

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

Judgment reserved on: 10.12.2014
% Judgment delivered on: 04.03.2015

+ **OMP Nos. 692/2011 & 235/2008**

HARYANA PACKAIDS PVT. LTD. Petitioner

Versus

INDIAN OIL CORPORATION LTD. & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Rajiv Bahl & Ms Usha Mann, Advocates.
For the Respondents : Mr. M.M. Kalra & Mr Kunal Kalra, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

OMP 692/2011 & IA No. 14514/2011 (Condonation of delay in re-filing petition)
IA No. 15690/2010 (for extension of time by arbitrator) in OMP No. 235/2008

1. This is a petition, essentially, filed under Section 14(1)(a) and 14(2) read with Section 11(6) and 11(8)(b) of the Arbitration & Conciliation Act, 1996 (in short the 1996 Act).

1.1 In addition to the above, provisions of Section 18(4) of the Micro, Small and Medium Enterprises Development Act, 2006 (in short the 2006 Act), have also been invoked.

1.2 In effect, the petitioner seeks to replace the present incumbent, who is functioning as an arbitrator, namely, one Sh. M.K. Jain, with a court appointee. Sh. M.K. Jain has been arrayed as respondent no.3 to the present proceedings. Apparently, since the 2006 Act is applicable to the petitioner,

one of the prayers made in the petition adverts to the fact that the micro and small enterprises council/centre could act as an arbitrator or as conciliator under Section 18(4) of the 2006 Act. Though, during the course of arguments, this prayer was not pressed.

2. I may only note that the petitioner had earlier filed a petition bearing OMP No. 235/2008, in this court, for the very same relief, when a Single Judge of this court vide order dated 25.02.2010 disposed of the said petition, albeit with the consent of parties, by replacing the then arbitrator, one, Sh. S. Mazumdar. It was recorded that the parties had agreed that the arbitration proceeding shall stand concluded within six (6) months from the date, the new arbitrator entered upon reference.

2.1 It is in these circumstances, that respondent no.3 was appointed as an arbitrator.

2.2 The hope that the proceedings would stand concluded within six (6) months, stood belied, as is obvious', from the turn of events. It is in these circumstances, that the petitioner, appears to have approached this court, once again, for the removal of respondent no.3 as the arbitrator.

3. I may also note that the captioned petition was moved and, consequently, got listed on for the first time on 13.09.2011, when my predecessor was informed that an application for extension of time, being: IA No. 15690/2010 had been filed in OMP No. 235/2008. The said application was, however, listed before another Single Judge of this court. Consequently, the learned Judge directed that the captioned petition along with IA No. 14514/2011, be placed before the Judge, who was dealing with IA No. 15690/2010 filed in OMP No. 235/2008. IA No. 14514/2011 is an application filed by the petitioner seeking condonation of delay in re-filing. According to the petitioner, there is a delay of 24 days in re-filing the

captioned petition, i.e., OMP No. 692/2011.

3.1 Though no formal notice was issued, parties have completed pleadings in the matter, whereupon arguments were heard and judgement was reserved. There is no formal reply filed by the respondents to the aforementioned application seeking condonation of delay in re-filing. Reply to the main petition has, however, been filed only by respondent no.1 (IOCL), which in effect, is the contesting party. Respondent no.2 is the Director (Marketing), IOCL, while respondent no.3, as noticed above, is the person who is presently charged with conducting arbitration in the matter.

3.2 It appears that since the captioned petition and IA No. 15690/2010, in OMP No. 235/2008, were being listed together, after order dated 13.09.2011 was passed in the instant matter, erroneously, based on the statement made by counsel for the petitioner that OMP No. 235/2008 had been rendered infructuous, and an order came to be passed on 14.08.2014 disposing of the said petition. Though this statement was made in the presence of counsel for the IOCL, the correct position was not brought to the notice of the court. The record would reflect, as indicated above, that OMP No. 235/2008 was in fact disposed of on 25.02.2010. Therefore, what was pending, was only IA No. 15690/2010. Having noticed this anomaly, IA No. 15690/2010 in OMP No. 235/2008, was listed for directions by me on 19.02.2015. On this day, order dated 14.08.2014 was recalled and order in IA No. 15690/2010 filed in OMP No. 235/2008 was also reserved.

4. In order to adjudicate upon the instant matters, the following broad facts need to be noticed:

4.1 The petitioner, qua the contract for supply of corrugated card board boxes to IOCL, raised disputes with respect to certain purchase orders spanning the period 03.05.1989 to 03.03.1992. Notice in this behalf was

issued by the petitioner, on 12.05.1995. By this notice, petitioner sought appointment of an arbitrator. Since IOCL did not oblige, a petition was filed in this court, which was numbered as AA 171/1997.

