

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 27.09.2010**

% **O.M.P. No.88/2009**

DENEL (PROPRIETARY LIMITED) SOUTH AFRICA Petitioner
Through: Mr. V. Giri and Mr. Chetan Sharma,
Senior Advocates with Mr. Ravinder
Singhania, Mr. Vikas Goel and Mr.
Abhishek Kumar, Advocates.

versus

LORD GORDON SLYNN & OTHERS Respondent
Through: Mr. P.P.Malhotra, Additional
Solicitor General with Ms. Mamta
Tiwari and Mr. Akshat Hanaria,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J. (Oral)

1. This petition has been preferred by the petitioner under Section 14(2) of the Arbitration and Conciliation Act, 1996 to seek a declaration that the mandate of respondent Nos. 1 and 2, as arbitrators, stand terminated. Further directions are sought with regard to the entitlement of the fee paid and payable to respondent Nos. 1 and 2 as arbitrators.

2. The petitioner entered into various contracts with the respondent UOI for supply of defence equipments and technology. Disputes in relation to three of those contracts, namely:

“(i) Contract no.18 (6)/99 D (GS-IV) dated 23.4.2002 (hereinafter referred as contract no. 18 (2002 BMCS)

(ii) Contract no.10 (1)/CON/2005/D (GS-IV) dated 7th March 2005, (hereinafter referred to as Contract no.10 (2005 NTW).

(iii) Contract no.120 (R & D)/OFT/AMR/P/W dated 7th March 2005, (hereinafter referred to as Contract no. 120 (2005 TOT),

were referred for resolution by an arbitral tribunal consisting of three learned arbitrators. The petitioner nominated Mr. Justice R.N. Mishra, former Chief Justice of India as one of the nominee arbitrators. The Union of India nominated Mr. Justice V.N. Khare former Chief Justice of India Respondent No. 2 as the second Arbitrator, and Hon’ble Lord G. Slynne Respondent No. 1 was appointed as the Chair Person by the two parties. The Tribunal accepted the mandate and started the arbitral proceedings.

3. The petitioner, vide its communication dated 21.08.2008 sought to terminate the mandate of the arbitral Tribunal. Consequently, Mr. Justice R. N. Mishra (Retd.) resigned from the Tribunal on 1/2.9.2008. During the pendency of this petition, Lord Slynne, the Chair Person has also passed away. Mr. Justice V.N. Khare (Retd.) Chief Justice of India Respondent No.2 is the only surviving Arbitrator from the aforesaid panel. In the meantime, the petitioner

has nominated Mr. Justice Arun Kumar, (Retd.) Judge, Supreme Court of India as an Arbitrator in place of Mr. Justice R.N. Mishra, former Chief Justice of India. The parties have not yet been able to agree upon the replacement of Lord Slynn to act as the Chair Person of the arbitral tribunal. Since Mr. Justice R.N. Mishra had resigned from his position as one of the Arbitrators, the remaining two learned Arbitrators, namely Lord Slynn and Mr. Justice V.N. Khare, vide communication 24.09.2008 held that the mandate of the arbitral tribunal does to stand terminated by operation of law for any reason alleged by the petitioner in its communication dated 21.08.2008. Consequently, the petitioner has preferred the present petition. Upon issuance of notice, the respondents have filed their reply and a rejoinder has also been filed by the petitioner.

4. The first submission of learned counsel for the petitioner is that before the arbitral Tribunal, both parties had set out the documents that they desired the opposite party to produce. While the request of the petitioner for production of documents by the respondent was rejected, the petitioner was directed to produce practically all the documents required by the respondent vide procedural order No. 4 dated 09.04.2008. This, according to the petitioner, smacks of bias on the part of the arbitral tribunal. The next contention of the petitioner is that the petitioner had sought interim relief under Section 17 from the arbitral tribunal. Though the Tribunal heard detailed submissions of the parties on 3rd, 4th and 5th February, 2008 on the aspect of grant of interim relief, the Tribunal passed an

unreasoned order, being procedural order No.4 dated 05.08.2008, thereby rejecting the prayers made by the petitioner for interim measures. The third submission of learned counsel for the petitioner is that the petitioner had thereafter moved an application to seek a partial award. That application has also been rejected by the arbitral tribunal in its procedural order No.5 dated 05.08.2008. He further submits that in paragraph 16 of this order, the Tribunal granted time to the petitioner to produce the documents (earlier ordered to be produced vide procedural order No. 4 dated 09.04.2008) on or before 07.08.2008 and held that if the documents are not so produced, the petitioner would not be entitled to rely upon the same. He submits that the tribunal acted with undue haste by giving only three days time to the petitioner to produce the said documents. According to the petitioner all these orders demonstrate bias in the mind of the arbitral tribunal while passing the said orders. It is further submitted by learned counsel for the petitioner that the procedural order no.5, in paragraph 19, had merely set out the view of Mr. Justice R.N.Mishra (Retd.) without their being a separate order passed by him. He submits that the procedural order No.5 has been issued by the President of the Tribunal and the same does not bear the signature of Mr. Justice R.N. Mishra (Retd.), even though Mr. Justice R.N. Mishra (Retd.) has attributed a different point of view in the matter.

5. Learned counsel for the petitioner submits that despite successive attempts to seek interim measures and partial award, the petitioner has not been given any relief in the arbitral proceedings

even though costs to the tune of Rs.2.10 crores had been incurred by the parties towards the arbitral tribunal's fees and expenses.

