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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.10.2013

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OMP 234/2013

NSSL LIMITED

.....PETITIONER

Vs

HPCL-MITTAL ENERGY LIMITED & ANR.

....RESPONDENTS

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioner: Mr. Sandeep Sharma, Mr. Girish Chandra and Mr.
Vatsal Kumar, Advocates

For the Respondents: Mr. Kartik Nayar, Advocate

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This is a petition filed under Sections 14 and 15 read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the Act). The relief sought in the petition is directed towards respondent no.2, who is the arbitrator appointed by respondent no.1 vis-à-vis disputes raised by the petitioner. The petitioner seeks termination of the mandate of respondent no.2 and appointment of an independent arbitrator to adjudicate upon the disputes between the parties herein.

2. It must be said at the very outset that the petitioner has raised several grounds in the petition. The grounds raised can, however, be segregated into two broad categories. The first category comprises of grounds which pertain to the alleged bias and the purported ineptness of respondent no.2 in

conducting the proceedings; perhaps because of the fact that he is not a person with a background in law. The second category pertains to the manner of appointment of respondent no.2. In respect of this category, challenge is confined to, the appointment of respondent no.2 not being made by the designated appointing authority, as defined in the contract obtaining between the parties.

2.1 In so far as the grounds, which fall in the first category, are concerned, which are numbered as (i) to (v) in the petition, these are not pressed by Mr. Sandeep Sharma, advocate, who represents the petitioner. This stand has been taken by Mr. Sharma for good reason. Firstly, on account of the fact that the petitioner had moved a petition under Section 14(2) of the Act before this court, which was disposed of, vide order dated 21.08.2012. Broadly, this court had directed respondent no.2 to set out his reasons for rejecting the petitioner's application filed under Section 13(2) of the Act, with a caveat that, the petitioner, would not be permitted to challenge the order of respondent no.2 ***“..at any stage earlier than a challenge to the Award itself under Section 34 of the Act..”*** Secondly for the reason that a Division Bench of this court in the case of ***Progressive Career Academy Private Limited vs. FIIT JEE Limited 180 (2011) DLT 714*** has clearly opined that a challenge to the proceedings before an arbitrator based on impartiality or independence is permissible only by adopting the means provided under the Act, which is, by filing objections qua the said aspect after the award is published.

3. Therefore, the only ground which I am called upon to deal with is, the ground raised, with regard to, the alleged defect in the appointment of respondent no.2. In order to deal with this issue, the broad facts, which are necessary, for the said purpose, are referred to hereinafter :-

3.1 The petitioner was awarded a contract for supply of valves in respect of respondent no.1's refinery project located at Bathinda, Punjab. The petitioner was, accordingly, issued letters of intent and a letter of award as also two purchase orders dated 14.07.2009 and 04.08.2009. In respect of purchase order dated 14.07.2009, the petitioner was required to deliver the valves in issue by 14.12.2009, while in respect of purchase order dated 04.08.2009, the delivery period expired on 19.02.2010.

3.2 Admittedly, there was delay in supplying the valves in issue under the aforementioned purchase orders. It is the petitioner's say that respondent no.1 accepted the supplies even eight months after the scheduled date.

3.3 According to the petitioner, respondent no.1 withheld payments against invoices raised. The contract with the petitioner, which was subject matter of the two purchase orders, was terminated by respondent no.1 on 19.10.2010.

3.4 Pursuant to termination of the contract, respondent no.1 took recourse to the arbitration agreement obtaining between the parties, vide communication dated 24.11.2011, which is contained in clause 37 of the General Purchase Conditions (GPC), applicable to the contract in issue. Pertinently, respondent no.1 apart from referring to purchase orders dated 14.07.2009 and 04.08.2009 also referred to two other purchase orders dated 15.09.2008 and 06.11.2008. The said communication of respondent no.1 adverted to clause 37.2 of the GPC and stated pertinently as follows in paragraph 12 of the said communication :-

“..That the Arbitration clause no.37.2 of the GPC of the subject purchase orders provides that the Appointing authority shall either himself act as Sole Arbitrator or nominate some officer of GGSRL (now HMEL) or that of HPCL to act as Sole Arbitrator.

The Appointing Authority is the concerned Functional Director of HPCL or Managing Director of GGSRL (now HMEL)...”.

3.5 It is important to note that, this communication, was addressed by the General Manager (Procurement) of respondent no.1 to the Managing Director and Chief Executive Officer (CEO) of respondent no.1.

3.6 In view of the aforesaid, the Managing Director and CEO of respondent no.1 vide communication dated 01.12.2011, appointed respondent no.2 as the sole arbitrator in the matter.

