In the High Court of Judicature at Madras

Dated : 09.10.2015

Coram :

The Hon'ble Mr.Sanjay Kishan Kaul, Chief Justice

O.P.No.426 of 2015

M/s.Unique Builders
Rep. by its Managing Partner,
Mr.P.Nallasamy. .. Petitioner

-vs-

1.The Union of India,
Rep. by the General Manager,
Southern Railway, Park Town,
Chennai.

2.The Chief Engineer (Construction),
Office of the Chief Administrative
Officer (Construction),
Southern Railway, Egmore, Chennai.

3.The Deputy Chief Engineer (Gauge
Conversion), Southern Railway,
McNichols Road, Chetput, Chennai.

4.Mr.A.K.Siddhartha (President Arbitrator)
Chief Electrical Distribution Engineer,
Southern Railway, NGO Annexe,
VII Floor, Park Town, Chennai.

5.Mr.J.S.Garg (Arbitrator)
Chief Materials Manager (SGT)
New Joint Office, Southern Railway,
Ayanavaram, Chennai.

6.Mr.H.Srinivasan (Arbitrator)
Dy.FA&CAO (Stores), New Joint Office,
Southern Railway, Ayanavaram, Chennai... Respondents

Petition filed under Sections 14 and 15 read with Section 11 of the Arbitration and Conciliation Act, 1996, to terminate the mandate of the present Arbitral Tribunal

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(comprising of the Fourth, Fifth and Sixth Respondents) and appoint an independent Arbitrator to arbitrate all the disputes and claims arising out of the Agreement No:11/GC/Sub/2008 dated 24.10.2008 to Arbitration.

For Petitioner : Mr.A.L.Somayaji, S.C.
For M/s.Amalaraj S.Penikilapatti

For Respondents : Mr.V.G.Sureshkumar

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O R D E R

The petitioner, a partnership firm, participated in the tender in pursuance to the tender notice dated 13.02.2008 for the following work:

> ''Gauge Conversion works between Chennai Beach – Tambaram – Chenglepattu – Proposed construction of road over bridge (sub-structure and super-structure) with 1 x 49.50 x 1 x 47.70 m clear span of Bowstring girder in lieu of LC No: 7 at Km. 10/7/8 at Rangarajapuram between Kodambakkam and Mambalam stations (balance works)''.

The aforesaid tender bid of the petitioner, after negotiations, was accepted vide letter of acceptance dated 15.09.2008 and an agreement was entered into on 24.10.2008 with the contract period for 13 months from 15.09.2008 to 14.10.2009. It, however, appears that this contract period was extended from time to time and for the purpose of present petition, it is suffice to note that during this

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period of time, dispute arose inter se the parties.

2.The petitioner vide letter dated 01.02.2011 sought resolution of disputes through arbitration even during execution of work while reserving the right to modify or add to the claims. On account of lack of response, O.P.No.364 of 2011 was filed making an averment of the continuing project work. In those proceedings, vide order dated 11.11.2011, the first respondent was called upon to appoint the Tribunal in terms of arbitration clause. The Tribunal was, however, belatedly constituted on 15.05.2012. The work is stated to have been completed and the bridge under work was opened for traffic on 15.10.2012 at which time it is stated that the petitioner could formulate the final claims. The petitioner sought new terms of reference containing even the additional claims which the respondent did not oblige. The first respondent, instead, vide letter dated 06.11.2012 furnished a panel of officers to replace the Tribunal's then Presiding Arbitrator and finally constituted a second Tribunal on 27.12.2012 with a new Presiding Arbitrator but without change of the terms of reference. The reminders sent by the petitioner in this behalf were to no avail.

3.In the proceedings, on 07.08.2014, the competent officer of the respondents was personally called to be present in Court on 22.08.2014. In order to not further

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delay the matter, the petitioner is stated to have spontaneously selected the nominees and thus, the Arbitral Tribunal was duly constituted in terms of the final order passed in O.P.No.364 of 2011.

4.The grievance of the petitioner is that despite the observations in the order dated 22.08.2014 for the Arbitral Tribunal to make every endeavour to conclude the arbitration proceedings within six months from its first sitting with the requirement of the first sitting to be held not later than one month from the date of constitution of the Arbitral Tribunal, there was continued delay. The terms of reference issued by the appointing authority vide letter dated 03.09.2014 also required the Tribunal to publish the award within six months, an aspect clearly defaulted upon. As to what transpired on the proposed hearings as brought out from the facts and the proceedings of the Tribunal have been enumerated as under:

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	Proposed Hearing	***Description of the Event***
1	First Proposed Hearing 29/09/2014	One Arbitrator – J.S. Garg – was absent. NO QUORUM
2	Second Proposed Hearing 11/11/2014	One Arbitrator – H.Srinivasan – was absent. NO QUORUM
3	Third Proposed Hearing 17/12/2014	Full Quorum of Tribunal Present
4	Fourth Proposed Hearing	Full Quorum of Tribunal Present