6. Learned counsel for the petitioner places strong reliance on the decision of this Court in ***Alcove Industries Ltd. V. Oriental Structural Engineers Ltd.***, 2008(1), ARBLR 393(Del). He also places reliance on the judgment of the Gauhati High Court in ***State of Arunachal Pradesh V. Subhash Projects & Marketing Ltd. and Anr.***, 2007(1) Arb.LR 564 (Gauhati) (DB) and the Supreme Court judgment in ***Saurabh Prakash V. DLF Universal Ltd***, (2007) 1 SCC 228 .

7. On the other hand, the learned Additional Solicitor General, Mr. P.P.Malhotra, submits that the present proceedings are dilatory tactics on the part of the petitioner to scuttle the arbitration proceedings. He submits that if the petitioner was aggrieved by the orders passed by the arbitral tribunal on the petitioner's application under Section 17, it was open to the petitioner to prefer an appeal under Section 37 of the Act. He submits that no appeal has been preferred by the petitioner under Section 37 of the Act and the present is an indirect way to impugn the said order. The procedural orders bearing No.4 and 5 were passed by the Tribunal on 09.04.2008 and 05.08.2008, whereas the present petition has been preferred on 03.02.2009. By the time the present petition was preferred, the statutory appeal under Section 37 was also barred by limitation.

8. Mr. Malhotra has referred to the narration contained in the

reply filed by the respondent, of the proceedings which have transpired before the arbitral tribunal. He submits that the petitioner has not controverted there averments and there is no dispute with regard to the facts, as they are a matter of record. By reference to these averments, Mr. Malhotra submits that the consistent modus operandi of the petitioner was to scuttle the hearings fixed by the arbitral tribunal, by making one application after another just before the dates of hearing before the arbitral tribunal were to arrive.

9. Mr. Malhotra submits that merely because the Tribunal did not pass any interim orders as sought by the petitioner and orders were not being passed to the liking of the petitioner, is not a ground to either allege bias or to seek to terminate the mandate of the arbitral tribunal. The nature of the interim reliefs sought by the petitioner was such, as possibly could not have been awarded by the arbitral tribunal by way of an interim measure. The petitioner was seeking:

“An order restraining the Respondent from continuing to act wrongfully or to act in any manner to the prejudice of the Claimant”

... ..

“such as:

1.1 withholding legitimate payments due and payable to the Claimant;

1.2 encashing bank guarantees or compelling the Claimant wrongfully to extend the validity of bank guarantees in contracts other than the Subject Contracts;

1.3 continuing the operation of the blacklisting of

Claimant i.e. the suspension of all business dealings with the Claimant by not allowing the Claimant to participate in any of the tender issued by the Respondent, and in particular the BHIM/T6 Contract alternatively the Respondent's requirement for 155mm Towed or Tracked Howitzer Guns.

1.4 not considering any offers made by the Claimant in respect of tenders or requests for proposal issued by the Respondent."

10. He submits that the Tribunal passed a reasoned order rejecting the said prayers made by the petitioner while passing the procedural order No.4 dated 09.04.2008 by, inter alia, observing that many contentions relied upon by the claimant/petitioner involve issues of law and facts which are contested by the Respondent and the determination of these issues requires hearing of evidence and full arguments. Mr. Malhotra submits that the reliefs sought as interim relief were, in fact, in the nature of final relief which could not be granted as there were disputed question of fact and law raised by the parties. Mr. Malhtora points out that the petitioner had been repeatedly granted time for production of the documents as ordered by the tribunal in its procedural order No. 4 dated 09.04.2008. He has referred to procedural Order no.4 dated 04.04.2008 whereby the tribunal had directed the petitioner to disclose the documents, not later than 14.04.2008. The petitioner had not complied with the said order and it is for this reason that in the hearings held between 26th and 29th May, 2008, the Tribunal, by a majority had again directed the production of the documents by 07.08.2008. He submits that though the order of the Tribunal dated 05.08.2008 was signed and circulated

on that date, during the course of the proceedings held between 26th and 29th May, 2008, the said issue had been considered by the Tribunal and appropriate directions issued. Therefore, it could not said that the petitioner was not granted sufficient time for production of documents. Mr. Malhotra further submits that directions with regard to the production of witnesses statements had been made as early as on 10.01.2008 while passing procedural order No.3. He relies on paragraph 6 of the said order. It is for this reason that the tribunal while passing the procedural order No. 5 dated 05.08.2008 had limited the further time that it granted to the petitioner for filing witness statements.

11. Having heard learned counsel for the parties, I am of the view that the present petition is a gross abuse of the process of the court and it is writ large from the record that the petitioner has tried every trick to scuttle the arbitral proceedings. It is also evident that the attempt of the petitioner has been to browbeat the arbitral tribunal and to black mail the learned Arbitrators merely because the Tribunal did not pass an interim order in favour of the petitioner; directed the petitioner to make disclosure of certain documents; mostly rejected the petitioners request for production of documents sought from the respondent; rejected the petitioners application to seek separation of issues, and; did not pass a partial award in its favour.

