

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 82/2015

MBL INFRASTRUCTURES LTD Petitioner
Through: Ms Anusuya Salwan with
Mr. Vikas Sood, Advocates.

versus

TELECOMMUNICATION CONSULTANTS INDIA
LTD & ORS Respondents
Through: Mr. Nikhilesh Krishnan, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
16.01.2015

IA No. 1001 of 2015 (for exemption)

1. Exemption allowed subject to all just exceptions.
2. The application is disposed of.

OMP No. 82 of 2015 & IA No. 1000 of 2015 (for stay)

3. This is a petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner, MBL Infrastructure Limited ('MBL'), seeking termination of the mandate of the sole Arbitrator on the ground that he has become "de-facto and de-jure" unable to perform his function as an Arbitrator and to appoint any independent arbitrator in his place.
4. By an agreement dated 10th December 2007 entered into with the Madhya

Pradesh Road Development Corporation Limited, the Petitioner was awarded a contract of rehabilitation and upgradation of road between Nagod – Amanganj with a contract value of Rs. 80,59,20,611. By an agreement dated 22nd February 2008 entered between the Petitioner, the Respondent, Telecommunication Consultants India Limited ('TCIL') and SMH Infrastructure Private Limited ('SMH'), it was agreed that the Petitioner and TCIL had jointly executed the aforementioned road project and that TCIL would get the work executed through SMH.

5. Relevant to the present petition is the arbitration clause in the agreement which reads as under:

“13. Arbitration

13.1 All disputes and differences that may arise between the parties hereto in regard to or touching these presents, the carrying out of the terms and conditions hereunder and or the interpretation thereof in any way whatsoever so as to the construction, meaning, validity of effect of this agreement or any cause, matter or thing herein contained or the rights and liabilities of the parties hereunder shall be referred to arbitration and the said arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment in force for the time being. The Arbitrator shall be appointed by CMD, TCIL. The award of the Arbitrator shall give reasons for the Award and the same shall be final and binding on both the parties. Such arbitration shall be conducted at New Delhi. The laws of India shall govern this Agreement including the arbitration.

13.2 Only Delhi Courts shall have the exclusive jurisdiction on the subject matter of the agreement.”

6. In terms of the agreement, the estimated sub-contract value for SMH was Rs. 78,98,02,199. TCIL was to pay the mobilization advance of 10% of the

contract value to the Petitioner and also a work advance, including advance at any point, which would not exceed a balance of Rs. 8 crores. In terms of the said agreement, TCIL released to the Petitioner mobilization advance of Rs. 7,88,39,238. According to the Petitioner, of the above mobilization advance, a sum of Rs. 5,44,98,654 was recovered against various RA Bills and further by cheque dated 26th December 2011 the Petitioner paid TCIL an amount of Rs. 2,43,90,547 being the balance mobilization advance together with interest. Therefore, according to the Petitioner, the entire mobilization advance along with interest stood paid by the Petitioner to TCIL.

7. The Petitioner claimed that the contract was successfully completed and a completion certificate was issued by the Petitioner by its letter dated 17th November 2011 to TCIL. The final bill was raised by SMH for a sum of Rs. 73,97,30,756.

8. As far as the work advance for a sum of Rs. 8 crores is concerned, the Petitioner claims to have submitted bank guarantees ('BGs') to the extent of Rs. 4.6 crores to TCIL from time to time. On 5th December 2012 the Petitioner paid to TCIL a sum of Rs. 5.10 crores and requested the TCIL for release of the BGs. The balance sum of Rs. 2.90 crores was to be paid before expiry of the BGs.

9. To restrain TCIL from encashing the said BGs, the Petitioner filed OMP No. 802 of 2013 in this Court. In its order dated 14th August 2013, the Court recorded the submissions of learned counsel for the Petitioner that the Petitioner would have no difficulty if the Respondent would encash the BGs to the extent of Rs. 2.90 crores. There was a stay granted by the Court on

encashment of the BGs for the remaining amount. By a subsequent order dated 15th May 2014 the Court directed the Petitioner to invoke the arbitration agreement.

10. By its letter dated 26th July 2014 the Petitioner wrote to the TCIL requesting for the appointment of an Arbitrator. In response thereto on 13th August 2014 the Chairman-cum-Managing Director ('CMD') of TCIL appointed Mr. P.K. Mandal, Executive Director (Technical) as sole Arbitrator for adjudication and determination of the disputes between the parties.