4.2 By order dated 20.08.1998, the said petition was disposed of by a Single Judge of this court. The court appointed respondent no.2, i.e., Director (Marketing), IOCL as an arbitrator in the matter, in terms of arbitration clause obtaining between the parties.

4.3 Since, the then Director (Marketing), one, Sh. O.N. Marwah, was unable to act as an arbitrator, evidently, an application was moved for modification of the order. Resultantly, order dated 20.08.1998 was modified vide order dated 20.04.1999. This resulted in the appointment of, one, Mr A.P.S. Gulia, as the sole arbitrator.

4.4 Sh. A.P.S. Gulia, entered upon reference on 02.07.1999 and, functioned as, an arbitrator till December, 2003. In the interregnum, pleadings were completed. However, on 02.12.2003, a yet another arbitrator was appointed by the Director (Marketing), IOCL. This time around, Sh. S. Mazumdar, was appointed as an arbitrator.

4.5 Issues in the matter were framed on 08.12.2004. Affidavits by way of evidence, was filed by the petitioner and IOCL on 16.03.2005 and 18.05.2005, respectively.

4.6 After nearly two years, a petition was moved by IOCL for summoning a witness from State Bank of India (SBI), so that he could appear and depose before the learned arbitrator. This petition was, in the first instance, allowed and disposed of on 13.02.2007. Upon an application for modification being moved, order dated 13.02.2007, was modified by an order dated 09.05.2007. The modification sought was, that the, direction to summon witness, should include the record referred to in the application. Accordingly, the court

directed the summoned witness to produce the power of attorney dated 25.11.1987, which, apparently, SBI, had received from the petitioner.

4.7 The petitioner, being frustrated by the delay, moved a petition, as indicated above, for removal of Mr S. Mazumdar, as the arbitrator. This petition was numbered as OMP No. 235/2008, as noted above, and as indicated, came to be disposed of on 25.02.2010.

4.8 Resultantly, once again, a new arbitrator was appointed, by Director (Marketing), IOCL vide his communication dated 09.03.2010. This resulted in the appointment of respondent no.3, i.e., the present incumbent. Respondent no.3, entered upon reference on 17.03.2010.

4.9 On 09.04.2010, respondent no.3, issued a direction for summoning the witness from SBI, along with record. The matter was posted for the said purpose on 23.04.2010. Since, a letter was received of even date, i.e., 23.04.2010, from SBI, stating that the concerned officer was not available, due to his posting outside Ghaziabad, a fresh date was fixed for summoning of the witness. The matter was posted for this purpose on 06.05.2010.

5. On 06.05.2010, the arbitrator was unavailable, and hence, vide communication dated 07.05.2010, SBI and the contesting parties, were informed that proceedings, would take place on 14.05.2010. The said communication also called upon the SBI-witness to bring originals of documents listed out in respondent no.3's communication of 07.05.2010.

5.1 Since, the SBI-witness could not produce the entire record, on his request, the matter was renotified by respondent no.3, on 21.05.2010. On the following date, the situation was no different, and consequently, the matter had to be adjourned to 31.05.2010. The matter, however, could not be taken on 31.05.2010 as the witness fell ill, which resulted in the matter being postponed to 11.06.2010. It appears that on the following day, which

is, 12.06.2010, the witness from SBI was partially examined. The matter was posted for further cross-examination of the said witness to 21.06.2010. On the said date, the petitioner's counsel was not available, as a result, it was postponed to 03.07.2010.

5.2 The SBI-witness was thereafter subjected to cross-examination on 03.07.2010, and thereafter, on 10.07.2010 when, his cross-examination stood concluded. Pertinently, on 10.07.2010, the following direction was passed by the learned arbitrator:

“....The remaining cross-examination of Mr Vimal Bakshi, Chief Manager has been concluded. Both the parties may file additional affidavits by way of evidence, if any, by next date.

To come up on 22.07.2010 at 4.30 p.m. for directions...”

5.3 As is evident on 10.07.2010 respondent no.3 had directed both parties, i.e., the petitioner and IOCL to file their respective additional affidavits. Somehow, from hereon, IOCL waited for petitioner to file its additional affidavits.

