

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

% *Judgment Reserved on: 13th May, 2013*
Judgment Pronounced on: 31st May, 2013

+ **O.M.P. No.1098/2012**

ISHVAKOO (INDIA) PVT LTD Petitioner
Through Mr.Maninder Singh, Sr.Adv. with
Ms.Lakshmi Gurung, Adv.

versus

NATIONAL PROJECTS CONSTRUCTION CORPORATION LTD
..... Respondent
Through Mr.Santosh Kumar, Adv. with
Mr.Madhurendra Sharma, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The abovementioned petition has been filed by the petitioner under Section 14 of the Arbitration and Conciliation Act, 1996 (in short, called the "Act") seeking directions to terminate the mandate of the sole Arbitrator.
2. The petitioner is a private company, whose registered office is in New Delhi. The Board has authorized the CMD, Mr.Kamal Radhu to represent the Company. The respondent is a public sector company, also having its registered office in New Delhi. The present petition is with regards the termination of the mandate of Mr.K.K.Gupta, the Chief Manager (HR) of National Projects Construction Corporation Ltd. (for short NPCC). This was because he had failed to enter upon reference and so resigned from the post. This was also communicated by him to the parties who had later on

terminated mandate as Arbitrator and after giving the present petition Mr.S.C.Garg was appointed in place of Mr.K.K.Gupta on 21st November, 2012 by Chairman and M.D. of the respondent.

3. A MoU between the parties, with regard to the construction of a bus terminus in Agra, contained an arbitration clause for the resolution of future disputes. Pursuant to the MoU, the petitioner was awarded the contract for the construction of a bus terminus, by a Letter of Intent, dated 14th November, 2002. As per this clause, the CMD of NPCC is to appoint the arbitrator, once mutual settlement of the dispute failed/was not possible.

4. The present dispute concerns the non-payment of arrears against the respondent to the petitioner. In order to settle this particular dispute, the petitioner invoked the arbitration clause present in the MoU and requested the respondent to appoint an Arbitrator (preferably a retired Judge of the Supreme Court or High Court).

5. In the meantime, various petitions were filed before the Supreme Court and the Allahabad High Court against the respondent contending that the work undertaken in Agra was affecting the fragile environment of the area. The respondent had also filed an application to amend the suit in order to include the petitioner. The petitioner submits that this proceeding is irrelevant to the issue at hand. He further contends that these orders have nothing in common with the dispute concerning the outstanding amount.

6. In response, the CMD appointed an arbitrator, Mr.A.K.Jethi, a sole Arbitrator. On 11th September, 2006, the respondent requested the arbitrator for a sine die adjournment of the proceedings, because, the same matter is being adjudicated upon by the Supreme Court. The arbitrator granted this request of staying the proceedings for six months. The petitioner again

submits that the cases pending before the Supreme Court and the Allahabad High Court have no relation to the case at hand. However, the arbitrator agreed to stay the proceedings until an order from these proceedings was obtained.

7. Seven years since the request for arbitration, the arbitrator terminated his mandate on the ground that the proceedings have been in abeyance for a long time and have become unnecessary or impossible. In spite of informing the arbitrator that the matters before the court were different from the one at hand, the arbitrator terminated the proceedings.

8. The CMD of NPCC, therefore, appointed a fresh arbitrator, Mr.K.K.Gupta vide letter dated 29th April, 2011. He has also failed to act as 18 months have passed since his appointment. Therefore, the petitioner has asked the CMD, vide letter dated 6th November, 2012 to appoint a fresh Arbitrator within 7 days. The arbitrator informed the parties on 16th November, 2012 that, due to a heavy workload, he could not continue as an arbitrator and resigned from the post.

9. The present application is a request to terminate the mandate of the previous arbitrator and to request the court to appoint a suitable one. The petitioner requests this Court to terminate the mandate of the previous Arbitrator upon his withdrawal, and to appoint another one, in the interests of fairness and equity. Further, he argues that, since a new arbitrator was not appointed by the respondent within 7 days (as per its prior communication dated 6th November, 2012), the court is the right authority to appoint the same. As mentioned, after filing the present petition, respondent appointed Mr.S.C.Garg, in place of Mr.K.K.Gupta whose mandate had terminated as per Section 15 of the Arbitration and Conciliation Act, 1996.

Case of the Respondent

10. The respondent first contends that the person with the authority to appoint an arbitrator is the CMD of NPCC, as has been previously agreed upon by the parties. It further alleges that a substitute arbitrator, Mr.S.C.Garg has been appointed by the CMD vide letter dated 21st November, 2012.

11. He further relies upon Section 15(2) of the Act, arguing that the rules applicable for the appointment of the replaced arbitrator are to apply for the substitution of the Arbitrator as well. Therefore, the argument is that since a substitute Arbitrator has already been appointed, the petition is untenable.

12. The respondent further reiterated its stance, saying that, the matters under adjudication by the Supreme Court are indeed vital for the Arbitrator, as it is a 'back to back contract'.

