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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (T) (COMM.) 41/2016**

OMAXE INFRASTRUCTURE & CONSTRUCTION PVT. LTD.
..... Petitioner
Through: Mr.M.K.Ghosh, Ms.Tina Garg, Advs.

versus

UNION OF INDIA & ANR. Respondents
Through: Mr.Jaswinder Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
27.05.2016

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IA's 6758-6759/2016

Exemption allowed, subject to all just exceptions.

Applications are disposed of.

O.M.P. (T) (COMM.) 41/2016 & IA 6760/2016 (stay)

1. The present petition has been filed by the petitioner under Section 14(2) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation Act (amendment Act, 2015), with the following prayers:-

“(i) Pass orders for substituting the arbitral tribunal comprising of Sh. K.K. Gupta, Ld. Sole Arbitrator by any of the following arbitrators:

*a. Dr. D.P. Sharma,
Former Law Secretary, Govt. of India,
A-176, Gujrawala Town, Part-I,
Delhi-110009, Mob. No. 97711157473.*

Email: dr.dpsharma@nic.in

*b. Sh. Krishna Kant,
M.Tech, FIE, FIITA, FIV,
MICA, MIBC, MICI, MIRC,
Former Un Expert & CE CPWD,
411, Sector A, pocket C, Vasant Kunj,
New Delhi- 110070, Mob:- 9910329400 (M)
Fellow Member of Indian Institute of Technical
Arbitration. Email :- kantk45@gmail.com*

*c. Shri S.R.Pandey,
Former ADG, CPWD,
19, SRM Apartments; 106, IP Extension;
Delhi- 110092. Mob No. 9810275731.
Email :- psr0127@yahoo.co.in*

(ii) Declare that Sh. K.K. Gupta, Ld. arbitrator has become de jure and de facto unable to perform his functions as a Ld. arbitrator.

(iii) Declare that the mandate of Sh. K.K. Gupta, Ld. arbitrator has terminated.

(iv) Declare that the letters/orders dated 02.02.2016, 18.02.2016, 03.03.2016, 18.04.2016 and 03.05.2016 passed by Sh. K.K. Gupta, Ld. arbitrator are without jurisdiction, void ab initio and non est.

(v) Pass such further or other orders as this Hon'ble Court may deem fit in the facts and circumstances of the case in favour of the Petitioner and against the Respondents."

2. It is the submission of the learned counsel for the petitioner that the appointment of Mr.K.K.Gupta, as the sole arbitrator having been made after 23rd October, 2015 vide letter dated 3rd December, 2015, an employee of the

respondents could not act as an Arbitrator, in view of the provisions of Section 12(5) of the Act read with Seventh Schedule. He states that Section 21 of the Arbitration and Conciliation Act, 1996 states, “*unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.*”

3. According to him, the date of invocation of arbitration by the petitioner even though before 23rd October, 2015, as the parties have in terms of proviso to clause 60 agreed as under, the invocation before that date is inconsequential:-

“Provided that in the event of abandonment of the works or cancellation of the contract under condition Nos.46, 47, 48 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.”

4. He states, twice the respondents have rejected the request of the petitioner. In other words, the parties having agreed for not making reference till such time arrangements are made, the appointment being on 3rd December, 2015, the Amendment Act shall be applicable.

5. I am afraid that the aforesaid submission of the learned counsel for the petitioner is not appealable for the simple reason that the reliance placed by

the petitioner on proviso to clause 60 of the agreement, is only a bar for the respondents not to make a reference unless alternate arrangements have been finalized by the Government to get the works completed but the proviso does not preclude the petitioner to invoke arbitration. It is one thing to state that a request for referring the dispute to arbitration is made by one party and other that reference shall not be made by the other party, till such time arrangements are made.

6. Suffice to state, Section 21 of the Arbitration and Conciliation Act, 1996 gets attracted in the present case, inasmuch as invocation was before 23rd October, 2015. I do not see any merit in the petition and the same is dismissed.

V. KAMESWAR RAO, J

MAY 27, 2016
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