5.4 The petitioner though sought and was given time, for this purpose, on 22.07.2010, 30.07.2010 and 13.08.2010.

5.5 At the hearing held on 18.08.2010, respondent no.3, noted that the petitioner had filed its additional affidavit and, therefore, IOCL could file a “counter affidavit” by 23.08.2010, which was the next date of hearing fixed by respondent no.3. The change, though subtle, which was brought about was, that the additional affidavit, which was required to be filed simultaneously by IOCL along with that of the petitioner, by virtue of liberty granted by respondent no.3, on 10.07.2010, got categorized as a “counter affidavit”.

5.6 Evidently, IOCL did not file its additional affidavit by the aforesaid

date, i.e., 23.08.2010. Notably, in the proceeding of this date, i.e., 23.08.2010, the respondent no.3, labelled the affidavit to be filed by IOCL, once again, as an additional affidavit.

5.7 This by itself may not be of much significance, but what was of significance, was that, based on the consent of parties, it was agreed that after IOCL had filed its “additional affidavit”, they could straightaway proceed to final arguments, as it was felt that there was no need for cross-examination of witnesses, whose affidavits had been filed. Accordingly, after recording, as much, respondent no.3 fixed the matter on 01.09.2010, I would assume, for hearing arguments in the matter.

5.8 Evidently on 01.09.2010 a “draft copy” of the affidavit was handed over on behalf of IOCL to the counsel for the petitioner, with an assurance that the original would be filed by 03.09.2010. Accordingly, respondent no.3, fixed the matter “for arguments” of the petitioner on 04.09.2010.

5.9 On 04.09.010, oral submissions were advanced on behalf of the petitioner. Since, the matter was partly heard, it was fixed for further proceedings on 11.09.2010. These proceedings being crucial for the purposes of a decision in the matter, the directions, issued on that date are extracted hereinbelow:

“.... As per directions, respondent has filed additional affidavit with a copy to the claimant which has been taken on record.

Today the learned counsel for the claimant has advanced oral argument in part and the remaining arguments will be heard on the next date of hearing.

To come up on 11.09.10 at 11.00 a.m. in chamber at 5th Floor, Indian Oil Bhawan, Yusuf Sarai, New Delhi for arguments on behalf of claimant....”

(emphasis is mine)

6. Quite curiously, on the adjourned date, instead of continuing with

hearing submissions in the matter, respondent no.3 permitted, IOCL, to move an application under Section 18 and 19 of the 1996 Act for bringing on record additional documents. Accordingly, notice was issued in the said application, which was accepted by the petitioner. The petitioner was given time till 20.09.2010.

6.1 Since, parties, as also respondent no.3, i.e., the arbitrator, were conscious of the fact that the six (6) months' period for concluding the arbitration was coming to an end, they agreed to one month's extension to facilitate a decision on the reference.

6.2 On 20.09.2010, respondent no.3, while recording that arguments had been heard and orders were reserved, noted the submission of counsel for IOCL that he would be filing "some application" in the matter. After making this observation (the proceeding sheet is indicative of the fact), respondent no.3 fixed the case for final arguments, on 01.10.2010.

6.3 To my mind, on 20.09.2010, respondent no.3 may have reserved orders in the application moved by IOCL under Section 18 and 19 of the 1996 Act.

6.4 But what was rather curious, was that, there appeared to be no end to the indulgence which, respondent no.3 sought, to extend to IOCL to move one application after another.

6.5 As a result of this liberty, on 01.10.2010, true to form, IOCL moved an application for production of additional documents. On this date, respondent no.3 handed over a copy of the decision rendered by him, which was dated 22.09.2010. Though this order is not placed before me, evidently, by this order IOCL's application under Section 18 and 19 of the 1996 Act was allowed, which is why the petitioner's counsel indicated at the hearing, that he would want to file an application for review.

6.6 Respondent no.3, consequently, gave an opportunity to the petitioner to file a reply to the IOCL's application for production of documents; and also, quite strangely, gave an opportunity to IOCL to file a reply to the review application, which had not been, as yet, placed before him. The matter was, however, posted for further proceeding on 07.10.2010.

6.7 On 07.10.2010, petitioner's reply to IOCL's application was taken on record, as also, its "application for rectification of order dated 22.09.2010". The matter was listed for further proceedings on 09.10.2010. Furthermore, orders were reserved on IOCL's application for production of additional documents.

6.8 On 09.10.2010, respondent no.3 allowed IOCL's application for production of additional documents and received its reply to the application for rectification (which was referred to as a review application at the hearing held on 22.09.2010) moved by the petitioner. The proceedings were fixed, consequently, on 11.10.2010.