12. Since the petitioner has not controverted the factual position as narrated by the respondent in its reply and the same is also a

matter of record, I think it appropriate to extract the relevant portions from the factual narration contained in the respondent's reply in paragraphs 22 to 45, bereft of the allegations made against the petitioner:-

- "22. The first hearing in the matter before the Tribunal took place on the 9th May 2007 through video exchange/conference wherein the suggestions/submissions on the draft Terms of Engagement were made on behalf of the parties and the same were finalized by the Arbitral Tribunal. Subsequently, Procedural Order No. 1 was passed on 21.05.2007, which recorded that the draft Terms of Engagement of the Arbitrators, as earlier circulated, were agreed subject to certain amendments during the course of the hearing on 9th May, 2007. The next date of hearing was fixed on 20.07.2007.
23. The second hearing before the Tribunal was held on 20th July 2007 wherein following aspects were discussed and decided:
- (i) The time-schedule for completion of pleadings by the parties;
 - (ii) The time-schedule for tendering the request for production of documents;
 - (iii) The time-schedule for serving the draft issues falling for determination; and
 - (iv) The dates for the next hearing in the matter.

Procedural Order No.2 dated 15th August, 2007 was passed recording the aforesaid proceedings.

24. In compliance of the Procedural Order No.2 both the parties vide letters dated 30th November, 2007, served upon the other a notice for the Discovery of Documents they sought relevant for the adjudication of the subject dispute. The Respondent asked for documents under four specific heads. Whereas the Petitioner gave a request for documents running into six pages
25. Thereafter, in accordance with the said Procedural Order No.2, as revised in terms of letter dated 4.10.2007, the Respondent vide letter dated 4.12.2007 forwarded the proposed issues which were

in fact the same as framed by Lord Slynn under the "Terms of Reference" dated 14.06.2007 subject to certain modifications. On the same date i.e. 4.12.2007, the Respondent also filed its reply to the Petitioner's request for production of documents.

26. Since the Petitioner failed to file and serve the draft proposed issues in the matter, which were required to be filed by 4th December, 2007, the Respondent, vide email dated 6th December, 2007 inquired about the status of the same.
27. It is stated, that rather than complying with Procedural Order No.2, just one day prior to the hearing scheduled for 8th December 2007, the Petitioner vide letter dated 7th December, 2007, filed an Application for Interim Relief, purportedly under Section 17 of the Act of 1996
28. The third hearing of the Tribunal took place, as scheduled on 8th-10th December, 2007. The Respondent sought time to file an appropriate Reply to the Application for Interim Relief filed by the Petitioner on 7th December, 2007. Accordingly, the Hon'ble Tribunal permitted the Respondent to file the said Reply by 10th January, 2007 and directed the Petitioner to file Rejoinder thereto by 15th January, 2008.

After consulting the parties, the Hon'ble Tribunal observed that the said Application for Interim Relief would be heard on 23rd-25th January, 2008 or in the alternative on 3rd-5th February, 2008, as may be subsequently confirmed by the Tribunal.

- (i) The draft issues as proposed by the Respondent vide letter dated 4th December, 2007 were discussed and were agreed to by the Tribunal subject to minor suggestions by the Petitioner.
- (ii) It was discussed and agreed that since certain issues and matters are common to the arbitration proceedings under the three contracts, being Contract No.10, Contract No.120 and Contract No.18, the arbitration in Contract No.10 would be taken first and only after the conclusion of the oral hearing in the arbitration in Contract No.10, the Hon'ble Tribunal, after hearing the parties, would

determine the issues and matters in the arbitrations in Contract No.18 and Contract No.120.

- (iii) Submissions were heard by the Tribunal on the respective requests for production of documents by both the parties and the response thereto during the course of the said hearing. The Respondent also filed and relied upon the submissions and compilation case law in support of its claim for privileges vis-à-vis the documents requested to be disclosed by the Petitioner.

The Respondent also sought time till 1st January, 2008 to file an Affidavit in support of the refusal to provide documents as requested by the Petitioner on the ground that the same are confidential or privileged documents; or relate to affairs of the state; or, that the disclosure of the same would be contrary to public interest; or, that they are not relevant to the issues in the arbitration. The Petitioner was given the liberty to file its Affidavit in reply to the said Affidavit by 10th January, 2008 and the Respondent was permitted to file its Rejoinder thereto by 18th January, 2008.

- (iv) Accordingly, the Hon'ble Tribunal provisionally decided that the hearing of the issues in Contract No.10 would take place during the course of 5 days beginning on 19th December, 2008, which dates, however, were subject to review during the hearing fixed on 3rd-5th February, 2008. In view of the said scheduled final hearing, the Hon'ble Tribunal directed:

- (a) The Petitioner to serve its Memorial of arguments on the Respondent and the Arbitrators not later than 8 weeks before the first date fixed for hearing and directed the Respondent to file its Reply to Memorial of the Petitioner's arguments including the arguments in the counterclaim not later than 4 weeks before the said date. The Respondent was also directed to serve its Memorial of arguments in Rejoinder and in Defence to the Counterclaim not later than 2 weeks before the first date so fixed for hearing.
- (b) The Respondent filed the written statements of its witnesses on the

opposing party and the Arbitrator not later than 14 days before the date fix for the hearing.

- (c) The parties to agree and serve on the Arbitrators a bundle of copies of documents, which each party wishes to include in chronological or some other agreed convenient order not later than 14 days before the first date fixed for hearing.

It was agreed that after the opening statements on behalf of both the parties, the witnesses of the Petitioner followed by the witnesses of the Respondent's will be examined and cross-examined.

Accordingly, the Procedural Order No.3 dated 10th January, 2008 was passed in the matter, which recorded the aforesaid proceedings of 8th-10th December, 2007. Vide the said Order, the Tribunal appointed 3rd-5th February, 2008 for holding further hearing in the matter.