11. On 20th August 2014 the learned Arbitrator called upon the Petitioner to file its statement of claims within 15 days and the Respondent, TCIL, to file its reply or counter-claims within 15 days thereafter. By its letter dated 4th September 2014 addressed to the learned Arbitrator, the Petitioner stated that since he was working as the Executive Director (Technical) in TCIL, it was not possible for him to act independent of TCIL. Further, the Arbitrator was formally reporting to the Director (Projects) as well as CMD, who were actively pursuing the dispute on behalf of TCIL. Further, the learned Arbitrator was directly or indirectly concerned with the projects and therefore, "the direct or indirect involvement and having personal knowledge in the contract thus suffers from *de-jure* inability from functioning as an Arbitrator in relation to the contracts and therefore, has lost the mandate to so act." The Petitioner stated that an independent Arbitrator should be appointed.

12. By his letter dated 26th September 2014 the learned Arbitrator treated the

aforementioned letter of the Petitioner as an application under Sections 12 and 13 of the Act. TCIL was called upon to file its response within two weeks and the Petitioner to file its rejoinder within two weeks thereafter. It was stated therein that the application would be taken for consideration on 27th October 2014.

13. TCIL through its advocate filed a detailed response on 28th September 2014 to the aforementioned application to which the Petitioner filed its rejoinder on 13th November 2014. On 17th December 2014 the learned Arbitrator by his detailed order rejected the application of the Petitioner. *Inter alia* the reasons given in the said order by the learned Arbitrator were:

- (i) Being Executive Director (Technical), he had never dealt with any contract between the Petitioner and TCIL including the contract in question in any manner directly or indirectly.
- (ii) He had also never met any of the officials of the Petitioner regarding any of the projects of TCIL and the Petitioner.
- (iii) He had never reported to any of the officials of TCIL who were associated with or being involved with the contract of TCIL with the Petitioner.
- (iv) The allegation that he was part of the meeting regarding contract of TCIL with the Petitioner was “totally incorrect.” Likewise the allegation that he was involved in the decision making process relating to contract of TCIL and the Petitioner was also “totally incorrect.”
- (v) The allegation that he was involved in the decision relating to invocation of BG furnished under the contracts, was also “totally incorrect”.
- (vi) He had never reported to the Director (Projects).

14. The learned Arbitrator fixed the arbitration proceedings for further hearing on 21st January 2015.

15. Ms. Anusuya Salwan, learned counsel for the Petitioner, submitted that with the learned Arbitrator functioning directly under the CMD, who was himself personally overseeing the contract between TCIL and the Petitioner, and with the learned Arbitrator in his capacity as Executive Director also involved with the decisions relating to the contract, the learned Arbitrator could not be expected to function independently. Ms. Salwan referred to the decisions in ***Bipromasz Bipron Trading SA v. Bharat Electronics Limited (BEL)* (2012) 6 SCC 384**, ***Denel (Proprietary) Limited v. Ministry of Defence* (2012) 2 SCC 759**, ***Denel (Proprietary) Limited v. Bharat Electronics Limited* 2010 (6) SCC 394**, ***National Highways Authority of India v. K.K. Sarin* 159 (2009) DLT 314**, ***Alcove Industries Limited v. Oriental Structural Engineers Ltd.* 2008 (1) Arb LR 393 (Del)** and ***Bihar State Mineral Development Corporation v. Encon Builders Private Limited* 2003 (3) Arb LR 133 (SC)**. Ms. Salwan also placed considerable reliance on the decision of Division Bench of Gauhati High Court in ***State of Arunachal Pradesh v. Subhash Projects and Marketing Ltd.* 2007 (3) RAJ (Gau)** to urge that notwithstanding that the Petitioner's application under Sections 12 and 13 of the Act had been rejected by the learned Arbitrator, the Petitioner was not precluded from invoking the jurisdiction of this Court under Section 14 (2) of the Act.

16. Mr. Nikhilesh Krishnan, learned counsel for the Respondent, on the other place placed reliance upon the decision of the Supreme Court in ***Indian Oil***

Corporation Limited v. M/s. Raja Transport (P) Limited 2009 (4) R.A.J 53 (SC) and the decision of the Division Bench of this Court in ***Progressive Career Academy Pvt. Ltd. v. FIIT JEE Limited 2011 (5) RAJ 7 (Del)*** to urge that with the dismissal by the learned Arbitrator of the Petitioner's application under Sections 12 and 13 of the Act, the Petitioner had to wait for the pronouncement of the Award before raising a challenge to the Award including the ground of lack of independence of the learned Arbitrator. Mr. Krishnan, also referred to the decisions in ***NSSL Limited v. HPCL-Mittal Energy Limited 2014 (2) R.A.J 332 (Del)***, ***Maharaji Educational Trust v. M/s. S.G.S. Constructions & Developers Pvt. Ltd. 2012 (95) Arb LR 361*** and ***State of Madhya Pradesh v. Vayam Technologies Limited AIR 2014 MP 88***.

