

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

Date of decision: 6th November, 2015

+ **LPA 760/2014, CMs No.19528/2014 (for stay) & 19529/2014 (for condonation of 31 days delay in filing the appeal)**

U.P. RAJYA VIDYUT UTPADAN NIGAM LTD. Appellant

Through: Mr. Pradeep Misra, Adv.

Versus

UNION OF INDIA & ORS

.....Respondents

Through: Mr. Ruchir Mishra, Ms. Saroj Bidawat and Mr. Mukesh Kumar Saxena, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra court appeal impugns the judgment dated 21st August, 2014 of the learned Single Judge of this Court of dismissal of W.P.(C) No.7328/2012 preferred by the appellant.

2. The appellant had preferred the writ petition from which this appeal arises impugning the letter dated 19th September, 2011 of the respondent No.3 Dr. Geeta Rawat (ILS), Joint Secretary, Govt. of India initiating proceedings for arbitration of disputes between the appellant and the respondent No.2 Engineering Projects India Ltd. (EPIL).

3. The facts are in a narrow ambit. The erstwhile U.P. State Electricity Board (UPSEB) placed a work order dated 5th February, 1982 on the respondent No.2 EPIL. The contract which thereby came into existence between the respondent No.2 EPIL and the UPSEB contained an arbitration clause as under:

“The arbitration clause suggested by Bureau of Public Enterprises shall be applicable.”

The respondent No.2 EPIL completed the work in December, 1988; prior thereto, the respondent No.2 EPIL on 6th May, 1988 raised certain claims. The said claims of the respondent No.2 EPIL were denied by the UPSEB vide letter dated 30th October, 1999. After some correspondence, the respondent No.2 EPIL finally vide letter dated 3rd July, 2001 approached the Department of Public Enterprises for settlement of the said disputes by forwarding the same to Permanent Machinery of Arbitration (PMA), as per the provisions of the circulars issued by the Department of Public Enterprises.

4. In the meanwhile, in pursuance of the Uttar Pradesh Electricity Reforms Act, 1999, UPSEB was unbundled and the thermal generating stations of UPSEB which had placed the work order aforesaid on the

respondent No.2 EPIL stood transferred to the appellant U.P. Rajya Vidyut Utpadan Nigam Ltd.

5. The respondent No.3 Dr. Geeta Rawat, acting as sole Arbitrator, in pursuance to the request aforesaid of the respondent No.2 EPIL, initiated the arbitration proceedings as aforesaid and which led to the filing of the writ petition from which this appeal arises.

6. The letter dated 19th September, 2011 supra of the respondent No.3 Dr. Geeta Rawat, *inter alia* intimates the appellant and the respondent No.2 EPIL:

(i) to pay the arbitration costs as prescribed by the Office Memorandum (OM) dated 22nd January, 2004 of the Department of Public Enterprises;

(ii) that failure to pay the costs within the prescribed time for upto six months will attract interest @ 15% per annum and beyond that will invite cancellation of the publication of the award;

(iii) that the forum of Permanent Machinery of Arbitration (PMA) had been established in terms of the decision of the Cabinet Secretariat in compliance of the directions of the Supreme Court in

Oil and Natural Gas Corporation Ltd. Vs. Collector of Central

Excise 1995 (4) SCC 541;

(iv) that Arbitration and Conciliation Act, 1996 or any other law for the time being in force shall not be applicable to the PMA;

(v) that the sole Arbitrator shall make a speaking award which will be published on plain paper and will be binding on both of them;

(vi) that they may however, if aggrieved from the award, file an appeal before the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice for setting aside or revision of the award;

(vii) that there shall be no appeal against the decision of the Law Secretary and the appellant and the respondent No.2 EPIL shall not be allowed to go to the Court for setting aside of the award published by the PMA, as the Arbitration and Conciliation Act, 1996 was not applicable thereto and the decision of the Law Secretary shall be binding on the parties.

7. The appellant filed the writ petition from which this appeal arises, contending (a) that the mechanism devised in ***Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise*** supra and reiterated in ***Oil and Natural Gas Corporation Ltd. Vs. City and Industrial Development Corporation, Maharashtra*** (2007) 7 SCC 39 had been overruled / recalled

in *Electronics Corporation of India Ltd. Vs. Union of India* (2011) 3 SCC 404; and, (b) that thus the mechanism devised thereunder also disappeared and the respondent No.3 Dr. Geeta Rawat had no authority to act as an Arbitrator for adjudication of the said disputes.