- 29. In accordance with Procedural Order No. 3, the Respondent filed its Affidavit claiming Privilege on the Disclosure of Documents on 31.12.2007. The Petitioner filed its reply to the same on 10.1.2008, in response to which the Rejoinder was filed on 23.01.2008.
- 30. Further, in terms of Procedural Order No. 3, the Respondent filed its Reply to the Petitioner's Application for Interim Relief dated 7.12.2007 purportedly under Section 17 of the "Act of 1996" on 31.12.2007. By virtue of the said Application for Interim Relief, the Petitioner, inter alia, sought final relief of full payment by the Respondent to the Petitioner, encashment of bank guarantee and allowing the Petitioner to participate in future tenders issued by the Respondent to be granted at the interim stage. The Rejoinder to the said Application of Interim Relief was filed on 10.01.2008 by the Petitioner.
- 31. It is pertinent to state that 10 days before the hearing scheduled for 3rd to 5th February 2008, the Petitioner, on 24.01.2008, filed another Application, viz., an Application for Separation of Issues. the Petitioner sought to a prayer for deciding the same as preliminary issues separately from issues of

fact the Petitioner had accepted and agreed to the issues as framed during the course of hearing on 8th to 10th December, 2007.

32. The fourth hearing before the Tribunal was held from 3rd to 5th February 2008. Pursuant to the aforesaid hearing, the Hon'ble Tribunal was pleased to pass the Procedural Order No. 4 dated 09.04.2008 which unanimously by a reasoned order refused/rejected the Petitioner's Application for Interim Relief and its Application for Separation of Issues. Vide the said order the Tribunal also decided on the Application for Disclosure of Documents by the parties. By the said Procedural Order No. 4, the Hon'ble Tribunal also recorded an estimated period of 5 days beginning on 22nd May, 2008 for further hearing in the matter.
33. That, however, the Petitioner failed and omitted to disclose the documents in terms of the Procedural Order No. 4 and also failed to give any intimation to the Respondent and the Tribunal in this regard. Accordingly, the Respondent through its Solicitors, vide letter dated 8th May, 2008 requested the Petitioner to disclose the requisite documents in compliance of Procedural Order No. 4 and also informed that the Respondent was examining the documents directed to be disclosed to the Petitioner and would intimate them about the same. However, despite the express directions and the order from the Arbitral Tribunal, the Petitioner till date has deliberately not disclosed the said documents to the Respondent... ..
34. It is further submitted that the Petitioner failed to file its Memorial of Arguments in terms of Procedural Order No.3, which required the Petitioner to file the same not later than eight weeks before the scheduled hearing on 22.5.2008 i.e. not later than 27.03.2008. Since, the Respondent was required to file the Memorial of its arguments only subsequent to the Petitioner's Memorial, which the Petitioner failed to file, the Respondent was unable to file the same. Further, since the Procedural Order No.3 required the parties to file the written statements of their witnesses only subsequent to the filing of Memorial of Arguments, the Respondent was also unable to file the Witness Statements in the matter, which also awaited the Witness Statements of the Petitioner's witnesses, which were also not filed.
35. That rather than complying with the Procedural Order

Nos.3 and 4, the Petitioner herein, just 6 days before the scheduled date of hearing i.e. on 16th May 2008, ... filed an Application for Interim Award. Since the said Application was filed just 6 days prior to the scheduled hearing, the Petitioner vide letter dated 16.5.2008, sought a postponement of the said hearing scheduled for 22.05.2008 in order to file a detailed Reply to the same.

36. That after having considered the submissions of both the parties, in the interest of justice, the Tribunal granted time to the Respondent to reply to the aforesaid Application for Interim Award by the Petitioner and directed that the hearing of the said application would commence on 26.05.2008 and that the hearing of the main matter be postponed to a date to be decided after hearing the said application.
37. The Respondent, on 23.5.2008, filed its Reply to the Petitioner's Application for Interim Award. Further, since the Petitioner failed to file its witness statements and contended that it did not need trial on merits, the Respondent filed an Application for closing of Petitioner's evidence under Section 25 (c) of the "Act of 1996".
38. That the fifth hearing before the Tribunal was held from 26-29th May 2008, Pursuant to the aforesaid hearing, the Hon'ble Tribunal, was pleased to pass a Procedural Order No. 5 dated 5th August, 2008 which unanimously, by a reasoned order, rejected the Petitioner's Application for Interim Award. By the said Procedural Order No.5 the Hon'ble Tribunal also fixed 1st – 10th September 2008 for holding further final hearing (other than quantum) in the matter.
39. However, yet again, the Petitioner filed written submissions/ communication purportedly under Section 14 of the "Act of 1996" on 21st August, 2008 i.e. 10 days prior to the scheduled final hearing of the above matter, alleging Termination of the Arbitrators' Mandate. The Petitioner, inter alia, alleged that:
 - i) The Arbitrators have misconducted themselves in law by acting in disregard of Indian law and giving decisions in Procedural Orders No. 4 and 5, contrary to Indian Law.
 - ii) Sufficient time has not been provided by the Arbitral Tribunal to the Claimant to file its

witness statement and/or documents.

