

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. (T) (COMM.) 48/2016 & IA No.7759/2016 (for stay)

Reserved on: September 26, 2016

Date of decision: October 20, 2016

STEEL AUTHORITY OF INDIA LTD

..... Petitioner

Through: Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Shival Srivastava and Mr. Abhijeet Sinha, Advocates.

versus

BRITISH MARINE PLC.

..... Respondent

Through: Mr. Abhinav Vasisht, Senior Advocate with Mr. Sumit K. Batra & Ms. Priya Chauhan, Advocates.

CORAM: JUSTICE S.MURALIDHAR

J U D G M E N T

20.10.2016

%

1. An interesting question of law arises for determination in this petition filed by the Petitioner, Steel Authority of India ('SAIL') against the Respondent, British Marine PLC. ('BMPL') under Section 14 of the Arbitration and Conciliation Act, 1996 ('Act'). It is whether the Court, in exercise of its power under Section 14 (1) (a) of the Act, can declare that two of the three members constituting the Arbitral Tribunal ('AT') are "unable" to perform their functions and therefore, their mandate should be terminated and they should be substituted by another two arbitrators?

2. The factual background to the present petition is that on 5th December,

2007 an agreement was entered into between SAIL and BMPL which was amended by Addenda dated 14th December, 2009 and 20th April, 2011. The Agreement was for import of coal from Australia to the extent of 3.0 million tonne (MTs) plus or minus 5% during the period from June 2008 to December 2012. It is not in dispute that by its letter dated 12th September, 2012 SAIL terminated the Agreement under Clause 62 thereof.

3. BMPL then invoked Clause 60 of the Agreement which provided for arbitration under the Act “or any further amendment thereof” and under the Maritime Arbitration Rules (‘MAR’) of the Indian Council of Arbitration (‘ICA’). In terms of the said clause, the Arbitrators were to be appointed “from out of the Maritime Panel of Arbitrators” of the ICA. It was further stipulated that “the arbitrators shall be commercial men.”

4. After invoking the arbitration clause on 31st March 2014, BMPL filed its statement of claim and nominated Mr. Niranjan Chakraborty from the Maritime Panel of Arbitrators of the ICA. On 30th April, 2014 SAIL challenged the appointment of Mr. Chakraborty on the ground that he did not qualify as a commercial man. Under Clause 10 (4) (c) of the MAR, any party shall have the right to challenge the appointment of an Arbitrator within 30 days after his appointment has been communicated to the challenging party or even within 30 days after his becoming aware of the reasons for which the challenge is made. The Rule further stipulates, “The Maritime Arbitration Committee shall be the sole judge of the grounds of challenge and its decision shall be final and binding on the parties.”

5. By an order 17th June 2014, the Maritime Arbitration Committee

(‘MAC’) of the ICA rejected the challenge of SAIL.

6. In the meanwhile, on 29th May 2014 SAIL appointed Mr. Ashok Sharma as its nominee Arbitrator. On 20th June, 2014 SAIL filed a Statement of Defence contesting the claim of BMPL.

7. On 18th June, 2014, Mr. Chakraborty while accepting to serve as an arbitrator made a declaration that “I do not have financial or personal interest in the outcome of the award which is likely to disqualify me to act as an impartial or independent arbitrator.” On 25th June 2014 the ICA appointed Captain S.M. Berry as the third/Presiding Arbitrator and the AT was thus constituted.

8. The case of SAIL is that there was a claim made against SAIL by Seaspray Shipping Company Limited ('Seaspray') which came to be adjudicated by the AT which comprised of both, Mr. Chakraborty and Captain Berry as co-Arbitrators. The Award dated 20th August 2014 in that case was passed by the three-member AT (which was presided over by Capital Prakash Anand). It allowed the claim of Seaspray against SAIL. SAIL states that it had received a copy of the said Award, which was sent to it by covering letter dated 1st September 2014, only on 5th December, 2014.

9. Meanwhile, on 10th October, 2014, the AT in the present case framed issues. On 6th January, 2015 SAIL filed an application under Section 12 of the Act challenging the continuance of both Mr. Chakraborty and Captain Berry on the ground that they were disqualified from functioning as such. According to SAIL, the questions involved in the present arbitration and

those in the arbitration in which the Award was made in favour of Seaspray and against SAIL were more or less identical. Both the said members were, according to SAIL, unlikely to take a different view in the present arbitration. Therefore, according to the SAIL, the Seaspray Award gave rise to justifiable doubts as to the lack of independence and impartiality of Mr Chakraborty and Captain Berry.

10. SAIL further stated in its application before the AT that “independent of the challenge based on lack of impartiality, independence and prejudice, both the said arbitrators are also *de jure* and/or *de facto* incapable of performing their function as arbitrators in this matter and their mandate stands terminated.”

11. On 7th January, 2015, the AT requested the MAC to decide the said application expeditiously since it had exclusive jurisdiction to do so. By its letter dated 20th January, 2015 SAIL requested MAC for an oral hearing on its application. This was rejected by the ICA by its letter dated 21st January, 2015. Thereafter, on 27th January 2015 SAIL filed its detailed written submissions in support of its application. By an email dated 3rd March, 2015 the ICA informed SAIL that the matter had been referred to the MAC. The MAC had in its meeting held on 4th February, 2015 after considering the submissions of both the parties and after carefully going through the relevant facts and circumstances of the objection filed by SAIL decided to dismiss SAIL’s application by a speaking order on the ground of delay. It is stated by SAIL that a copy of the speaking order was not provided to it despite a requested made on 9th May, 2015.

