

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.05.2008

+ OMP 45/2008

KURUP ENGINEERING COMPANY PVT. LTD. ... Petitioner

- versus -

**M/S BHARAT HEAVY ELECTRICALS
LIMITED AND OTHERS.**

...Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Amit Sharma

For the Respondents : None

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. This petition has been filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') seeking an order from this court terminating the mandate of the sole arbitrator and appointment of a substitute arbitrator. On 23.01.2008, when this petition came up for hearing for the first time, notice was issued to the respondents. The learned counsel for the respondents was present and accepted the notice and sought time to file a reply. Thereafter, the respondents 1 to 3 filed their reply and the petitioner filed its rejoinder to the said reply. Nobody has appeared on

behalf of the respondents today. The petition has been heard in the absence of the counsel for the respondents.

2. The facts leading to the filing of the present petition are that on 23.10.2003, the respondent awarded the work of erection of, *inter alia*, the HRSG Boiler at the Indian Oil Corporation Limited Refinery at Mathura, U.P. The contract was terminated by the respondent (BHEL) before the expiry of the contract term. Disputes had arisen between the parties and the petitioner had invoked the arbitration clause. Since the respondent did not appoint the arbitrator within the 30-day period given in the notice, the petitioner filed an application under Section 11 (6) of the said Act for appointment of an arbitrator (i.e., Arbitration Application No.281/2004). In the meanwhile, the respondent had appointed Mr Jitendra Kumar, AGM, as the sole arbitrator. He held the first, second and third proceedings on 05.01.2005, 27.01.2005 and 23.02.2005. Thereafter, there was a stay of proceedings by this court. However, by an order dated 26.07.2005, the said petition was disposed of by directing that since the delay in appointment was of only 4 to 5 days, the arbitrator who had already been appointed would continue with the proceedings.

3. Being aggrieved by the said order dated 26.07.2005, the petitioner filed a writ petition being WP(C) 12721/2005 before a

Division Bench of this court. In the meanwhile, the decision of the Supreme Court in the case of **S.B.P. and Company v. Patel Engineering Ltd & Another: 2005 (8) SCC 618** was pronounced wherein the Supreme Court, *inter alia*, held that the order passed under Section 11 (6) of the said Act is a judicial order and not an administrative order. Consequently, the Division Bench, by its order dated 25.11.2005 dismissed the writ petition on this ground. Thereafter, the petitioner filed a Special Leave Petition [SLP (C) No.655/2006] before the Supreme Court against the order passed on 26.07.2005 under Section 11(6) of the said Act. On 30.01.2006, the Special Leave Petition was also dismissed by the Supreme Court. It is, therefore, clear that the appointment of Mr Jitendra Kumar as the sole arbitrator became final.

4. On 31.01.2006, the fourth proceedings were held before the sole arbitrator. The petitioner filed its statement of claims on 01.04.2006. The fifth proceedings were held on 13.04.2006 and the respondents were directed to file their reply to the statement of claim as also their counter-claim by 12.05.2006 and the next proceedings were scheduled to be held on 28.06.2006. However, on 27.06.2006, the learned arbitrator issued a letter postponing the proceedings till the first week of September, 2006. It is alleged by the petitioner that the arbitrator simultaneously and unilaterally extended time to the

respondents till 31.07.2006 for filing the counter-claim without there being any request made by the respondent/BHEL. Thereafter, the proceedings were again postponed and by a letter dated 12.07.2007 the arbitrator fixed 31.08.2007 as the date for the sixth proceeding. The arbitrator once again extended time to the respondents for filing the counter-claim. This date was also cancelled and by a letter dated 28.08.2007, the arbitrator rescheduled the proceedings for 25.09.2007 on account of his pre-occupation. Again on 21.09.2007, the arbitrator sent a letter stating that due to his non-availability and pre-occupation, the proceedings scheduled for 25.09.2007 stands cancelled and the said proceedings would be held on 09.10.2007.

5. Faced with the situation of repeated cancellations and adjournments granted unilaterally by the learned arbitrator and without there being any request or application from the respondents, the petitioner protested against the same through its letter to the arbitrator dated 30.09.2007. In this letter, the petitioner submitted as under:-

“The statement of claims was submitted on 1st April 2006 and thereafter the reply was to be filed on or before 12th May 2006. However, two adjournments were granted unilaterally. And subsequently there were no proceedings held for a period of over 14 months. Ultimately the proceedings were scheduled to be held on 31st August 2007 which were once again cancelled by the Ld. Arbitrator without affording the claimants an opportunity for submissions. Subsequently the proceedings were to be held on 25th September 2007, which has now been cancelled and rescheduled for 9th October 2007 again without

complying with prescribed norms or procedure. The purpose of arbitration is to expeditiously decide on disputes. But the manner in which the Id. Arbitrator is repeatedly granting time after time to the respondents in every letter even when notice of counter claims not issued, requesting the respondent to file counter claims is not only resulting in delay but also apprehension in our mind that the present arbitrator is working as an officer of BHEL than an independent, impartial and qualified arbitrator.

It is for this reason necessary that the arbitrator complies with the procedure under section 12 of the Arbitration and Conciliation Act, 1996.

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We reserve to ourselves the right to approach the courts for removal of arbitrator in the event after receipt of documents before the date of next hearing and on their perusal they reveal undue accommodation and leniency towards respondents.”

6. However, the arbitrator sent a letter dated 06.10.2007 once again cancelling the proceedings of 09.10.2007. In this letter, the arbitrator stated that the date fixed for 09.10.2007 was being postponed / adjourned as requested by the claimant (the petitioner herein). The petitioner was asked to propose a suitable date after 24.10.2007 for holding the proceedings in order to fix a date suiting the petitioner. This was protested to by the petitioner through its e-mail dated 06.10.2007 wherein the petitioner stated categorically that it had not sought any postponement of the date of arbitration and no such request had been made from its side. It is also indicated that the petitioner had, in fact, booked air tickets and engaged the counsel for attending the

arbitration meeting on 09.10.2007 and that the postponement of arbitration meeting would result in further losses to the petitioner.