- iii) The Tribunal has misconducted itself while deciding the following Applications:
 - a) Petitioner's Notice to the Respondent to discover documents dated 30th November 2007
 - b) Respondent's Request to the Petitioner for production of documents dated 30th November 2007.
 - c) Petitioner's Application for Interim Relief under Section 17 of the Act of 1996 dated 7th December 2007.
 - d) Petitioner's Application for Interim Award dated 16th May 2008.
- iv) The Arbitral Tribunal conducted the proceedings in a partial manner by not treating the parties equally.

... ..

- 40. That the Presiding Arbitrator Lord Slynn of Hadley (late) vide 3-mail dated 23rd August 2008 asked the Respondent for its views/comments on the Claimant's submissions dated 21st August 2008.
- 41. That the response to which the Respondent vide its letter dated 28th August 2008, stated that the mandate of the Tribunal does not stand terminated by operation of law as claimed and that the hearing fixed for 1st September 2009 may be held to resolve the way the Arbitral Tribunal was to deal with the Application/notification filed by the Petitioner u/s 14. Further, the Respondent would attempt to file an interim reply to the said application/notification at the hearing and would crave leave to file a detailed Reply.
- 42. The Respondent vide its Interim Reply dated 1.9.2008 to the Petitioner's submissions/communication dated 21.08.2008, disputed each of the contentions of the Petitioner as totally misconceived, being factually and legally incorrect and untenable, wholly misplaced, erroneous and liable to be rejected at the threshold.
- 43. That as a result of the abovementioned submissions/

communication of the Petitioner herein, the arbitration hearing scheduled for 01.09.2008 could not be held since the Respondent's Counsel was telephonically informed by the representative of Hon'ble Justice Ranganath Misra at around 10 p.m on 31.08.2008 that Hon'ble Mr. Justice Ranganath Misra would not be present on 01.09.2008. The said hearing was therefore postponed to 2.09.2008 at 1.30 p.m and the Arbitrators decided to hold a brief internal meeting at 12.30 p.m on the said date. However, Hon'ble Mr. Justice Ranganath Misra did not attend the said meeting/hearing and instead vide letter dated 01.09.2008 addressed to the other two members of the Tribunal and copied to the parties herein, (which was, delivered by Justice Misra's representative to the Respondent's Counsel on 02.09.2008 at about 12:30 p.m) communicated his withdrawal as an arbitrator in the present proceedings. Therefore, no meeting of the Arbitral Tribunal could take place during the period fixed either on 01.09.2008 or on 02.09.2008 or any date thereafter.

44. In light of the aforesaid circumstances, the Respondent vide its letter dated 2nd September 2008 asked the Petitioner to appoint a substitute Arbitrator under Section 15(2) of the Act in light of the vacancy created by Justice Misra's resignation as early as possible so that the Tribunal could proceed with the final hearing of the matter.
45. Thereafter, the Petitioner vide letter dated 15.09.2008 requested the two Arbitrators, namely, Lord Slynn and Hon'ble Mr. Justice Khare, for their comments/response by the Arbitrators within two weeks, from the receipt of the said letter, it would be assumed by the Petitioner that no controversy relating to the termination of the mandate of the Arbitral Tribunal remained. The Petitioner, however, clearly stated that in case the Arbitrators felt that any controversy remains from their side about the said alleged termination, it had to be decided by a competent court of law."

13. The aforesaid narration is in accord with the procedural orders passed by the arbitral tribunal, particularly the procedural order

nos.3, 4 and 5, which are placed on record.

14. In the procedural order No.3 dated 10.1.2008, the Tribunal fixed the dates of hearing on the petitioner's application for interim measures on 3rd, 4th and 5th February, 2008. The schedule for responding to the petitioner's application for production of documents by the respondent was also fixed by the Tribunal. It was directed that the Tribunal shall hear arguments on the said aspect between 3rd, 4th and 5th February, 2008. The oral hearing on the issues arising in the case i.e. on the merits of the dispute was fixed for five days beginning 19.5.2008. However, the dates fixed for hearing were to be reviewed at the hearing of the application of the petitioner for interim measures. The schedule for filing of memorials of its arguments, written statements of parties witnesses, copies of documents were fixed. It was further directed that after the statement of both the parties were filed, the witnesses of the claimant followed by the witnesses of the respondent will be examined, whose witness statements were available and then cross-examined, and, if necessary, re-examined. The Tribunal also fixed hours of sitting from 9.30AM to 12.30PM and 2.30PM to 5.30PM on each date.

15. It is, therefore, clear that the arbitral tribunal chalked out the entire road map for conduct of arbitration and directed the parties to file their respective memorials, written statement, documents and witness statements without fixing any unnecessary hearing before it. The arbitral tribunal fixed the hearings to enable the parties to make

their submissions on interim application; for cross examination and re-examination of witnesses and for hearing the final arguments. Even the timings for each days hearing was fixed, which were full days hearing for 6 hours each day.

16. The application for interim measures moved by the petitioner was accordingly heard on 3rd, 4th and 5th February, 2008 by the Arbitral Tribunal. The Arbitral Tribunal rejected the said application by its order alongwith procedural order no.4.

17. Paragraph 7 of the said procedural order is relevant for this purpose which reads as under :-

“1 – The Claimant’s application for interim relief dated 7 December 2007 is refused on the grounds that many of the contentions relied on by the Claimant involve issues of law and facts which are contested by the Respondent, which require determination after the hearing of evidence and full argument; and as to which the Claimant has not established at this stage a sufficiently strong prima facie case; no case has been made out that these issues cannot be satisfactorily dealt with at the last mentioned hearing in May 2008; the balance of convenience is in favour of deciding the claims for relief at that hearing and not by an order for interim relief.”

