

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

% **Decided on: 02nd February, 2023**

+ **O.M.P.(T)(COMM.) 19/2016**

1. PROGRESSIVE INFOTECH PRIVATE LIMITED

R/o, Flat No. 6317, Pocket-6&7,
Sec-C, Vasant Kunj,
New Delhi-110070

.....Petitioner

Through: Mr. Amit Goel, Advocate

versus

1. IRCON INTERNATIONAL LTD.

R/o, Plot No. C-4,
District Center,
Saket,
New Delhi

.....Respondent

Through: Mr. Chandan Kumar and Ms.
Kirti Atri, Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J.

1. The present petition under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "A&C Act, 1996"*) has been filed by the petitioner for removal of Ld. Arbitrator and appointment in lieu thereof.

2. **Facts in brief** are that the petitioner, engaged in the business of providing IT infrastructure services and systems integration, was awarded a Tender by the respondent *vide* Purchase Order no.

IRCON/IT/PUR./SAKET/THIN CLIENT/92 dated 11.04.2007 for supply, installation, testing commissioning and maintenance of hardware and system software for 64 bit UNIX/64bit LINUX based thin client solution and its associated servers, storage and backup Solution at the Respondent's Corporate Office at Saket, New Delhi. A Contract dated 15.05.2007 was accordingly executed between the petitioner and the respondent. The total value of the Purchase Order was ₹1,11,34,350/- out of which 10% of the amount was to be released on successful completion and commissioning of the project.

3. It is submitted that the Solution was accepted on 31.03.2008 *vide* the Petitioner's Letter dated 25.03.2008 and Milestone-II payment linked to acceptance was released on 31.03.2008. Thereafter, 10% balance money became due after one year of the acceptance testing i.e. on 31.03.2009 as per the terms of the Purchase Order. However, the money was not released by the respondent on frivolous issues and by raising demands which were not within the purview of the Contract.

4. Disputes arose under the Contract. The petitioner sent a Legal Notice dated 16.09.2009 for making payments as admitted by the respondent. The respondent in its response dated 23.11.2009 denied all its liabilities. Further correspondence was exchanged but the disputes could not be resolved.

5. Clause 40 of the Contract provided for resolution of the disputes through arbitration. A Notice was given to the respondent for appointment of the Arbitrator in accordance with Clause 40 of the General Conditions of the Contract. A Letter dated 24.09.2010 was received from one Mr. Deepak Bansal (CSTE/Project/East/Northern Railway) informing that he has been nominated as the sole Arbitrator by the Managing Director of the respondent

Company as an arbitrator. The petitioner objected to the appointment of Mr. Deepak Bansal as being illegal vide its letter dated 06.05.2011. Consequent thereto, the sole Arbitrator withdrew himself vide his Letter dated 13.05.2011.

6. A petition under Section 11 of the A& C Act, 1996 was filed in the Court which was disposed of vide Order dated 01.08.2011. Shri. N.K. Gupta was appointed as the sole Arbitrator. The respondent vide Letter dated 02/08.11.2011 appointed Ms. Manjusha Jain as the sole Arbitrator, which was accepted by Ms. Manjusha Jain vide her letter dated 15.02.2012. The petitioner submitted its claims to which reply and thereafter rejoinder was filed and the pleadings were completed. The affidavits along with the list of witnesses were also submitted. However, the learned Arbitrator thereafter, did not fix any date for cross-examination of the witnesses. From time to time the dates were fixed and many a times with long gaps but no cross-examination of the witnesses of the petitioner was conducted. It is also claimed that on many occasions, the learned Arbitrator did not inform/fix the adjourned date and it was on the letter of the petitioner that the date was fixed in the proceedings, but then too the purpose for which the matter was being fixed was never indicated. The affidavits and evidence of the petitioner was ready around in October, 2013 but till date, no cross-examination has been conducted. Hence, the present application has been filed with the request that another Arbitrator may be appointed in lieu of Ms. Manjusha Jain in the light of her conduct.