6.9 On 11.10.2010, petitioner's rectification application was rejected and, pursuant to respondent no.3's order allowing IOCL's application for production of additional documents, an affidavit, filed on behalf of the petitioner, was received. IOCL was, accordingly, given time to file an affidavit in rebuttal. The matter, however, was adjourned for further proceedings to 23.10.2010.

7. Yet again, on the aforesaid date, IOCL filed a fresh application. However, by this time, the mutually extended time for rendering a decision in the reference had come to an end; the time expired on 15.10.2010. The learned arbitrator, after noticing this fact, observed that necessary application be filed with the court, for further extension of time. The proceedings, consequently, stood adjourned to 30.10.2010. While doing so,

respondent no.3 indicated that the application moved on that date would come up for reply and arguments on 30.10.2010.

7.1 On 30.10.2010, however, due to respondent no.3's pre-occupation, the matter could not be taken up. The proceedings got adjourned to 10.11.2010. Counsel for the petitioner, in a communication dated 09.11.2010, indicated that, he was informed that the matter would come up for hearing on 12.11.2010. In view of the said mis-communication, he requested that the matter be taken up on 12.11.2010. Accordingly, on 10.11.2010, after recording his observations, listed the matter for further proceedings on 15.11.2010.

7.2 On 15.11.2010, counsel for the petitioner stated that he had furnished a copy of his reply to the "proxy counsel", appearing on the opposite side. This was, though, refuted by the officer of IOCL present at the hearing. The refutation was based on the assertion that the advocate concerned did not have the authority to appear in the matter. Respondent no.3, after recording this aspect, adjourned the matter *sine die*, on the ground that he had applied to this court for extension of time in the matter.

7.3 It is this application, which is numbered as IA No. 15690/2010, which was filed in disposed of OMP No. 235/2008. As noticed above, OMP No. 235/2008 stood disposed of on 25.02.2010.

7.4 During the pendency of the aforementioned application (i.e., IA No. 15690/2010 filed in OMP No. 235/2008), the captioned petition was filed. In the captioned petition, as indicated above, notice was issued on 13.09.2011.

7.5 I may only record that, on 02.05.2014, my predecessor, was informed, that respondent no.3 had retired from service of IOCL. On that date, time was taken by counsel for IOCL to seek further instructions in the matter.

SUBMISSIONS OF COUNSELS

8. In the background of the aforesaid facts, arguments on behalf of the petitioner were advanced by Mr Rajiv Bahl, while on behalf of IOCL, submissions were made by Mr Kalra.

9. Mr Bahl, learned counsel for the petitioner submitted that, given the history of the case, respondent no.3 ought to be removed as an arbitrator and, a new arbitrator, be appointed in the matter. It was the contention of the learned counsel that, since the appointment of the arbitrator by this court, in the first instance, in 1998, there has been no closure of the disputes pending between the parties. Respondent no.3, who was presently acting as an arbitrator, was in effect the fourth (4th) arbitrator to be appointed in the matter. Apart from the delay, according to Mr Bahl, the manner in which respondent no.3 had conducted himself, did not inspire confidence as regards his neutrality in the matter.

9.1 Mr Bahl further submitted that since the time given by the court vide its order dated 25.02.2010, passed in OMP No. 235/2008, had expired in September, 2010, respondent no.3, in law, in fact, has been rendered *functus officio*. In this context, it was further submitted, that even the one month's extension granted to respondent no.3, for rendering a decision in the reference came to an end on 15.10.2010. Thus, according to Mr Bahl, the mandate of respondent no.3 to act as an arbitrator had come to an end by virtue of provisions of Section 14(1)(a) of the 1996 Act.

9.2 It was the learned counsel's submission that, consequently, this court had the necessary power to appoint an arbitrator in the matter. In effect, Mr Bahl by making this submission gave up the relief sought in the petition, to the extent that, in the petition a specific prayer is made for appointment of an arbitrator under the 2006 Act.

9.3 In support of his submissions, Mr Bahl placed reliance on the following judgements: *Union of India vs Uttar Pradesh State Bridge Corporation Ltd., 2014 (10) SCALE 561* and *NBCC Ltd. vs J.G. Engineering Private Limited, (2010) 2 SCC 385*.

10. Mr Kalra, who appeared for the respondents, submitted that the petitioner had repeatedly approached this court for change of arbitrator, and that, the petitioner, was responsible for the delay in the conclusion of the arbitration proceedings.