13. Learned counsel for the respondent has also relied upon the following judgments in support of his submissions:-

- (i) M/s. Yashwith Constructions (P) Ltd. vs. M/s. Simplex Concrete Piles India Ltd., AIR 2006 SC 2798.
- (ii) National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and others, 2006(10) SCC 763.
- (iii) NBCC Limited vs. J.G. Engineering Private Limited, (2010) 2 SCC 385.
- (iv) S.B.P. and Company vs. Patel Engineering Limited and Another, (2009) 10 SCC 293.
- (v) Indian Oil Corporation Ltd. and Others vs. Raja Transport Private Limited, (2009) 8 SCC 520.

14. In its rejoinder, the petitioner alleges that the respondent has malafidely appointed a third arbitrator, immediately after serving the petition under Section 14 filed by the petitioner. He continues to allege that this was done with an intention to deny relief to the petitioner. Further, He

argues that since the arbitrator was not appointed within one week, as specified by the petitioner in its communication, it had a right to request this Court for relief.

15. It is an undisputed fact between the parties that on 10th September, 2004, the CMD, NPCC appointed Mr.A.K.Jethi, DGM, NPCC to act as sole Arbitrator. By order dated 15th December, 2004, the Arbitrator directed the parties to file the original arbitration agreement. By communication dated 20th January, 2005, the Arbitrator directed the respondent to file within one month certified copy of the complete document between them. The respondent by its letter dated 15th February, 2005 intimated to the Arbitrator as under:-

“3. With reference to Para 4 of your aforesaid communication, it is submitted that no document displaying the rates, conditions and other parameters etc. was executed between NPCC and the client. However, NPCC has submitted the detailed project report consisting of following parts to the client for their approval and no communication has been received from them in this respect:- the detailed agreement for execution of works was not executed between the parties.

- a) Estimates and Costs.
- b) Detailed Technical Project Report
- c) Preservation of Environment
- d) Preservation of Ecology and Heritage.”

16. On receipt of the said communication from the respondent, on 22nd February, 2005 the Arbitrator directed the petitioner to submit its categorical and explicit reply, if any, within three weeks from the date of the order. The petitioner submitted the reply on 2nd March, 2005. By order dated 9th March, 2005, the Arbitrator directed the petitioner to file the specific reply which was filed on 29th March, 2005.

17. The respondent by its application dated 11th September, 2006 requested the Arbitrator for *sine-die* adjournment of the arbitration proceedings, pointing out that the matter is subjudice before the Supreme Court as well as the Allahabad High Court, Lucknow Bench. The petitioner filed its reply dated 25th November, 2006 in which it is stated that there is no provision in the Arbitration Act which provides for stay of the arbitration proceedings of the Arbitral Tribunal. The Arbitrator while considering the reply refused the prayer for *sine-die* adjournment of the arbitration proceedings but kept the proceedings in abeyance for six months vide order dated 19th September, 2007.

18. The petitioner submits that the proceedings before the Supreme Court of India are, in no way, related to the present disputes between the petitioner and the respondent. Similarly, the proceedings before the Allahabad High Court, Lucknow Bench do not deal with the issue of entitlement of payment to the petitioner. Thus, the dispute between the petitioner and the respondent about the entitlement of petitioner's payment is nowhere subjudice before any Court.

19. After the expiry of six months period, the respondent again asked the Arbitrator to keep the arbitration proceedings in abeyance vide letter dated 19th March, 2008. Despite of the awareness that no other documents of the parties are required to be filed, still the Arbitrator once again directed the parties to file fresh submissions along with the status within one month. The respondent despite of the same again requested the sole Arbitrator to keep the arbitration proceedings in abeyance till further orders of the Allahabad High Court, Lucknow Bench by letter dated 17th April, 2008. The Arbitrator passed the order dated 9th June, 2008 keeping the arbitration proceedings in abeyance till such time orders are passed by the Allahabad High Court,

Lucknow Bench, and/or by the Special Judge, CBI Court. Another communication was issued by the respondent to the Arbitrator on 21st May, 2009 requesting the Arbitrator to stand over the arbitration matter for some more time, in view of the pending consideration of the matter before the Supreme Court as well as Allahabad High Court, Lucknow Bench.

20. On 10th January, 2011 after the expiry of more than one year and 8 months, the Arbitrator issued a notice indicating his intention to terminate the arbitral proceedings on the ground that the matter is under adjudication for a period of more than 7 years since July, 2003 and there is no point/sense in keeping the chapter of arbitration alive indefinitely, therefore, the arbitral proceedings have become unnecessary and impossible under Section 32(2)(c) of the Act. The petitioner by letter dated 27th January, 2011 requested the Arbitrator not to terminate the proceedings. Another letter dated 15th February, 2011 was written by the petitioner to the Arbitrator explaining that the matter pending before the Allahabad High Court, Lucknow Bench is completely different from the matter pending before the Arbitrator, therefore, a request was made to him not to terminate the arbitration proceedings. The Arbitrator passed the order dated 28th February, 2011 directing the respondent to file the reply to the application filed by the petitioner, within three weeks. In the reply, it was requested by the respondent also not to terminate the arbitration proceedings. However, despite of the requests made by the parties, the Arbitrator terminated the proceedings vide communication dated 1st April, 2011.