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	Proposed Hearing	***Description of the Event***
5	Fifth Proposed Hearing 17/04/2015	Full Quorum of Tribunal Present
6	Sixth Proposed Hearing 07/05/2015	The Claimant Absent - NO HEARING
7	Seventh Proposed Hearing	One Arbitrator - H.Srinivasan - was absent. NO QUORUM

5.The petitioner makes a grievance that such delay goes against the very basis of having an alternate dispute resolution mechanism and thus, has prayed for in the present petition to appoint an Arbitrator by this Court to proceed with the arbitration, the present petition being filed under sections 14 and 15 read with section 11 of the Arbitration and Conciliation Act, 1996.

6.The records of the Tribunal were called and perused by this Court. It is not in issue that the arbitration has not proceeded beyond the pleadings being completed. It may be pertinent to note that the kind of problem faced in this case is no different from many other cases of the Railways, where primarily on account of officers in service being appointed who find little time for arbitration, the matters drag on. The subsequent development in this case is that one of the Arbitrators Shri.J.S.Garg, has since been transferred to North Western Railways. It is informed that out of the three arbitrations in which he was an Arbitrator, he has already given up one of the arbitrations. The stand of the

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respondents is that the Arbitrator can attend the arbitration proceedings.

7.The clause governing the parties is as under:

> *''In cases not covered by clause 64 (3) (a) (i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments, of the Railway to the Contractor who will be asked to suggest to the General manager upto 2 names out of the panel for appointment as the Contractor's nominee. The General manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other Departments of the Railways for the purpose of appointment of arbitrators.''*

8.As aforesaid, this Court has been faced with the similar position of inaction of the Tribunal in O.P.No.414

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of 2012 decided on 30.01.2015 (between **A.Chockalingam vs. Union of India, Rep. by the General Manager, Integral Coach Factory and Others**), O.P.No.313 of 2015 decided on 18.06.2015 (between **M/s.Nellai Concrete Products & Construction Co.(P) Ltd. vs. Union of India, Rep. by its Managing Director, Ministry of Railway and Others**) and O.P.No.808 of 2014 decided on 03.07.2014 (between **M/s.Y.Chinna Reddy vs. Union of India, Rep. by the General Manager, Southern Railway**). The prevalent position is reflected in the order dated 03.07.2015 in OP.No.818 pf 2014 in the following terms:

> *''4.If it may be said, the respondents have done it again ! There are numerous cases which have come up before this Court where the Arbitral Tribunal constituted by the respondents completely neglected to perform their duties. It may possibly be because the serving officers are appointed as Arbitrators and they find little time for arbitration process. Possibly the fallacy lies in appointing serving officers as Arbitral Tribunal members.*
>
> *..*
>
> *6.This Court, inter alia, has dealt with this issue in O.P.No.313 of 2015* ***(between M/s.Nellai Concrete Products & Construction Co. (P) Ltd., Rep. by its Managing Director, vs. Union of India, Rep. by its Secretary, Ministry***

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of Railway and Ors.) *decided on 18.06.2015, albeit slightly on different aspect. The fact remains, the said case is also one of gross neglect of Arbitral Tribunal proceeding in the context of the letter appointing them stipulating a period of six months to conclude the arbitration proceedings. This is not so in the present case. There is yet another case similar to the case on hand, being O.P.No.414 of 2012* ***(between A.Chockalingam vs. Union of India, Rep. by the General Manager, Integral Coach Factory and Ors.)*** *decided on 30.01.2015. The very same issue of re-constitution of Arbitral Tribunal was dealt with in that case and the attention of this Court was drawn to different proceedings qua the Railways itself. The present case is also one of gross neglect of the Tribunal, having failed to perform its functions right from the year 2010 till date. Five years have elapsed with only pleadings being completed. This defeats the very purpose of arbitration.*

9.The tragedy of arbitration proceedings in our country permeates the present matter with disputes seeing no light of the day. If one may say, there is hardly any beginning, as only pleadings have been exchanged in the present matter. On account of the inordinate and inexplicable delay coupled with now even the transfer of one of the officers constituting the Tribunal, it is a fit case where the mandate of the present Tribunal should be

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terminated and an Arbitrator be appointed by this Court.

10.Thus, as jointly proposed by learned counsel for parties, I appoint **Mr.Justice R.S.Ramanathan, a retired Judge of this Court**, as the sole arbitrator to enter upon the reference and adjudicate the disputes inter se the parties. As requested, the arbitration proceedings will be conducted under the aegis of the Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

11.The original petition is, accordingly, allowed, leaving the parties to bear their own costs.

Sd/ (S.K.K., CJ.)
09.10.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/29.12.2015 COURT OFFICER

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