allowed. A sole arbitrator was appointed to adjudicate the disputes between the parties under the aegis of the Delhi International Arbitration Centre.

In this Issue

Brief Facts

Issue

Judgment

Analysis





Analysis

The Court's decision reiterates that the court has authority to deviate from the parties' agreement to choose either a sole arbitrator or a three-member tribunal should the circumstances require. Despite the Respondent's assertion that preference should be given to party autonomy, as per Section 11(6) of the Act and contemporary jurisprudence, the court is vested with the power of appointment if a party fails to act as required under the agreed appointment procedure. It was clear from the submissions made and the contentions of the Respondent that there was a lack of consensus between the parties on the appointment of the sole arbitrator as well as the three-member tribunal.

In the instant case, however, there is lack of clarity as to whether the parties failed to appoint a sole arbitrator before moving onto a three-member panel. If in fact the parties failed, then the procedure to be followed was to appoint a three-member panel. The Court instead decided to appoint a sole arbitrator. This seems to be inconsistent with Clause 7 of the Service Agreement which provided for the appointment of a sole arbitrator and only if there was no consensus on the same, appointment of a three-member panel.

In *Singh Builders* (*supra*), it was required for the Court to appoint the sole arbitrator in order to expedite a matter that had been pending for nearly ten years. However, such facts were not present in the present case and therefore *Singh Builders* (*supra*) was distinguishable. Furthermore, in *Northern Railway Admn. v. Patel Engg. Co. Ltd.*,³ the Court laid emphasis on the terms of the agreement being adhered to as closely as possible and the exhaustion of all remedies provided for in the same before appointing the sole arbitrator.

Despite the abovementioned analysis, the factual incongruencies aside, the objective of the Court in laying down the ratio in *Singh Builders* (*supra*) was not to override the terms of the agreement regarding a three-member panel or sole arbitrator. It was instead to further the intent of the parties to bring disputes before an arbitral tribunal, regardless of its composition. In other words, in this case as well, the Court has prioritised the parties' decision to resort to arbitration in the first place, over the composition of said arbitral tribunal. Moreover, it should be kept in mind that Clause 7 did indeed provide for a sole arbitrator's appointment before a three-member panel is considered. Thus, the Court has not deviated from the decision in *Northern Railway* (*supra*) as in its view, all remedies provided for in the agreement were exhausted before appointment of sole arbitrator.

Endnote

1 Authored by Smarika Singh and Saifur Rahman Faridi, Partners and Arjun Singh Rana, Associate; *M/S Twenty-Four Secure Services Pvt. Ltd. v. M/S Competent Automobiles Company Limited*, ARB. Pet. No. 24/2024, High Court of Delhi, 2024 SCC OnLine Del 4358, judgment dated 22 May 2024.

Coram: Neena Bansal Krishna, J.

2 (2009) 4 SCC 523.

3 (2008) 10 SCC 240.

In this Issue

Brief Facts

Issue

Judgment

Analysis

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