17. The legal position regarding challenge, in terms of the Act, to the independence of an Arbitrator has given rise to several judicial pronouncements. The Court would like to begin the discussion by referring to the decision of the Division Bench of this Court in ***Bharat Heavy Electricals Limited v. C.N. Garg 2001 (1) RAJ 388 (Del)***. The said decision was rendered in a writ petition filed by BHEL challenging the *vires* of Sections 13 (3) and 13 (4) of the Act. It was urged by BHEL that there was no provision in the Act for removal of an Arbitrator as was available under Section 11 of the Arbitration Act, 1940. It was submitted that there was no remedy available to an aggrieved party under the Act to challenge, by way of a petition in the Court, the competence of the Arbitrator on the ground of bias and prejudice on the part of the Arbitrator. The Court referred to the UNCITRAL Model Code which inspired the Act. Referring to Section 5 of the Act, the Court observed that “the statute has endeavoured to minimise

judicial interference in the progress and completion of arbitration proceedings.” The Court noted that Section 13 (5) of the Act gave a right to the party challenging the Arbitrator, if unsuccessful in the application under Section 13 (3) of the Act to make an application for setting aside an Award under Section 34 of the Act. The Court observed that under the new Act, the Court’s interference during the arbitration proceedings was “done away with.” It was further observed as under:

“The new Act deals with the situation even when there is challenge to the constitution of the Arbitral Tribunal. It is left to the Arbitrator to decide the same in the first instance. If a challenge before the Arbitrator is not successful, the Arbitral Tribunal is permitted to continue the arbitral proceedings and make an arbitral award. Such a challenge to the constitution of the Arbitral Tribunal before the Court is then deferred and it could be only after the arbitral award is made that the party challenging the Arbitrator may make an application for setting aside an arbitral award and it can take the ground regarding the constitution of Arbitral Tribunal while challenging such an Award. Thus course of action to be chartered in such contingency is spelt out in the Act itself. Court interference on the basis of petitions challenging Arbitral Tribunal during the pendency of the arbitration proceedings would be clearly against the very spirit with which the Arbitration and Conciliation Act, 1996 has been enacted.”

18. The Court in ***Bharat Heavy Electricals Limited v. C.N. Garg*** (*supra*) upheld the validity of Sections 13 (3) and 13 (4) of the Act and in that process explained the scheme as under:

“We have already noted that a party having grievances against an Arbitrator on account of bias and prejudice is not without remedy. It has only to wait till the arbitral award comes and it can challenge the award on various grounds including bias and prejudice on the part of the Arbitrator. Before the stage of challenge of award under Section 34 comes, sub-Sections (1), (2) and (3) of Section 13 envisage a situation where the

Arbitrator may on his own recuse himself on objection being taken *qua* his functioning as an Arbitrator or where both the parties agree to his removal as per procedure accepted by them. If both fail, the Arbitrator is required to decide on the challenge to his functioning as an Arbitrator levelled by a party. The Arbitrator is expected to be a fair person and if he finds that there is substance in the allegations, an Arbitrator is expected to dispassionately rule on such an objection. Failing all this the last resort for an aggrieved party is the challenge under Section 13 (5) read with Section 34. Thus going on with the ethos of the new Act of speedy progress of arbitration proceedings without judicial interference coupled with the fact that an aggrieved party is not without remedy, it cannot be said that the absence of a provision regarding removal of an Arbitrator renders the relevant provisions of the statute ultra vires the Constitution. We are of the considered view that absence of a provision of removal of an Arbitrator does not render the relevant statutory provisions invalid or ultra vires the Constitution of India.”

19. In ***Progressive Career Academy Pvt. Ltd.*** (*supra*), the Division Bench of this Court was called upon to reconcile the different judgments of the learned Single Judges on the issue of the power of the Court to terminate the mandate of an Arbitrator in an application under Section 14 (2) of the Act. The Court again discussed the relevant provisions in light of the corresponding provisions in the UNCITRAL Model Law and held as under:

“20. A comparison of the provisions dealing with the challenge to the arbitrator’s authority in the A&C Act and the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13 (3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Tribunal. However,, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further appeal. It seems to us, therefore, that there is no room for debate that the Indian Parliament did not want

curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13 (5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral tribunal, a challenge on this score is possible in the form of objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is palpably different also to the English, Australia and Canadian Arbitration Law."