8. The respondent No.2 EPIL in its counter affidavit filed before the learned Single Judge pleaded, (I) that the respondent No.3 Dr. Geeta Rawat was acting as the sole Arbitrator in accordance with the arbitration clause contained in the contract between the respondent No.2 EPIL and the predecessor-in-interest of the appellant; the arbitration clause of the Bureau of Public Enterprises was set out in the counter affidavit; (II) that the appellant had failed to join in the arbitration proceedings before the respondent No.3 Dr. Geeta Rawat; (III) that the setting aside by the Supreme Court in *Electronics Corporation of India Ltd.* supra of the directions / mechanism devised in *Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise* had nothing to do with the PMA which had been set up prior to *Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise*.

9. The learned Single Judge accepted the defence aforesaid of the respondent No.2 EPIL and dismissed the writ petition vide the impugned

judgment *inter alia* holding as under:

(A) that though admittedly the mechanism devised pursuant to the dicta of the Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise*** of referring the disputes to Committee of Disputes stood set aside by the dicta of the Supreme Court in ***Electronics Corporation of India Ltd.*** supra, however the mechanism of PMA has not been dissolved and the parties were at liberty to agree to resolve the disputes through the mechanism of PMA which was set up by an executive decision to settle commercial disputes between public sector enterprises *inter se* and public sector enterprises and government departments;

(B) that PMA was set up independent of and prior to the mechanism of Committee of Disputes which was made effective by virtue of the decisions of the Supreme Court in ***Oil and Natural Gas Corporation Vs. Collector of Central Excise*** and ***Oil and Natural Gas Corporation Vs. City and Industrial Development Corporation, Maharashtra*** supra;

(C) that the arbitration clause contained in the work order placed by the predecessor-in-interest of the appellant on the respondent No.2

EPIL provided the contractual basis for resorting to PMA;

(D) that thus the arbitration agreement as suggested under the OM issued by the Department of Public Enterprises was applicable by virtue of the express terms of the contract of the appellant with the respondent No.2 EPIL.

10. Aggrieved from the aforesaid decision of the learned Single Judge, this appeal has been preferred contending, (i) that the continuance of the PMA is in derogation of the dicta of the Supreme Court in ***Electronics Corporation of India Ltd.***; (ii) that the claim of the respondent No.2 EPIL is barred by time; (iii) that the respondent No.3 Dr. Geeta Rawat in her letter dated 19th September, 2011 supra having specifically stated that the fora under which she was purporting to act as the sole Arbitrator was established under the decision of the Cabinet Secretariat in compliance with the dicta of the Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise***, the learned Single Judge could not have held that it is not so.

11. The appeal came up first before this Court on 28th November, 2014 when, finding that though the work order dated 5th February, 1982 placed by the predecessor-in-interest of the appellant on the respondent No.2 EPIL

provided for arbitration of disputes in accordance with the arbitration clause suggested by the Bureau of Public Enterprises but there was nothing on record to show as to what was the arbitration clause suggested by Bureau of Public Enterprises as on 5th February, 1982, we enquired so from the counsel for the appellant and on his request adjourned the matter to 9th December, 2014 and then to 19th January, 2015. The appellant has since filed, (A) OM dated 19th December, 1975 issued by the Cabinet Secretariat, the corrigendum thereof dated 19th August, 1976; (B) letter dated 23rd September, 1977 of the Cabinet Secretariat; and, (C) OM dated 17th July, 1982 issued by the Cabinet Secretariat. However, as per the said documents also, the disputes between the two public sector undertakings as the predecessor-in-interest of the appellant and the appellant on the one hand and the respondent No.2 EPIL on the other hand are, are to be resolved through arbitration (and recourse to litigation to be eliminated) of a serving Law Officer of the rank of Joint Secretary selected from a panel of names proposed by Law Ministry with the award being accepted as final challengeable any on grounds mentioned in Clauses (16) and (3) of the Arbitration Act (presumably the Arbitration Act, 1940) by reference made to the Secretary, Ministry of Law & Justice.