7. The **respondent no.1 in its reply** has taken a preliminary objection that the Letter dated 17.02.2016 by the petitioner addressed to respondent, no. 2 shows that it is the petitioner who is guilty of delay of the proceedings.

It had committed fundamental breach of Contract by not complying with its terms. It is further submitted that the petitioner has failed to approach the respondent before the filing of the present petition which is an abuse of process of law and is also premature.

8. **On merits**, it is admitted that the disputes had arisen *inter se* the parties which were referred to arbitration and respondent no.2 was appointed as the Arbitrator. The respondent has stated that it had written a Letter dated 11.04.2014 to respondent no. 2 seeking her withdrawal but the petitioner did not agree with the respondent as it did not issue any Letter conveying its consent to the withdrawal. It is further asserted that it is a matter of record when the petitioner had agreed for an out of Court settlement on which ground it took several adjournments. Though the respondent had also sought substitution but the said offer of the respondent cannot be considered while deciding this application as it is the petitioner who has to be blamed for the delays on account of efforts for out of Court settlement.

9. **The petitioner in its Rejoinder** has re-affirmed the assertions that have been made in the petition.

10. **Learned counsel on behalf of the petitioner in its written submissions as well as in the Court has argued** that Arbitrator has been changed four times in this case. The respondent had initially appointed Ms. Niwa Singh, and thereafter Mr. Deepak Bansal, who was followed by Mr. N.K. Gupta, and finally Ms. Manjusha Jain was appointed as the sole Arbitrator on 08.11.2011, in terms of Clause 40 of the Contract. It is asserted that since the matter has been delayed inordinately, there exists no right with the respondent to appoint sole Arbitrator.

11. Reliance has been placed on Union of India (UOI) v. Singh Builders Syndicate 2009 (4) SCC 523, Ratna Infrastructure Projects Pvt. Ltd. v. MejaUrja Nigam Private Limited Arb. P. 537/2016 dated 11.04.2017 passed by the High Court of Delhi, NCR Developers v. University of Delhi 2019 (177) DRJ 241, Nandyal Coop. Spinning Mills Ltd. v. K.V. Mohan Rao 1993 (2) SCC 654, and EssEss Constructions v. Union of India ARB. P. 801/2016 dated 02.02.2017 passed by the High Court of Delhi.

12. **The respondent has argued and also submitted** written arguments that since the Contract is prior to 2015 when the amendments were made in the A & C Act, 1996, it is the old law which is applicable in regard to appointment of the Arbitrator and for this reliance has been placed on Aravali Power Co. Pvt. Vs. Era Infra Engg. Ltd. (2017) 15 SCC 32. It is further argued that it is the petitioner itself who has not been attending proceedings before the learned Arbitrator since 2014 but has been wrongly accusing the learned Arbitrator for not taking interest. It is claimed that the application is without merit and is liable to be dismissed.

13. **Submissions Heard.**

14. To understand whether the grounds as pleaded in the application come within the scope of Section 14 and 15 of A & C Act, 1996, these sections are reproduced as under:

“Section 14: – Failure or impossibility to act.–

(1) The mandate of an arbitrator shall be terminated and he shall be substituted by another arbitrator, 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. Section 15 of A & C Act, 1996 further provides for termination of mandate and substitution of Arbitrator which reads as under:

“Section 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 sub-section (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.”*

16. Section 14 of A & C Act, 1996 provides for termination of the mandate of the Arbitrator if he becomes *de jure* or *de facto* unable to perform his functions or withdraws from his office.

17. Likewise, Section 15 of the A & C Act, 1996 provides for termination of mandate of the Arbitrator either on the ground that the Arbitrator withdrawing from the office for any reason or pursuant to the Agreement between the parties.

18. These Sections further provide that where the mandate of the Arbitrator is terminated, the substituted Arbitrator shall be appointed according to the rules that are applicable to the appointment of the Arbitrator being replaced. In both the situations, it is only the mandate of the Arbitrator which comes to an end and, therefore, provision is made for the appointment of substitute Arbitrator who can continue from the stage where the earlier proceedings are left as has been held by the Co-ordinate Bench of this Court in Chemical Sales Corporation v. A & A Laxmi Sales and Service Private Limited (2011) SCC OnLine Del 3847.