10.1 Learned counsel drew my attention to the list of dates set out in IOCL's reply to demonstrate that the petitioner, in the very least, had sought five extensions between 21.06.2010 and 10.11.2010; which is when proceedings were held before respondent no.3.

10.2 Mr Kalra further submitted that applications had to be moved before respondent no.3 as new material had come to light which seemingly demonstrated that the petitioner had been paid the money claimed by it, in the action, pending before respondent no.3.

10.3 According to Mr Kalra, it was because the witness summoned from SBI could not produce the record, that an application had been filed calling upon the petitioner to produce the record.

10.4 Mr Kalra submitted that an arbitrator being not bound by the provisions of the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908, respondent no.3, was well within his rights to entertain applications being moved by IOCL even after final arguments in the matter had commenced.

10.5 Mr Kalra denied that there was any bias displayed in the arbitrator entertaining the applications, as alleged or at all.

10.6 Mr Kalra, thus, submitted that this was not the stage at which a

petition could be entertained for changing the arbitrator, and since, respondent no.3, despite his retirement had indicated his willingness to continue with the arbitration proceedings, respondent no.3, could conclude the matter.

10.7 Therefore, according to Mr Kalra, the stage for assailing the proceedings, on account of alleged bias, would arise only after an award is passed by way of a petition under Section 34 of the 1996 Act.

10.8 Mr Kalra, further submitted that, in terms of the arbitration agreement, obtaining between the parties, only the Director (Marketing), i.e., respondent no.2, or the officer of IOCL, so nominated by respondent no.2, could act as an arbitrator in the matter. This, according to Mr Kalra, was yet another reason as to why the relief prayed for in the petition could not be accorded.

10.9 In support of his submissions, Mr Kalra relied upon the following judgements: *Progressive Career Academy Pvt. Ltd. vs FITT JEE Ltd., 180 (2011) DLT 714 (DB)* and *Hashmukhlal H. Doshi & Anr. Vs Justice M.L. Pendse & Ors., 2001 (1) Arb. L.R. 87 (Bombay)*.

REASONS

11. Having heard the learned counsels for the parties and perused the record, what has come to light is a sad state of affairs. The disputes, in the instant case, pertain to a period spanning 1989 and 1992. Upon a petition being moved, an arbitrator was appointed by this court on 20.08.1998. In terms of the arbitration agreement, the then Director (Marketing), IOCL, was directed to act as an arbitrator.

11.1 Since, the then Director (Marketing), indicated his inability to act as an arbitrator, on an application of IOCL, the order was modified on 20.04.1999.

11.2 This resulted in, one, Mr A.P.S. Gulia being appointed as an arbitrator. As a result, at the very beginning, more than six (6) months were spent without any effective proceedings in the matter.

11.3 Mr A.P.S. Gulia acted as an arbitrator between 1999 and December, 2003. During this period of more than four (4) years, all that could be achieved was completion of pleadings.

11.4 Mr A.P.S. Gulia was replaced thereafter by Sh. S. Mazumdar, whose appointment was effectuated by Director (Marketing), IOCL, vide letter dated 02.12.2003.

11.5 Issues in the matter were framed, as late as 08.12.2004. By this time, since the appointment of the arbitrator by this court, on 20.08.1998, six (6) years had already gone by. Evidence by way of affidavit was filed by the petitioner and IOCL on 16.03.2005 and 18.05.2005, respectively.

11.6 IOCL woke up to the fact that it required to summon a witness from SBI, to produce the record only in 2007. Consequently, a petition, bearing OMP No. 286/2006, was moved for this purpose under Section 27 of the 1996 Act which, ultimately, came to be disposed of on 09.05.2007. This order of the court gave IOCL the liberty, only to summon, from the SBI, the power of attorney dated 25.11.1987.

11.7 Being aggrieved by the delay, the petitioner, moved an application for removal of Sh. S. Mazumdar, as the arbitrator. This petition was numbered as: OMP No. 235/2008. The court in its wisdom, at that stage, with the consent of parties, agreed to the appointment of a new arbitrator, with a caveat that proceedings will stand concluded within six (6) months from the date of the said arbitrator entering upon reference. The arbitrator was also mandated to impose costs for unnecessary adjournments.

11.8 Respondent no.3, i.e., Sh. M.K. Jain, the present incumbent, was

appointed by Director (Marketing), IOCL vide communication dated 09.03.2010. The arbitrator, however, entered reference on 17.03.2010.

11.9 First hearing before respondent no.3 took place on 09.04.2010. As per the order of this court dated 25.02.2010, arbitration proceedings were required to be concluded by respondent no.3 by 16.09.2010.

