

CASE NO.:
Arbitration Petition 22 of 2005

PETITIONER:
MSA Nederland B.V.

RESPONDENT:
M/s. Larsen & Toubro Ltd.

DATE OF JUDGMENT: 29/11/2005

BENCH:
Arun Kumar

JUDGMENT:
JUDGMENT

O R D E R

This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 praying for appointment of a sole arbitrator. The application has been placed before me as a nominee of the learned Chief Justice of India for necessary orders. The petitioner is a company incorporated under the laws of the Netherlands while the respondent is an Indian company. The parties had entered into an agreement regarding certain works to be executed by the petitioner. Disputes appeared to have arisen between the parties. The agreement between the parties admittedly contains an arbitration clause which runs as under:

"23. Arbitration

Any dispute or claim arising out of or relating to the Agreement its breach or interpretation thereof, shall be determined by reference to a sole Arbitrator to be in accordance with the Arbitration & Conciliation Act, 1996 and the Rules framed thereunder. The venue of the arbitration shall be at England (UK). The language to be used in the arbitration shall be the English language. This clause shall survive the expiration or termination of the Agreement."

As per the above agreement a sole arbitrator has to be appointed. Parties have been unable to agree as to who should be the sole arbitrator. This has led to the present application being filed for appointment of the sole arbitrator.

The learned counsel appearing for the petitioner drew my attention to the fact that the petitioner company is a company incorporated in Netherlands while the respondent Company is a Company incorporated in India. He prayed that in view of provisions of Sections 11 (9) of the Arbitration & Conciliation Act, an arbitrator having a neutral nationality be appointed meaning thereby that the sole arbitrator should neither be a Dutch national nor be an Indian national. Section 11 (9) is reproduced as under:

"11 (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities."

The key word in the above provision is 'may' which leaves a discretion in the Chief Justice or his nominee in this behalf and it is not mandatory that sole arbitrator should be of a nationality other than the

nationalities of the parties to the agreement.

I have the benefits of judgments of this Court on this aspect in Malaysian Airlines Systems BHD (II) v. STIC Travels (P) Ltd. [2001 (1) SCC 509]. While dealing with the same provision this Court has held that the use of the word 'may' indicated that this aspect may be kept in view while appointing the sole arbitrator but the provision is not mandatory. In this decision this Court considered similar provisions in the laws of various countries and held that the word 'may' in Section 11(9) of the Act is not indicated to be read as 'must' or 'shall'. The said decision was followed by this Court in Grid Corpn. Of Orissa Ltd. v. AES Corpn. and others [2002 (7) SCC 736. In view of this legal position it is clear that Section 11(9) of the Arbitration & Conciliation act is not a mandatory provision. Accordingly, I am not bound to appoint a Sole Arbitrator having neutral nationality. I hereby appoint Mr. Justice S.N. Variava, a retired Judge of this Court, as the sole arbitrator in this case. The address of Justice Variava is 7-B, Rockside, 116, Walkeshwar Road, Mumbai- 400 006. The remuneration of the arbitrator and the other costs that may be involved, particularly in view of the fact that the venue of arbitration as per the arbitration clause has to be at England (U.K.) shall be fixed by the arbitrator. The petition is disposed of accordingly. A copy of this order be forwarded by the Registry of the Court to Mr. Justice S.N. Variava forthwith.