19. The undisputed facts in the present case are that the petitioner was awarded Contract on 15.05.2007. The disputes arose and the first three arbitrators nominated by respondent no.1 were unable to take up the Arbitration. The present sole Arbitrator, Ms. Manjusha Jain was appointed on 08.11.2011 and the arbitration proceedings were commenced by her after giving her acceptance on 15.02.2012.

Referral of Disputes by the Managing Director of the Respondent

20. Admittedly, there in Arbitration Clause contained in the Contract Agreement dated 15.05.2007 which reads as under:

Special Conditions of Contract:

40.0 ARBITRATION AND LAWS

ARBITRATION:

Except where otherwise provided for in the contract, all questions and disputes relating to the meaning of the

specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right matter or thing whatsoever in any way arising out of or relating to the contract, design, drawings, specifications, estimates, instructions, orders of the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to arbitrator to be appointed by the MDI Director, IRCON from a panel of arbitrators to be approved by the Northern Railway. If the arbitrator to whom the matter originally referred, is transferred or vacates his office or being unable to act for any reason as aforesaid at the time of such transfer, vacation of office or inability to act, the MD/Director, IRCON shall appoint another person to act as the arbitrator in accordance with the terms of the contract. It is also a term of this aforesaid should act as arbitrator and if for any reason, it is not possible, the matter is not to be referred to arbitration at all.

Subject as aforesaid to the provision of the Arbitration Act, 1996, or any statutory modifications or reenactment thereof and the rules made there under and for the time being in force shall apply to the Arbitration proceedings under this clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with this clause.

The arbitrator may, from time to time, with consent of the parties, enlarge the time for making and publishing the award.

The work under the contract shall, if reasonably possible, continue during the arbitration proceedings and payment due or payable to the contractor shall not be held on account of such proceedings.

The arbitrator shall be deemed to have entered into reference on the date he issues notice to both the parties fixing the date of the first hearing.

The arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the arbitrator in his sole discretion.

The award of the arbitration shall be final, conclusive and binding.

The cost of arbitration shall be borne by the parties to the dispute and may be decided by the arbitrator(s). "

41.0 Law Governing the Contract:

This contract shall be governed by the Indian laws for the time being in force.

42.0 Courts Jurisdiction:

In case of any disputes/differences between contractor & IRCON, the jurisdiction shall be of Delhi Courts only.

21. Clause 40 of the Agreement thus, authorized the MD/Director, IRCON to appoint or substitute the Arbitrator in case of his transfer or if he vacates his office or is unable to act for any reason, from a panel of arbitrators to be approved by the Northern Railway. Thus, it is the MD of the respondent who was entitled to appoint the Arbitrator. The question is whether an appointment under such a procedure can continue and remain valid in light of the 2015 amendment.

22. The respondent has placed reliance on Aravali Power Co. (p) Ltd. Vs. Era Infra Engg. Ltd. (2017) 15 SCC 32 to submit that since the arbitration proceedings in the present case was initiated prior to the amendments affected in 2015, it is the un-amended act that shall be applicable. It was further observed that merely because the arbitrator happens to be an employee of the party to the arbitration, it would not by itself as per the un-amended Act, render the appointment invalid and unenforceable.

23. The implication of the 2015 amendment was examined in Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd. (2017) 4 SCC 665. It was found to be clear that the major goal of the amendment was to ensure the impartiality of arbitrators. To accomplish this, sub-section (5) of Section 12 states that notwithstanding any prior Agreement to the contrary, any person whose relationship with the parties, counsel, or the dispute fell under any of the categories listed in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In the event that the revised provision conflicts with the arbitration clause, the court would have the authority to appoint arbitrator(s) in a manner permissible under the A & C Act, 1996. Due to the *non-obstante* provision in Section 12(5), the opposite party can insist on the arbitrator's nomination in defiance of the arbitration agreement in case of the ineligibility of the proposed arbitrator.