18. According to the petitioner the aforesaid does not constitute reasons for the rejection of application for the interim measures. I may note that the issue before me is not as to whether the aforesaid extract constitutes good reasons for rejection of the prayer made for interim measures, since I am not hearing an appeal from the order

dated 9.4.2008. The issue that arises is as to whether the aforesaid gives rise to any justifiable doubt as to the independence of the Arbitral Tribunal or about the Tribunal acting with bias against the petitioner and in favour of the respondent. Considering the nature of the reliefs sought by the petitioners, namely, the restraint against encashment of their performance bank guarantees; the release from the obligation to renew the bank guarantees; to discontinue the black listing of the petitioner (which is disputed by the respondent who states that no black listing order was passed); to allow the petitioner to participate in tenders issued by the respondent and to consider its offers not to withhold payments under the other contracts, in any event, it cannot be said that the Arbitral Tribunal did not disclose reasons for making its procedural order no.4 while rejecting the petitioner's application for interim relief. The reliefs sought were in the nature of final reliefs, which could not have been granted at the interim stage particularly because there were disputed questions of fact and which required the leading of evidence by the parties. If the petitioner was still aggrieved, the petitioner ought to have preferred an appeal from the said order which, admittedly, was not done. The petitioner could not have adopted the circuitous manner, which has now been done, to challenge the procedural order no.4 in this petition under Section 14 of the Act.

19. Learned counsel for the petitioner has not been able to show as to how any reasonable person can infer any sense of bias from the

order of the arbitral tribunal from a reading of the aforesaid order dated 09.04.2008.

20. Similarly, the Tribunal heard and decided the petitioner's application whereby the petitioner sought production of various documents by the respondent. The tribunal directed the production of various documents subject to the claim of privilege claimed by the respondent on the grounds of national security and defence of state in public interest. Some of the documents were not directed to be produced as the respondent had denied being in possession thereof, while the other were refused as to the Tribunal they did not appear to relate to any issue in the arbitration.

21. From the procedural order no.4, it is evident that the Tribunal individually dealt the petitioners request for production of documents and gave its reasons for requiring production, or declining the request of the petitioner. The Tribunal also gave liberty to the parties to apply if difficulties arose as to compliance of orders in relation to specific documents or category of documents which the parties are not able to resolve by the agreement. It was further directed that the Tribunal, at the request of the parties or of one of them or on its own motion, may inspect the documents if it considers it necessary so to do. Similarly, the request of the respondent for production of documents was also considered and disposed of vide procedural order no.4. The date of substantive hearing was fixed beginning 22.05.2008, for five days.

22. The prayer made by the petitioner to seek separation of issues was rejected by the Tribunal in para 5 of the procedural order no.4. The Tribunal observed that it was not satisfied that to set down issues proposed by the claimant would assist in the speedier resolution of the case. On the contrary, the Tribunal considered that the determination of the proposed issues will or is likely to involve questions of fact. Moreover, it was not satisfied that the determination of those issues, even if they are only of law, can be seen confidently as being likely to avoid determination of other issues in the case.

23. From the aforesaid, it is evident that while passing order of procedural order no.4 the Tribunal gave sufficient reasons for each and every decision taken by it. It is well-settled in law that the Arbitral Tribunal is not required to write a detailed judgment like a Court. It is enough that if the Tribunal gives the brief reasons, wherefrom the mind of the Arbitrators is disclosed.

24. Once again, I fail to appreciate, how the aforesaid order conveys any sense of bias against the arbitral tribunal. Before me, it is not even urged that the aforesaid order of the tribunal is unreasonable. Even if it were so, that would not have been a ground to allege bias against the tribunal.

25. A perusal of the procedural order no.5 passed by the Arbitral Tribunal shows that even though the hearing of the issues on merits were fixed on 22.5.2008, without meeting the deadline fixed by the Tribunal for filing the memorials and the witnesses statements, the

petitioner once again moved an application on 16.5.2008 (i.e. six days before the date of hearing) to seek an interim award, inter alia, stating that if the respondent desires to file its reply, the final hearing fixed on 22.5.2008 may be postponed to an early suitable date.

26. The respondent purportedly replied to the said communication complaining that it had been denied the opportunity to reply to the said application. The respondent stated that it would need to file a detailed reply to the application which could not be done. The Tribunal accordingly adjourned the proceedings by 4 days and decided to commence the hearing on 26.5.2008. In view of the failure of the petitioner to file its memorial of arguments and statement of witnesses, the respondent also moved an application on 23.5.2008 to seek an order that the petitioner's right to lead evidence should be closed and that the statement of claim of the petitioner should be dismissed or, alternatively, the Tribunal should proceed to make the arbitral award on the evidence of the respondent that it may lead.

27. The Tribunal has set out the reasons contained in the petitioner's application to seek an interim award in paragraph 6 of its procedural order no.5. It appears that the reason given by the petitioner to seek an interim award was that the procedural order no.4 was *void ab initio* in that it violated natural justice by not giving reasons for the decision made in the order passed in respect of the application for separation of issues; the application for interim relief,

and; parties notices of disclosure. The Tribunal rejected these submissions of the petitioner by recording the following reasons :-

“7 - It is clear that, in the giving of judicial, quasi judicial decisions and administrative decisions, the law leans in favour of requiring reason to be given. But even for judicial tribunal it is no less clear that not every issue must necessarily be dealt with in detail for the test to be satisfied.