20. As a result, the Division Bench in ***Progressive Career Academy Pvt. Ltd.*** (*supra*) affirmed the judgments of the learned Single Judges in ***Pinaki Das Gupta v. Publicis (India) Communications*** 115 (2004) DLT 345, ***Neeru Walia v. Inderbir Singh Uppal*** 160 (2009) DLT 55, ***Ahluwalia Contracts (India) Ltd. v. Housing and Urban Development Corporation*** 2008 (100) DRJ 461 and ***Newton Engineering and Chemicals Limited v. India Oil Corporation Limited*** 2007 (1) RAJ 146. On this basis, clearly the decisions of the learned Single Judges in ***Interstate Constructions v. NPCC Limited*** 2004 (3) RAJ 672 (Del), ***Indira Rai v. Vatika Plantations (P) Limited*** 127 (2006) DLT 646, ***National Highways Authority of India v. K.K. Sarin*** 159 (2009) DLT 314, ***Shyam Telecom Limited v. Arm Limited*** 113 (2004) DLT 778 are no longer good law.

21. After the decision of the Division Bench of this Court in ***Progressive Career Academy Limited*** (*supra*) a party which has been unsuccessful in its application before the Arbitrator under Sections 12 and 13 of the Act cannot thereafter approach this Court in an application under Section 14 of the Act

seeking termination of his mandate on the same grounds. Such an aggrieved party has to wait for the Award to be pronounced and, if aggrieved by it, challenge it under Section 34 of the Act on the grounds available to be urged in accordance with law.

22. The decision of the Division Bench of the Gauhati High Court in ***State of Arunachal Pradesh v. Subhash Projects and Marketing Limited*** (*supra*) was given in the year 2007, prior to the decision of the Division Bench of this Court in ***Progressive Career Academy Pvt. Ltd.*** (*supra*). Also, the said decision of the Division Bench of the Gauhati High Court was rendered in a different context where no application had been filed before the learned Arbitrator under Sections 12 and 13 of the Act. The question that arose was whether such a party could still file a petition under Section 14 of the Act before the Court. It was in the context held that “....failure of such a party to file an application under Section 13 (2) on the grounds under Section 12 (3) of the Act would not act as an estoppel against him” and that such a party “ would not be debarred from invoking Section 14 contending that the arbitrator had become *de jure* unable to perform his functions.” In the considered view of this Court, the decision of the Division Bench of Gauhati High Court in ***State of Arunachal Pradesh*** (*supra*) is distinguishable on facts. As far as this Court is concerned, the decision of the Division Bench in ***Progressive Career Academy Pvt. Ltd.*** (*supra*) holds the field and binds the Court.

23. The legal position has been reiterated in a recent decision in ***State of Madhya Pradesh v. Vayam Technologies Limited*** AIR 2014 MP 88 as under:

“Challenge to the authority of the arbitrator by way of application under Section 14 (2) of the Act was in substance made on the grounds enumerated under Section 12 (3) of the Act, which is impermissible in law as Sections 13 and 14 of the Act operate in different fields. Moreover the Respondent had invoked the remedy under Section 13 (2) of the Act therefore, in the facts of the case it cannot be permitted to invoke Section 14 (2) of the Act on the ground enumerated under Section 12 (3) of the Act and has to wait till an Award is passed in view of Section 13 (4) and Section 13 (5) of the Act.”

24. The decisions in ***Bipromasz Bipron Trading SA*** and ***Denel (Proprietary) Limited*** (*supra*) were rendered by the learned designated Judge of the Chief Justice of India in applications filed under Section 11 (6) and (8) of the Act. They did not deal with a situation where the party already applied to the learned Arbitrator under Sections 12 and 13 of the Act and failed.

25. The result of the above discussion is that it is not possible for this Court to entertain the present petition seeking removal of the learned Arbitrator under Section 14 (2) of the Act on the ground that he has become “*de-facto and de-jure*” unable to perform his function as an Arbitrator. The Petitioner will have to await the pronouncement of the Award and if aggrieved thereby, seek appropriate remedies under Section 34 of the Act.

26. The petition and the pending application are dismissed.

S. MURALIDHAR, J.

JANUARY 16, 2015

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