12. We heard the counsel for the appellant on 7th April, 2015 and reserved judgment on admissibility of the appeal.

13. The challenge by the appellant to the arbitration proceedings initiated was primarily on the ground of the same being pursuant to the mechanism set in place under the dicta of the Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise*** and which mechanism stood set aside / withdrawn vide later dicta in ***Electronics Corporation of India Ltd.*** Though the grounds, of the claim for adjudication of which the Arbitral Tribunal had been set up were stale and time barred and of the arbitration being bad for the reason of excluding the applicability of the provisions of the Arbitration and Conciliation Act, 1996, were pleaded but not pressed.

14. The appellant having not pressed the challenge to the arbitration on the grounds of limitation and of excluding the applicability of the Arbitration Act, cannot in this appeal urge the same. Even otherwise, it is the settled position in law (see ***S.B.P. & Co. Vs. Patel Engineering Ltd.*** (2005) 8 SCC 618 and ***Lalit-Kumar V. Sanghavi Vs. Dharamdas V. Sanghavi*** (2014) 7 SCC 255) that a writ petition with respect to arbitration proceedings does not lie.

15. Thus the only question for adjudication is, whether the arbitration was under a mechanism which no longer was in force / existed.

16. No error can be found in the reasoning or the conclusion reached by the learned Single Judge on the said aspect. It is not as if the contract between the parties did not provide for arbitration and the parties were being compelled to arbitrate only because of the dicta of the Supreme Court in *Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise* supra and which dicta is no longer in force. The work order placed by the predecessor-in-interest of the appellant on respondent no.2 EPIL expressly provided that the arbitration clause suggested by the Bureau of Public Enterprises shall be applicable.

17. It is not the case of the appellant that at the contemporaneous time there was no arbitration clause suggested by the Bureau of Public Enterprises and that thus there was no arbitration agreement between the parties.

18. The parties had thus admittedly contracted for arbitration.

19. Once that is so, the fact that the Supreme Court in *Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise* supra disapproved of the Government Departments or the Public Sector Enterprises litigating with

each other in Courts and suggested a mechanism for settlement of such disputes including by arbitration, would not be relevant inasmuch as the appellant was / is bound by its agreement of arbitration.

20. In our view, it also matters not that the respondent no.3 Arbitrator considered that her appointment constitution as a sole Arbitrator was owed to *Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise* supra and not to the contract between the parties. The same would be totally irrelevant.

21. Significantly, it is not the case of the appellant that the constitution of the Arbitral Tribunal is not in accordance with the contract.

22. Though the counsel for the appellant has not argued, we may record that the question, whether the provisions of the Arbitration Act are applicable to the arbitration aforesaid, is not relevant at this stage and the occasion therefor may arise at a subsequent stage. It may however be observed that Section 2(2),(4) & (5) of the Arbitration Act provides that the part thereof relating to domestic arbitration applies where the place of arbitration is in India, save as otherwise provided in any law. It may further be observed that this Court in *Steel Authority of India Ltd. Vs. Engineers Project India Ltd.* MANU/DE/2793/2014 reiterated by me in Order dated

18th September, 2015 in W.P.(C) No.6591/2015 titled ***Rakesh Kumar Garg Vs. DSE Financial Service Ltd.*** has held that there is no provision in Arbitration Act that proscribes a two tier arbitration procedure.

23. We therefore do not find any merit in the appeal.

24. We may however observe that though the Supreme Court in ***Electronics Corporation of India Ltd.*** supra has withdrawn the directions issued in ***Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise*** but for the reason of finding that the same were not serving any purpose and were merely delaying the adjudication of the disputes *inter se* Government Departments and Public Sector Enterprises and which were ultimately landing in the Courts. What has not been set aside in Electronics Corporation of India Ltd. is the lament of the Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Collector of Central Excise*** of the Government Departments / Public Sector Enterprises being unable to settle their disputes amicably and spending huge amount of public money over litigation and owing to which litigation a large number of public projects remain held up. The present is yet another instance of a Public Sector Undertaking as the appellant insisting upon litigating for the sake of litigation, without any endeavour to take a logical view of the matter at any

level and in the process, continuing to spend lacs of rupees on litigation.

25. We therefor find no ground to entertain this appeal. The same is dismissed. We refrain from imposing costs on the appellant.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

NOVEMBER 06, 2015

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