12. Despite the parties and respondent no.3 being aware of this deadline, the proceedings in the matter meandered. I may only note that the learned arbitrator (i.e., respondent no.3), as a matter of fact, went beyond the directions obtained by IOCL with regard to the record, giving rise to scope for delay in the conclusion of proceedings before him. This court by order dated 09.05.2007 had permitted the production of only the power of attorney dated 25.11.1987. Respondent no.3, however, vide summons issued on 07.05.2010, included other documents, such as cancellation of power of attorney dated 15.03.1988 and the statement of account of the petitioner for the period, January, 1988 to March, 1993.

12.1 At the hearing held on 14.03.2010, the documents of which production was sought from SBI's witness, was further expanded, as in addition to the aforementioned documents, two (2) other items were added. In the order dated 14.05.2010 the additional items detailed out are as follows:

“(d) The details of the payment made to the bank specifically relating to amount showing the cheques etc. (copy of details is attached to specifically bring the record pertaining to the said payment made on the account of claimant detailed in Annexure R-2).

(e) The copy of the details of the payment made to State Bank of India, Noida in the account of Haryana Packaids as mentioned in the rejoinder of the claimant amounting to Rs. 45,22,886.65 is also attached herewith (as per Annexure R3)...”

12.2 Finally, the cross-examination of SBI's witness got concluded on 10.07.2010. Therefore, nearly three (3) months were utilized, only in, recording the testimony of the SBI- witness, summoned by IOCL. What is curious though, is that on 10.07.2010 respondent no.3 gave opportunity to both the parties to file additional affidavits by way of evidence. As noted above, affidavit of evidence had already been filed, way back in March and May, 2005. This procedure entailed further delay. Having this in mind, it appears that respondent no.3 made it clear that additional affidavits should be filed by both parties, and not, as was sought to be understood by IOCL, if I may say quite conveniently, that it would file its additional affidavit after the petitioner had filed its affidavit.

12.3 Petitioner at this stage was remiss in taking three (3) adjournments for filing the additional affidavit by way of evidence. Accommodation in this behalf was taken by the petitioner on 22.07.2010, 30.07.2010 and 13.08.2010. All this while, IOCL did not file its additional affidavit by way of evidence.

12.4 Respondent no.3, it appears, placed neither the petitioner nor IOCL to terms, for their failure to do the needful in the matter as directed in the hearing held on 13.08.2010.

12.5 At the hearing held on 18.08.2010, respondent no.3 gave time to IOCL to file its additional affidavit by labelling it as a counter affidavit. Finally, IOCL filed its additional affidavit of evidence on 03.09.2010; a copy of which was given to the petitioner on 01.09.2010.

12.6 On 04.09.2010, the petitioner commenced its submissions in the matter. What the arbitrator did thereafter, in my view, was completely unacceptable, which is that, it permitted IOCL to move not one (1) but three (3) applications in the matter:

- (i) The first application dated 11.09.2010, was filed for bringing on record additional documents. This application was, evidently, filed under Section 18 and 19 of the 1996 Act.
- (ii) The second application was filed on 01.10.2010 for issuance of a direction to the petitioner to bring on record certain documents.
- (iii) The third application was filed on 23.10.2010, to once again, summon an officer of SBI, Ghaziabad Branch with a request to: “..bring the original record available with the bank more particularly the bank agreement between the claimant and the respondent and the proceedings of the Debt Recovery Tribunal in RA No. 516/202, SBI vs Haryana Packaids Pvt. Ltd. pending before Debt Recovery Tribunal, Lucknow....”.

12.7 The first application dated 11.09.2010, was allowed by the arbitrator vide order dated 22.09.2010. Obviously, being aggrieved by the order, an application was filed by the petitioner for review/ rectification of the order by the learned arbitrator. This application was dated 06.10.2010. By order dated 11.10.2010 the application was rejected.

12.8 Pursuant to respondent no.3 allowing the petitioner's application dated 11.09.2010 an affidavit was filed, which resulted in IOCL being permitted to file an affidavit in rebuttal. In addition to the above, pleadings also got completed in the third application dated 23.10.2010, which as would be obvious from narration of facts hereinabove, was filed not only after the expiry of six (6) months period accorded by this court for completion of arbitration proceedings, but also beyond the one month's extension agreed to by the parties, which expired on 15.10.2010.

12.9 Therefore, on 15.11.2010, when respondent no.3 finally adjourned the proceedings before him *sine die*, he was left to deal with not only the main dispute arising between the parties, but was also required to render a

decision on IOCL's application dated 23.10.2010, whereby it sought to summon, once again, SBI's witness with record referred to in the said application.