What is required is that reasons should be given which are sufficiently clear and explicit so that the parties know what has been decided against them and why, and that courts asked to review judicially those decisions have sufficient to know whether the law has been observed.

8 – In the course of this current application we have been referred to many authorities and to even more extended arguments than on the application for Interim relief. The Tribunal, having considered all these arguments and authorities, unanimously rejects the contention that it has failed to give adequate reasons or violated the rules of natural justice or that its decision was void. In considering this contention the nature of the proceedings is relevant. These were applications for interim orders, either “relief” in the first or “an award” in the second. At the time of the hearing of the first application the final hearing, other than quantum, had been fixed in January 2008 for May 2008 so that a long delay in determining the final order was not involved. The second application for an interim award was made only 6 days before the date fixed for the final hearing, other than quantum.

9 - The Tribunal was and is satisfied that questions of fact as well as law have to be decided in this case, that it is not possible to decide general questions of law separate from the facts and the context. Even if questions of pure law arise, it was not clear that they could or should be decided quite separately from other issues in the case and the context. To

decide fact-based or fact-related at this stage can moreover be prejudicial to the final hearing if decided against the applicant for an interim order.

10 - The Tribunal holds that the reasons given on the first application were clear sufficient and self standing. The first ground is dismissed without prejudice to the determination of relevant questions at the final hearing.

11 - The second ground relied on by the claimant for attacking the Tribunal's first interim decision is that it is plain that the respondent blacklisted the claimant unlawfully and contrary to the rules of natural justice – in particular audi alteram partem. The claimant contends that this is so clear as a matter of law that the Tribunal should have made an immediate order in respect of the alleged blacklisting by the respondent. The Tribunal has no doubt that this issue on the law and the facts should be investigated at the final hearing on liability and not at this interim stage. It is an essential part of the main case to be decided in the context of the whole case.

12 – Thirdly the claimant renewed its argument that alleged breaches of clauses 15 and 17 of Contracts no.20 and 27 cannot for a number of reasons constitute breaches of contract no.10 and conversely. The respondent's claims of an alleged breach of clauses 15.1 and 17.1 of Contracts No.20 and 27 are "void ab initio" and therefore of no effect.

13 – The Tribunal considers that these matters fall to be investigated at the final hearing (other than quantum) and that it is not appropriate to separate them and deal with them individually now. Whether they are in fact and law individually to be decided in favour of the claimant, as it contends, or the respondent as it contends and what is the overall effects are matters to be decided at the principal hearing. But for these renewed applications (for an interim award rather than a preliminary decision) largely going over matters already considered and ruled on, some or all of these matters might already have

been fully argued.

14 - The claimant's application for an interim award is refused unanimously."

28. It appears that the petitioner had contended that it did not lead any evidence and does not, or may not, wish to call any evidence. Reference may be made to reference no.15 of the procedural order no.5 in this regard. It was in this light of the matter that in paragraph 16 the Tribunal observed as follows :-

"16 - The respondent may be justified in contending that the claimants by their conduct in failing to observe the Tribunal's order in relation to documents and witnesses and in their attitude to be calling of evidence would justify such an order as is sought. The Tribunal decides however that in all the circumstances the proceedings shall continue to be hearing but that the claimant shall not be entitled to call any evidence of which a statement has not been provided, or to refer to any document which has not been produced, to the respondent's solicitors and to the Tribunal by 7 August, 2008."

29. The Tribunal fixed the final date of hearing as on 10.9.2008. The Tribunal also recorded the view of the Mr. Justice R.N. Mishra that the issue with regard to the blacklisting of the petitioner; the making of an interim award as requested by the petitioner, and; breach of the agreement should be decided as preliminary issues.

30. From the aforesaid it is evident that:

(i) The Tribunal from the beginning acted in a thoroughly professional manner, inasmuch, as, it fixed a

detailed time schedule for each stage of the proceedings from start to finish;

The hearings were fixed for six hours on the dates of hearing to maintain efficient and cost effective hearings.

(ii) It is the petitioner who repeatedly and at crucial moments i.e. just before the arrival of the dates of hearing fixed by the tribunal, moved one application after another, firstly under section 17 of the Act; secondly for separation of issues; and thirdly, to seek an interim award even after the dismissal of the application under section 17 praying for the same reliefs. Pertinently, the grounds for rejection of the application under Section 17 of the Act were that the grant of the said reliefs require leading of evidence; that the petitioner had failed to make out a strong prima facie case for grant of such relief, and; the interim measures sought were in the nature of a final relief. These very grounds would obviously have been relevant to deny an interim award. A party who has been denied interim measures on certain grounds would be foolhardy to approach the tribunal to seek a final relief of the same nature without even leading any evidence.

(iii) The petitioner failed to adhere to timelines set by the tribunal, as it failed to file its memorials and witness

statements. It even failed to provide copies of documents as directed by the tribunal to the respondent.

31. The orders passed by the Arbitral Tribunal, particularly orders nos.4 and 5 with which the petitioner seems to be aggrieved, were passed in the ordinary course and there is absolutely nothing in these orders to suggest that the Tribunal acted with any kind of bias against the petitioner. It is not enough for the petitioner to merely contend that the Tribunal acted with bias because the tribunal did not pass interim measures and orders in favour of the petitioner either at the time of consideration of the application under section 17 of the Act, or when the petitioner sought production of various documents of the respondent, or at the time when the petitioner sought separation of issues, or even the tribunal considered the application for passing of an interim award. It should have been demonstrated by the petitioner from the conduct of the Tribunal that the learned Arbitrators, or any of them conducted themselves/himself in a manner which demonstrated lack of good faith or partial treatment against the petitioner.