3.7 Consequent thereto, respondent no.2 vide communication dated 21.12.2011, directed the parties to appear before him on 29.02.2012 at 1500 hrs, at the place indicated in the said communication alongwith their pleadings, in respect of, their respective stands in the matter. Immediately, thereafter, the petitioner vide communication dated 22.12.2011 sought to challenge respondent no.2's appointment under Section 13(2) of the Act. The four broad grounds raised were as follows :-

“..(i). Contract was executed / signed by employee of HMEL; (ii). Recommendation letter dated 24.11.2011 has been sent by employee of HMEL; (iii). Appointing Authority is the employee / CEO of HMEL and (iv). Proposed Sole Arbitrator is the employee of HMEL..”

3.8 These grounds, as indicated in the said communication, were based on provisions of Section 12 (3)(a) of the Act. The said communication, which was really in the nature of an application, was rejected by respondent no.2, on 25.09.2012, after this court had directed him to give reasons vide order dated 21.08.2012 passed in OMP 587/2012.

3.9 Thereafter, several proceedings were held before the arbitrator, in respect of which, the petitioner has, made grievance of bias and purported ineptness displayed by respondent no.2, in conducting the proceedings;

known. As indicated, at the very outset, this is an aspect, which I do not propose to deal with. The petitioner, it appears, after having filed several applications qua various aspects decided to file the present petition. The present petition was moved before the court, on 08.03.2013, when notice was issued. Since then, respondent no.1 has filed its reply to the petition.

4. Mr. Sharma, on behalf of the petitioner, has made the following brief submissions :

4.1 That clause 37.2 of GPC requires the appointing authority to either act on its own as the sole arbitrator or, nominate some officer of Guru Govind Singh Refineries Limited (in short GGSRL) or that of Hindustan Petroleum Corporation Ltd. (in short HPCL) to act as sole arbitrator, in respect of disputes and differences arising between the parties. The appointing authority, as defined in clause 37.11 of the GPC is the Functional Director of HPCL or the Managing Director of GGSRL. Therefore, having regard to the said provisions the appointment order dated 01.12.2011 issued by the Managing Director and CEO of respondent no.1 is flawed, and thus, the mandate of respondent no.2 requires to be terminated by this court. It is, Mr. Sharma's contention that the appointment order was issued by a person, who is neither the Functional Director of HPCL nor the Managing Director of GGSRL.

4.2 Mr. Sharma contended that, having regard to the aforesaid provisions of the agreement obtaining between the parties, the petitioner could approach this court under Section 14(1)(a) of the Act to seek the termination of respondent no.2's mandate under sub-Section(2) of the very same Section.

4.3 In support of his submission, Mr. Sharma relied upon the following order(s) / judgments :-

Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL), (2012) 6 SCC 384; Mukesh Malhotra, Prop. Of M/s. Shivshakti Electric Works, decided on 11.09.2013 in Arb. P. 329/2010; and Indian Oil Corporation Limited and Ors. Vs. Raja Transport Private Limited (2009) 8 SCC 520.

4.4 Mr. Kartik Nayar, who appeared for respondent no.1, submitted that the present petition under Sections 14 and 15 read with Section 11(6) of the Act was not maintainable for the reason that no objection of the nature raised in the petition, has ever been raised, before respondent no.2 i.e., the arbitrator. Mr. Nayar also contended that, the petitioner, had made a similar attempt earlier to derail the arbitration proceedings, which was repelled by this court vide order dated 21.08.2012. Mr. Nayar, further contended that the petitioner, in the midst of an ongoing arbitration proceedings could not take recourse to the provisions of Section 11 of the Act for appointment of a substitute arbitrator in place of respondent no.2. In support of his submission, Mr. Nayar relied upon a judgment of a single Judge of this court in the case of ***Maharaji Educational Trust & Anr. Vs. M/s. S.G.S. Constructions & Developers Pvt. Ltd. 2012 (95) Arb. LR 361 (Delhi)*** and also the judgment of the Supreme Court in the case of ***Antrix Corp. Ltd. Vs. Devas Multimedia P. Ltd. 2013 (2) Arb. LR 226 (SC)***.

5. Before I proceed further, I had put to Mr. Nayar, as to whether, GGSRL was in existence as the communication dated 21.12.2011 issued by respondent no.2 to the parties herein indicated that he had been appointed by the Managing Director and CEO of GGSRL, which is now known as respondent no.1. Mr. Nayar's answer was vague to say the least, perhaps for the reason that this aspect has not been dealt with in the reply filed on behalf

of respondent no.1. It was, however, Mr. Sharma's assertion that GGSRL was in existence and contrary to the impression given in the communication dated 21.12.2011, had not merged in or, was not subsumed by respondent no.1.