13. Having regard to the above, four (4) questions emerge for consideration of this court.

(i) First, whether respondent no.3, i.e., the incumbent arbitrator, had become *functus officio* after expiry of a period of six (6) months from the date of entering upon reference?

(ii) Whether the court could enlarge the time period which was extended by a period of one (1) month to enable respondent no.3 to render a decision in the matter?

(iii) Whether respondent no.3 had failed to act without undue delay?

(iv) Could the court override the arbitration agreement and appoint an arbitrator in exercise of its power under Section 11(6) of the 1996 Act?

ISSUE No. (i) & (ii)

14. In so far as issue no. (i) and (ii) are concerned, they appear to be covered by the decision of the Supreme Court in ***NBCC Ltd. Vs J.G. Engineering Pvt. Ltd. (2010) 2 SCC 385.***

14.1 In somewhat similar situation the court had directed the appellant therein to appoint a new arbitrator and conclude the proceedings within a period of six (6) months. The parties in that case extended the period of six (6) months, by another period of six (6) months, to enable the arbitrator to render an award. The arbitrator, however, was unable to render the award even within the extended time-frame. On intercession of the respondent, the High Court declared that the arbitrator, who was entrusted with the matter, had become infructuous. The High Court, therefore, proceeded to appoint an arbitrator.

14.2 It was in this context, that the matter was brought before the Supreme Court for adjudication. The Supreme Court noted that while under the 1996 Act, there is no provision available to fix a time limit for conclusion of arbitration proceedings, the court could do so in exercise of its inherent power on an application of either party. The court went on to say, where however, the arbitration agreement itself provides for a procedure for enlargement of time, and parties have taken recourse to it, and consented to enlargement of time, by the arbitrator, the court cannot exercise its inherent power to extend the time fixed by the parties, in the absence of consent of either of one of the parties before it. [See paragraph 22 at page 392 of the Judgement].

14.3 In the instant case, admittedly, six (6) months accorded by this court vide order dated 25.02.2010, came to an end on 16.09.2010. Parties by mutual consent, at the hearing held on 11.09.2010, extended the period by one (1) month to enable respondent no.3 (i.e., the arbitrator) to render a decision qua the reference. The extended period of one (1) month was to commence from 16.09.2010.

14.4 Admittedly, even according to respondent no.3, this period came to an end on 15.10.2010; as recorded by him in the hearing held on 23.10.2010.

14.5 In these circumstances, one can only conclude that the arbitrator had become *functus officio*, if not on 16.09.2010, but certainly on 15/16.10.2010.

15. If that being the position, respondent no.3 cannot continue as an arbitrator. I may only notice, that in the ***NBCC Ltd. vs J.G. Engineering Private Limited*** case, on the aspect as to whether an appointee of a court can continue as an arbitrator, the matter was remanded to the concerned High Court in view of the judgement of the Supreme Court in ***Northern Railways vs Patel Engineering Co. Ltd., 2008 (10) SCC 240***, wherein the court had

observed that while it was not mandatory on the Chief Justice, or any person or institution designated by him, to appoint the named arbitrator, due regard must be given to the qualifications required by the agreement or other considerations to secure the appointment of an independent and impartial arbitrator. The court also observed that in *Northern Railways vs Patel Engineering Co. Ltd.* (*supra*), there was, a reference to an earlier decision rendered in *Ace Pipeline Contracts ltd. vs Bharat Petroleum Corporation Ltd, 2007 (5) SCC 304*.

16. Furthermore, this aspect of the matter has been considered by the Supreme Court in a recent judgement, in the case of *Union of India vs Uttar Pradesh State Bridge Corporation Ltd.* (*supra*). After examining a plethora of judgements, the Court came to the conclusion that the “default procedure”, which was applied for appointment of independent arbitrators by the court, in exercise of its powers under Section 11 of the 1996 Act, could also be exercised for appointment of a substitute arbitrator in place of an existing arbitrator, where arbitration was delayed beyond a reasonable time. This power, however, was to be exercised having regard to facts and circumstances of each case. The relevant observations are contained in paragraphs 18 to 22 of the judgement.

16.1 The Supreme Court in that case finally sustained the exercise of power by the High Court under Section 11, whereby it had substituted the existing arbitral tribunal.