21. Thereafter, the CMD, NPCC appointed another Arbitrator Mr.K.K.Gupta, Chief Manager (HR), NPCC by communication dated 29th April, 2011 to act as a sole Arbitrator. Mr.K.K.Gupta, admittedly, has not even entered reference for more than 18 months already elapsed from

the date of his appointment. Under these circumstances, the petitioner was left with no other option but to file the present petition for appointment of an independent Arbitrator, as the earlier two sole Arbitrators appointed by the respondent have failed to act and according to the petitioner, the situation in the present case has become necessary by this Court to exercise his power under Section 14(1)(a) of the Act.

22. Prior to filing of the present petition, the letter dated 6th November, 2012 was issued by the petitioner requesting the Chairman & Managing Director of the respondent to appoint within 7 days another Arbitrator to adjudicate upon the disputes. Said letter was delivered to the respondent on 9th November, 2012. Similarly, the petitioner also wrote to the Arbitrator, Mr.K.K.Gupta informing about the termination of the mandate as he failed to act as Arbitrator within reasonable time and without any reason, which delivered to him on 9th November, 2012. Mr.K.K.Gupta, sole Arbitrator admitted the fact that he could not enter reference into the matter in respect to adjudicate the disputes between the parties because of pre-occupation with pressing official duties and important assignments with him. Therefore, he resigned from the post of Arbitrator under the provisions of Section 15 of the Act.

23. It is the admitted position that after receiving the notice of this petition, the respondent appointed Mr.S.C.Garg, another Arbitrator in place of Mr.K.K.Gupta whose mandate had terminated as per Section 15 of the Act.

24. In the present case, it is undisputed fact between the parties that the Arbitral proceedings were commenced in the year 2004. The said proceedings have not been concluded for the last more than eight years. Three arbitrators have been appointed by the respondent in terms of

Arbitration Clause. There has not been any much progress in the arbitral proceedings. In case the entire proceedings recorded by the Arbitrators are read, it is evident that the respondent, time and again, requested the Arbitrator to adjourn the proceedings *sine-die* in view of litigation pending between the parties in the Supreme Court and the Allahabad High Court, Lucknow Bench. The petitioner, on the other hand, was trying to demonstrate before the Arbitrator that those proceedings are in respect to the due payment recoverable by the petitioner and there was no order for stay by any Court. However, it appears that despite of above, the proceedings were adjourned for one reason or the other. Even, in one of the orders, the Arbitrator has rightly recorded that the respondent had been taking the dates. After having gone through the record, this Court is of the view that it would be futile exercise that despite of that another chance is given to respondent. The respondent has forfeited his right to appoint an Arbitrator in terms of the Arbitration Clause.

25. In the case of ***Union of India Vs. Singh Builders Syndicate***, reported in (2009) 4 Supreme Court Cases 523, the Hon'ble Supreme Court has held as under:-

“11. The question that arises for consideration in this appeal by special leave is whether the appointment of a the retired Judge of the High Court as sole Arbitrator should be set aside and an Arbitral Tribunal should again be constituted in the manner provided in terms of clause 64.

12. Dealing with a matter arising from the old Act (Arbitration Act, 1940), this Court, in *Union of India v. M.P.Gupta* [2004 (10) SCC 504], held that appointment of a retired Judge as sole Arbitrator contrary to clause 64 (which requiring serving Gazetted Railway Officers being appointed) was impermissible.

13. The position after the new Act came into force, is different, as explained by this Court in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.* [2008 (11) SCALE 500]. This Court held that the appointment of arbitrator/s named in the arbitration agreement is not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered and/or given effect, as closely as possible.

14. It was further held in *Northern Railway* case, (2008) 10 SCC 240 that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of sub-section (8) of section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the Arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the Arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.

15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such Tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the Arbitration Agreement, the Chief Justice or his designate, required to exercise power

under section 11 of the Act, can step in and pass appropriate orders.

16. We fail to understand why the General Manager of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as Arbitrators and that the Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

17. Constituting Arbitral Tribunals with serving officers from different far-away places should be avoided. There can be no hard-and-fast rule, but there should be a conscious effort to ensure that Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.

18. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of clause 64, there may be a need to change even the other two members of the Tribunal.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole Arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India.”

26. Therefore, this Court terminates the mandate of Mr.S.C.Garg as an

Arbitrator appointed by the Chairman and Managing Director of the respondent in place of Mr.K.K.Gupta (General Manager), HR of the respondent.

27. In view of above, in exercise of its powers under Section 11 read with Section 14(2) of the Act, Justice A.P. Shah, former Chief Justice of this Court (Mob. No.9910160007) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator will proceed with the matter from the stage left by the earlier Arbitrators.

28. The respondent will ensure that entire arbitral record is collected from the sole Arbitrator within two weeks and placed before the Arbitrator appointed by this Court. The fee of the learned Arbitrator would be paid in terms of the Rules of Delhi High Court Arbitration Centre.

29. The petition is disposed of in the above said terms.

30. A copy of this order be communicated to the learned Arbitrator immediately.

(MANMOHAN SINGH)
JUDGE

MAY 31, 2013