24. The Hon'ble Supreme Court has dealt with the issue of applicability of 2015 Arbitration amendment to pre 2015 contracts in Ellora Paper Mills Limited v. State of Madhya Pradesh (2022) 3 SCC 1, wherein the High Court of Madhya Pradesh had held that Amendment Act, 2015 will not apply retrospectively to arbitration proceedings. This view was overruled by the Hon'ble Supreme Court and while relying upon Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited v. Ajay Sales & Suppliers 2021 SCC OnLine SC 730 and TRF Limited vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377, it was held that not applying Section 12(5) of the Arbitration (Amendment) Act, 2015 is unjust and against principles of natural justice. It went on to further state that an ineligible arbitrator cannot act/ continue as an arbitrator even if the Arbitral Tribunal was constituted much prior to Amendment Act, 2015.

25. In terms of the Clause 40 of the Contract, it is the MD of the respondent Company who had appointed the Arbitrator. The Hon'ble Supreme Court in the case of Bharat Broadband Network Limited v. United Telecoms Limited 2019 SCC OnLine SC 547, has held that where the Arbitrator has been appointed by the party itself unilaterally, the mandate may be terminated and a substitute Arbitrator may be appointed.

26. The Supreme Court in the case of TRF Limited (Supra) held that the test for determination of competence of an Arbitrator proposed to be appointed was: "*whether he would have an interest in the outcome of the dispute*". The element of eligibility was relatable to the interest that he had in the decision. The decision of the Apex Court in Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd. (2020) 20 SCC 760 recognizes the importance of ensuring that the Arbitrator having an interest in the outcome of the matter is not appointed so as to obviate any doubt as to the impartiality and independence of Arbitral Tribunal. A reference was made to Pratapchand Nopaji vs. Kotrike Venkata Setty & Sons (1975) 2 SCC 208 wherein the three Judge Bench of the Supreme Court applied the maxim *qui facit per allium facit per se*, and the relevant paragraph is reproduced as under:

"9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act is embodied in the maxim: "*qui facit per allium facit per se*" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area....."

27. In Perkins Eastman (supra) this principle was endorsed and it was

observed that if the nomination of an ineligible arbitrator is allowed, it would tantamount to carrying on the proceedings of the arbitration by the Managing Director himself. The ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee. The procedure of appointment of a Managing Director of a Company as the Sole Arbitrator or any arbitrator so appointed by the MD of the Company was held to be hit by vice of bias and impartiality. The Managing Director or an Arbitrator so nominated by him may be objective or individual of respectability, but the irresistible conclusion is that once the Arbitrator having become illegible by operation of law, he cannot nominate another person as an Arbitrator. It is inconceivable in law that any person who is statutorily ineligible can nominate a person. Such MD or a nominee of the MD becomes ineligible on account of the prescriptions contained in Section 12(5) of the Act. Once, an infrastructure collapses, the superstructure is bound to collapse. To put it differently, once the identity of the Managing Director as the Sole Arbitrator is lost, the power to nominate someone else as an Arbitrator is obliterated.

28. In Proddatur Cable TV DIGI Services vs. Siti Cable Network Ltd. 2020 SCC OnLine Del 350, the Co-ordinate Bench of this court observed that one has to see the rationale and reasoning behind the judgment in the case of Perkins Eastman (*supra*) which is to ensure that the Arbitrator sought to be appointed has no interest in the outcome of the case. Applying a test of a person being interested in the outcome of the arbitration, it was observed that a Company functions through its Board of Directors who according to Section 166 of the Company's Act, 2013 are under a duty to act in good faith to promote the objects of the Company and act in the best interest of the Company, its employees and shareholders. A Director shall

not involve in a situation in which he may have a direct or indirect interest that conflicts or possibly may conflict with the interest of the Company. It is thus, shown that the Directors of the Company as part of the Board of Directors, would be interested in the outcome of the arbitration proceedings. The Company, therefore, acting through its Board of Directors would suffer the ineligibility under Section 12(5) read with Schedule 7 of the Act.