ISSUE No. (iii) & (iv)

17. These two issues can be dealt together as they are inter-dependant. In so far as issue no. (iv) is concerned, I have no difficulty in coming to the conclusion that the court has the power to appoint a new arbitrator in place of the incumbent arbitrator; provided it were to come to the conclusion that

there has been undue delay in concluding the arbitration proceedings. [See discussion hereinabove in paragraphs 14 to 16]. In so far as the aspect of delay is concerned, that is subject matter of Issue no.(iii); an aspect discussed below in the context of facts delineated above.

18. The narration of the facts would demonstrate that the incumbent arbitrator is the fourth (4th) arbitrator, who had been charged with the duty to conclude the proceedings. Prior to respondent no.3 entering upon reference, nearly twelve (12) years had already passed since the time, the first arbitrator was appointed to adjudicate upon the disputes arising between the parties herein. Given these facts, respondent no.3 ought to have been conscious about the fact that arbitration proceedings were required to be concluded, as expeditiously as possible, especially, having regard to the direction of the court issued vide order dated 25.02.2010.

18.1 Respondent no.3, instead of concluding the proceedings, allowed IOCL to move one application after the other, even after the petitioner's counsel had commenced oral submission in the matter.

18.2 What made matters worse is, that respondent no.3 allowed IOCL to move an application, on 23.10.2010, when the extended time frame beyond the time accorded by this court, had already come to an end.

18.3 In sum, the only conclusion that one can draw, is that, respondent no.3 has failed to act with due alacrity in the matter. That being so, I am persuaded to accept the submission advanced by Mr Bahl that the mandate of respondent no.3 is liable to be terminated under Section 14(1)(a) as he has failed to act without undue delay. If that being my conclusion, which it is, I see no reason not to exercise my power under Section 11(6) of the 1996 Act to appoint an arbitrator in the matter, in substitution to respondent no.3.

19. The judgements cited by Mr Kalra are clearly distinguishable. The

judgment in *Progressive Career Academy Pvt. Ltd. vs FITT JEE Ltd.* (*supra*) dealt with an issue, as to whether an arbitrator could be removed on the ground of bias by seeking the termination of his mandate under Section 14 of the 1996 Act. The court in that case came to a conclusion that such allegations of bias could be tested only after the final award was published in a petition under Section 34 of the Act and, therefore, no interference was called for by the court at the pre-award stage.

19.1 The position of law, as articulated in *Hashmukhlal H. Doshi & Anr. Vs Justice M.L. Pendse & Ors.* (*supra*) was no different.

19.2 In the instant case, the mandate of the arbitrator, i.e., respondent no.3 is being terminated on the ground of undue delay. The proceedings carried on by arbitrators appointed, one after the other, by Director (Marketing), IOCL, have now dragged on for yearly sixteen (16) years, without seeing the light of the day. Resultantly, the entire ethos behind arbitration stands completely defeated. Parties are encouraged to engage in arbitration proceedings, so that disputes are adjudicated fairly, with economy of time and expense, as an added attraction. The instant arbitration has certainly lost out on economy of time, and would have thus put the petitioner, which is a miniscule entity, as compared to IOCL, to a great distress, financially.

20. In view of the foregoing discussion, I am persuaded to hold that respondent no.3's mandate ought to be terminated. It is ordered accordingly. In order to expedite the conclusion of the proceedings, I hereby appoint Mr G.P. Thareja, Retd. ADJ (Ph. No. 011-20906899) as an arbitrator in the matter. The learned arbitrator shall though continue with the proceedings from the point at which they are positioned presently. While doing so, he shall also deal with the application dated 23.10.2010 filed by IOCL. Having regard to the huge expanse of time which has elapsed, since

the dispute arose between the parties herein, the learned arbitrator will endeavour to conclude the proceedings with requisite expedition, though not later than four (4) months. Parties will appear before the arbitrator on 10.03.2015. In case the said date is not convenient, the learned arbitrator will give a date in close proximity of the date indicated above. The period of four (4) months shall commence from such date. For this purpose, the learned arbitrator shall be paid a fee of Rs. 1 lac to be shared equally by both parties. In addition to the fee, the learned arbitrator will also be reimbursed any expense incurred by him, albeit on actual basis.

20.1 As a consequences of the directions issued hereinabove, the respondent no.3's application being: IA No. 15690/2010 filed in OMP No. 235/2008, shall also stand dismissed. It is ordered accordingly. IA No. 14514/2011 seeking condonation of delay is allowed, for the reasons given therein, coupled with the fact that there is no opposition preferred qua the said application.

21. Parties are, however, left to bear their own costs.

RAJIV SHAKDHER, J

MARCH 04, 2015

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