7. Thereafter, on 10.10.2007, the petitioner sent another protest letter in which it was categorically stated that the arbitrator's order is not correct nor is it based on facts and is misleading. The petitioner specifically stated that it had never asked for any adjournment or postponement of the arbitration proceedings scheduled to be held on 09.10.2007. The letter also contained the following submissions:-

“According to the turn of events we have reason to believe that the postponement is at the behest of the respondents. The Ld. Arbitrator is not directing the respondents to submit the copy of postponement request and has been unilaterally initiating cancellation and postponement of proceedings indicating bias and has created an apprehension in the mind of my client that the Honourable Ld. Arbitrator is acting like AGM (BHEL) than an independent impartial arbitrator.

On account of the untrue statements made in the fax / email message of postponement of scheduled meeting dated 09.10.2007 for which we were in all readiness to participate and which now has been postponed indefinitely on false pretexts. We therefore now require the arbitrator to submit information as contemplated under section (12) of Arbitration & Reconciliation Act 1996 relating to independence, qualification and competence of the arbitrator.

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Kindly let us know the date on which the respondents M/s. BHEL has requested for postponement of filing of reply from April 2006 onwards and further clarify whether such applications were oral or were in writing. We may also be informed the inward and outward numbers of register

to avoid possibility of ante dating of correspondence.
Further we demand inspection of arbitral records of
this arbitrator and be permitted to take copies thereof.
Please do the needful and oblige.”

8. No replies to the protest letters were received from the arbitrator. Subsequently, by a letter dated 27.11.2007, the arbitrator informed that the next proceedings would be held on 18.12.2007. However, the arbitrator, while fixing 18.12.2007 as the next date of holding the proceedings denied the contents of the petitioner’s letter dated 10.10.2007. The learned arbitrator ostensibly was of the view that entering into the controversy raised by the petitioner in its letter dated 10.10.2007 would further delay the arbitration proceedings and he “advised” the parties to participate in the arbitration proceedings. Consequently, he fixed 18.12.2007 as the next date and directed the parties to attend the arbitration proceedings on the date, time and place fixed as per the said notice. This was also not to be so. The learned arbitrator sent a letter dated 14.12.2007 cancelling the proceedings to be held on 18.12.2007 on the ground that he would be busy due to “urgent official work”. Once again, the arbitrator directed the parties to attend the arbitration proceedings on the next date, i.e., 28.01.2008 and “made it clear” that the above said date would not be changed. But even that date was cancelled by the learned arbitrator and the 6th meeting was rescheduled for 08.03.2008.

9. In the meanwhile, the petitioner had filed the present petition on 22.01.2008. The grievance of the petitioner is that the arbitrator has failed to act without undue delay and, therefore, his mandate stands terminated. Of course, the petitioner also took the grounds of bias and the fact that the arbitrator became the General Manager of the very department which had cancelled the contract of the petitioner and that this fact had not been disclosed by him as was required to be disclosed under the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The main ground, however, for seeking directions under this application is that the arbitrator has failed to act without undue delay. Sections 14 and 15 of the said Act are relevant and they read as under:-

“14. **Failure or impossibility to act.**—(1) The mandate of an arbitrator shall terminate if—

- (a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
- (b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause

- (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator. –

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

- (a) Where he withdraws from office for any reason; or
- (b) By or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under subsection (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

10. It is apparent that the mandate of an arbitrator shall terminate if he, *inter alia*, fails to act without undue delay. It is also apparent that by virtue of Section 14(2) of the said Act, if there is a controversy with regard to this, a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate. No contrary agreement between the parties has been brought to the notice of the court. Therefore, the petitioner is well within his rights to approach this court for a decision on the question of termination of the

mandate of the arbitrator. The facts and circumstances as narrated above amply demonstrate that the arbitrator has not been able to act and the 5th proceedings which were held on 05.01.2005 could not be followed by a 6th proceeding till the filing of the petition on 22.01.2008. If this is not undue delay, then nothing could be. The only ostensible reason for the delay is that the arbitrator has been busy with his other official duties. It is abundantly clear that the arbitrator is so busy with his official duties that he cannot conduct the arbitration proceedings without undue delay. The numerous occasions on which dates have been fixed and cancelled unilaterally by the arbitrator clearly demonstrate that the said arbitrator has failed to act without undue delay and, if I may add, act at all. The whole purpose of arbitration is to provide a quick remedy to the parties to have their disputes adjudicated upon. This objective has been completely obviated by the manner in which the present proceedings have been conducted by the learned arbitrator. In fact, the learned arbitrator has been most unfair in adjourning one of the proceedings on the ground that the petitioner had sought an adjournment when, in fact, the petitioner had sought no such adjournment.

11. All these circumstances lead me to only one conclusion and that is that the mandate of the arbitrator has terminated inasmuch as he has failed to act without undue delay. This being the position, a

substitute arbitrator has to be appointed in terms of Section 15 (2) of the said Act according to the rules that were applicable to the appointment of the arbitrator who is being replaced. Consequently, the arbitration shall now be conducted by the General Manager, BHEL or his nominee in terms of clause 33 of the agreement between the parties. The General Manager, BHEL is directed to take up the arbitration himself or nominate another arbitrator within four weeks.

This petition is allowed and disposed of accordingly.

**BADAR DURREZ AHMED
(JUDGE)**

May 06, 2008

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