32. The Supreme Court in ***International Airport Authority of India v. K.D. Bali***, (1988) 2 SCC 360 has considered as to what would constitute a reasonable apprehension of bias against an arbitrator. The Supreme Court, in its decision at paras 5 and 6, observed as follows:-

"5. It is well settled that there must be purity in the administration of justice as well as in administration of quasi-justice as are involved in the

adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; arbitrator must not do anything which is not in itself fair and impartial. See Russell on Arbitration, 18th Edition page 378 and observations of Justice Boyd in Re Brien and Brien [1910] 2 I.R. 83. Lord O'Brien in The King (De Vesci) v. The Justices of Queen's Country [1908] 2 I.R. 285, observed as follows:

By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that their vague suspicions of whimsical capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds was reasonably generated and but certainly mere flimsy grounds elusively generated and morbid suspicions should not be permitted to form a ground of decision. (Emphasis supplied)

See The Queen v. Rand and Ors. [1866] 1 Q.B. 230; Ramnath v. Collector, Darbhanga I.L.R. 34 Pat. 254; The Queen v. Meyer and Ors. [1875] 1 Q.B. 173 and Eckersley and Ors. v. The Mersey Docks and Harbour Board [1894] 2 Q.B. 667."

"6. In the words of Lord O'Brien, L.C.J, there must be a real likelihood of bias. It is well settled that there must be a real likelihood of bias and not mere suspicion of bias before proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by interest. See in this connection Gullapalli Nageswara Rao vs. State of Andhra Pradesh and Mineral Development Ltd. vs. State of Bihar. Recently this Court in a slightly different context in Ranjit Thakur vs. Union of India had occasion to consider the test of bias of Judge. But there must be reasonableness of the apprehension of bias in the mind of the party. The purity of administration requires that the party to the

proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. While on this point we reiterate that learned counsel appearing for the petitioner in his submissions made a strong plea that his client was hurt and had apprehension because the arbitrator being the appointee of his client was not acceding to the request of his client which the petitioner considered to be reasonable. We have heard this submission with certain amount of discomfiture because it cannot be and we hope it should never be (that) in a judicial or quasi-judicial proceeding a party who is a party to the appointment could seek the removal of an appointed authority or an arbitrator on the ground that the appointee being his nominee had not acceded to his prayer about conduct of the proceedings. It will be a sad day in the administration of justice if such be the state of law. Fortunately, it is not so. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision. It is the reasonableness and apprehension of an average honest man that must be taken note of. In the aforesaid light, if the alleged grounds of apprehension of bias are examined, we find no substance in them. It may be mentioned that the arbitrator was appointed by the Chief Engineer of the petitioner, who is in the service of the petitioner”.

33. The reasons given by the Tribunal for passing these aforesaid orders have been clearly set out and it cannot be said that those reasons are absurd. In a given case even if the reasons are not found to be good enough to justify the passing of an order that, by itself, in any event cannot be a reason to allege bias against the Tribunal. It is evident that it is the petitioner who is responsible for the delay in the proceedings before the Tribunal and also for wasteful hearings taking

place. Once the application for interim measures had been dismissed, there could be no justification for the petitioner to again seek more or less the same relief by way of an interim award even without leading any evidence in the matter. If the petitioner was serious about pursuing the said application, the same should have moved much earlier and there was no justification for moving the same just about 6 days before the date fixed for hearing by the Tribunal.

34. The allegation of the petitioner that the Tribunal has in the course of its sitting had only considered the application for interim relief, the application for production of documents, the application for separation of issues and the application interim award and that the tribunal had not proceeded with the main matter is like the pot calling the kettle black. The allegation is not justified for the reason that the petitioner itself failed to lead its evidence or file its memorial or produce the document required of it. The petitioner scuttled the hearings fixed by the tribunal repeatedly by moving one application after another just when the dates of hearings were to arrive before the tribunal.

35. It is obvious that the endeavour of the petitioner was merely to delay the hearings and blackmail and browbeat the Tribunal by making allegation of bias against the tribunal, merely because the petitioner failed to secure any interim order in its favour.

36. The decisions relied upon by the petitioner are of no avail. The decision in ***Alcove Industries Limited*** (supra) has been stayed

by the Division Bench in an appeal preferred from the said decision being FAO No.128/2008. In any event, I have considered the submissions of the petitioner on merits and this petition has not been dismissed by holding that the same is not maintainable. For the same reason, the decision in ***Subhash Projects & Marketing Ltd.*** (supra) is also of no avail to the petitioner. The decision in ***Saurabh Prakash*** (supra) appears to be wholly irrelevant.

37. For all the aforesaid reasons, I dismiss this petition with costs quantified at Rs.5 lakhs to be paid to the respondents.

38. It is hoped that the parties will sincerely proceed to conclude the arbitral proceedings at the earliest and steps shall be taken to constitute the arbitral tribunal by filling the vacancy created by the demise of Hon'ble Lord G. Slyn without any further delay.

VIPIN SANGHI, J.

SEPTEMBER 27, 2010

as/ns