6. Having heard the learned counsels for the parties, according to me, what emerges from the record is that an officer of respondent no.1 invoked the arbitration agreement obtaining between the parties vide communication dated 24.11.2011. That communication was addressed to the Managing Director and CEO of respondent no.1. Respondent no.2, on his part, accepted the appointment though in his letter of 21.12.2011, wherein he claimed that, he was appointed by the Managing Director and CEO of GGSRL, which was, now known as respondent no.1. Pertinently, though, respondent no.2's communication dated 21.12.2011 adverted to the appointment order dated 01.12.2011, which was issued by respondent no.1.

6.1. In this factual context, one has to examine as to whether, at this stage, this court should intervene in the matter, and as prayed, by the petitioner, terminate the mandate of respondent no.2. Undoubtedly, sub-Section (2) of Section 14 of the Act gives the aggrieved party an option to apply to the court for termination of the arbitrator's mandate if, the eventualities mentioned in Section 14(1)(a) arise. The eventualities, in which, an Arbitrator's mandate can be terminated under Section 14(1)(a) of the Act are: when he, either de jure or de facto is unable to perform his functions or, for other reasons, fails to act with expedition, that is, delays proceedings, unduly. Section 14 does not include other eventualities which relate to justifiable doubts as regards his independence or impartiality or even with regard to the absence of qualifications as agreed to between the parties. These are grounds of challenge provided in Section 12 of the Act. The stage

for the court to intervene in the matter, however, arises only “*if a controversy remains concerning the grounds referred to in clause (a) of sub-Section (1) of Section 14 of the Act.*”

6.2 The petitioner, in this case, does not appear to have raised the issue of respondent no.2’s appointment in the context of clause 37.2 read with clause 37.11 of the GPC before respondent no.2. This aspect was squarely put to Mr. Sharma, by me. Mr. Sharma, in response, referred to his application made to the learned arbitrator at the stage when proceedings under Section 13(2) of the Act were pending before him. According to me, that stage culminated with the rejection of the application by respondent no.2 vide order dated 25.09.2012 pursuant to this court’s order dated 21.08.2012.

6.3 Therefore, the petitioner in my view, has to raise the said objection before respondent no.2, who then may rule, on his jurisdiction, which in this case is relatable to his appointment under Section 16 of the Act.

6.4 In this particular case, recourse to aforementioned route will have to be taken as the entire case of the petitioner is pivoted on the legal status of GGSRL. This is an aspect, which the arbitrator will have to delve into if an objection is raised qua the mode and manner of his appointment. This is also the view taken by the single Judge of this court in the case of ***Maharaji Educational Trust and Anr.*** The relevant observations are contained in paragraphs 16 and 18 of the said judgment, which are extracted hereinafter for the sake of convenience :-

“..16. This court is not inclined to entertain the above pleas for more than one reason. Section 16 of the Act permits a party to challenge the jurisdiction of the Arbitral Tribunal by filing an application before such Tribunal. The words “may rule on its own jurisdiction” occurring in Section 16(1) of the Act are followed by the word “including”. Therefore, the grounds that can be urged

before the Arbitral Tribunal to challenge its jurisdiction is not limited to those set out in Section 16(1)(a) and (b). It could include the ground set out in Section 14(1)(a) as well.

18. Therefore, the Court would be slow to entertain a plea under Section 14 (1)(a) if the aggrieved party has invoked the provision of Section 16 of the Act already. The better course in such instance is to await the decision of the Arbitral Tribunal and abide by the mandate of the statute. If, as in the present case, the Tribunal has not decided the application, then it can be persuaded to expedite its decision thereon.....”

7. Therefore, Mr. Sharma’s reliance on the order in *Mukesh Malhotra’s* case is misplaced as that matter dealt with a case where appointment was sought under Section 11(6) of the Act in view of the abolition of post of the CEO of the respondent company, who was mandated with the power to appoint an arbitrator. It was not a case where an arbitrator had been appointed, whose mandate was sought to be terminated. The said judgment is clearly distinguishable.

8. The judgment of the Supreme court in the case of *Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL)*, and *Indian Oil Corporation Limited and Ors. Vs. Raja Transport Private Limited* are also distinguishable as the said judgments also relate to the provisions of Sections 11 and 12, and not with, Section 14 of the Act.

9. Therefore, for the foregoing reasons, I find no merit in the petition. It is accordingly dismissed leaving the parties to bear their own costs.

RAJIV SHAKDHER, J

OCTOBER 10, 2013

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