29. It may thus be **concluded** that the appointment of a Sole Arbitrator by one party or appointment of the Managing Director or its nominee as the Arbitrator does not meet the test of impartiality and independence and is hit by the bar of Section 12(5) of the Act and are inherently incapable of being appointed as the Arbitrator as has been held in the various judgments. The learned Arbitrator is disqualified under Section 12 of A & C Act, 1996 to continue as an Arbitrator.

Inordinate Delay in conduct of Proceedings:

30. The petitioner has sought termination of the mandate of the learned sole Arbitrator for the reason that there has been inordinate delay in the conduct of arbitration proceedings and nothing effective has happened since 2013 when the affidavit of evidence has been filed by the petitioner till 2016 when the present petition has been filed. It has been claimed that many a times, the sole Arbitrator was not found available on the date given, or no cross-examination was undertaken on any of the date fixed by the learned Arbitrator after the completion of pleadings even though the witness of the petitioner was present.

31. It is argued that in effect, though the learned Arbitrator entered into arbitration way back in February, 2012, nothing effective except in

completion of pleadings has been done till 2016 when the present petition has been filed.

32. The question which arises is whether such delay and in-action and non-completion of proceedings in an expeditious manner by the learned Arbitrator would be a valid ground to hold that the learned Arbitrator suffered from *de-facto* or *de-jure in capacity* as provided under Section 14 of the A & C Act, 1996 warranting an amendment of substitute Arbitrator.

33. In Department of Economics Policy and Development of the City of Moscow v. Bankers Trust Co. (2004) EWCA Civ 314, Mance, L.J. succinctly summed up the objective of the Act by stating that Arbitration Act was enacted by the Parliament to encourage and facilitate a reformed and more independent, as well as private and confidential system by a consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interest of public and of basic fairness.

34. The main principles of arbitration law are: (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision of the Act has to be applied purposively and in case of doubt, regard should be had to these principles.

35. In Union of India (UOI) v. Singh Builders Syndicate (2009) 4 SCC 523, the pendency of arbitration proceedings for over a decade, was found it to be a mockery of the process by the Apex Court. The court expressed its anguish in the following words:

“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 the 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 the 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."

36. It was concluded in Singh Builders Syndicate (*supra*) by the Apex Court that considering the delay even in the proper constitution of the Arbitral Tribunal to be able to make any progress in the adjudication of claims, it can be easily concluded that there is a *de-facto* and *de-jure* inability on the part of the Arbitrators to conduct the

arbitration. This in itself is a sufficient ground to allow the petition under Sections 14 and 15 of the A & C Act, 1996.

37. In the present case, it cannot be ignored or overlooked that the genesis of the dispute is in Contract which was entered into between the parties in the year 2007. The disputes arose in the year 2010 and since then the parties are struggling to get their matters adjudicated. It is on record that since 2013, the matter was being listed according to the petitioner for cross-examination of its witnesses but the perusal of the various orders sheets would show that nothing effective has transpired since 2013. It is quite apparent that even though some dates were fixed by the Arbitrator herself or on the request of the petitioner but nothing effective has transpired over a period of three years till 2016 when the present petition has been filed. In the circumstances, it would not be incorrect to conclude *de-facto* incapability of the learned sole Arbitrator to conduct this arbitration.

38. Therefore, the circumstances justify substitution of the learned sole Arbitrator. Mr. Ashish Sheoran, Advocate (Mobile No. 9811079781) is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

39. The parties are at liberty to raise their respective objections before the Arbitrator.

40. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.

41. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A&C Act, 1996 or as consented by the parties.
42. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry.
43. A copy of this Order be also forwarded to the learned Arbitrator, for information.
44. The petition is accordingly allowed in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

FEBRUARY 02, 2023
PA