12. The Court was informed during the course of the hearing of the present petition that in the arbitration proceedings, evidence of the Claimant i.e. BMPL has been concluded and the cross-examination of its witnesses by SAIL has already been completed. The matter is now at the stage of SAIL's evidence.

13. By its letter dated 13th May, 2015, while rejecting SAIL's request for a copy of the speaking order, the ICA informed SAIL the relevant mandate of the MAC regarding its objections "cannot be made available even to any of the ICA members, let alone the parties concerned, except the Committee Members who can only inspect the minutes."

14. With effect from 23rd October, 2015 an important change took place when the Ordinance to amend the Act was issued. The Ordinance has since been replaced by the Arbitration and Conciliation (Amendment) Act, 2015 ('Amendment Act') which came into effect on the same date. Important changes were made to Sections 12 and 14 of the Act. As far as Section 12 of the Act is concerned, it has been recast to provide for a person who is approached in connection with his possible appointment as an arbitrator having to mandatorily disclose in writing the circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality [Section 12 (1) (a)] and the circumstances "which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of 12 months" [Section 12 (1) (b)]

15. Explanation 1 to Section 12 (1) of the Act as amended states that "the

grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.” Under Explanation 2, it is stated that “the disclosure shall be made by such person in the form specified in the Sixth Schedule.”

16. It may be noted that even under Section 12 (2) of the un-amended Act, the Arbitrator was required to disclose to the parties in writing “from the time of his appointment and throughout the arbitral proceedings” without delay, “any circumstances referred to in sub-Section (1) unless they have already been informed of them by him.”

17. Section 12 (3) of the Act states that “an Arbitrator may be challenged only if (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualification agreed to by the parties.” Section 12 (4) states that “a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.” Section 12 (5) has been inserted by the Amendment Act where, notwithstanding any prior agreement, in view of the relationship of the person with the parties or counsel or the subject matter of the dispute as specified in the Seventh Schedule, such person becomes ineligible to be appointed as an arbitrator. This, however, can be waived by the parties by an express agreement between them in writing.

18. Section 14 of the Act talks of the failure or impossibility to act. Barring the small change in the Amendment Act to provide that the Arbitrator

would be substituted by another arbitrator if his mandate terminates in accordance with the provision, Section 14 more or less remains the same and reads as under:

“14. Failure or impossibility to act. – (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if –

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this Section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply an acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.”

19. Mr. Ciccu Mukhopadhaya, learned Senior counsel appearing for the Petitioner SAIL, at the outset stated that there are two broad grounds on which SAIL is seeking termination of the mandate of both Mr. Chakraborty and Capitan Berry. One is on account of them acting in defiance of the statutory obligations to make a full disclosure in terms of Section 12 of the Act which, according to him, results in their *de jure* disqualification precluding both of them from functioning as arbitrators. It is contended that by their conduct of refusing to make disclosure, both of them become *de jure* and/or *de facto* incapable of performing their

functions as arbitrators in terms of Section 14 (1) (a) of the Act. Secondly, it is stated that a situation under Item 24 of the Fifth Schedule exists in the present case as both these arbitrators participated in the Seaspray Award which involved similar issues and therefore, gave rise to the reasonable and justifiable doubts as to the lack of independence and impartiality. Item 24 of the Fifth Schedule reads as under:

“24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.”

20. Mr. Mukhopadhaya points out that on 19th November 2015, SAIL sought the disclosure from the two arbitrators under the Fifth, Sixth and Seventh Schedules read with Section 12 of the Act (as amended by the Ordinance). After objections were raised by BMPL in its letter dated 24th November 2015 on the ground that the amended Act would not apply to the present arbitration, SAIL wrote on 3rd December, 2015 stating that under Section 12 (2) as it existed prior to the amendment, there was a continuing obligation on the arbitrators to make disclosures.

21. On 9th December 2015, Mr. Chakraborty wrote to the Registrar, ICA in response to the above request of SAIL, enclosing a copy of the declaration already made by him on 18th June, 2014 as per the Rules of the ICA which, according to him, are more or less similar to the disclosure required under the amendment to the Act made in 2015. He stated that “there is no conflict of interest and may clarify that I have neither acted for and/or against TRANSCART. I never had or intended to have any dealings with TRANSCART.” On 10th December 2015, Mr. Ashok Sharma made his

disclosure under Section 12 read with the Fifth and the Seventh Schedule.

22. On 15th December, 2015 SAIL again requested Mr. Chakraborty to make full disclosure in terms of the Schedules read with Section 12 of the Act. At the hearing on 15th December 2015 before the AT, SAIL again pressed for the disclosures. On the same date itself i.e., 15th December, 2015 the AT stated that for hearing it was *inter alia* required that the format of the Sixth Schedule be provided by counsel for SAIL to the AT. According to SAIL, it had been provided to the arbitrator on that date itself.

23. At the next hearing on 8th April, 2016, the AT declined to accept the request for disclosure by its order. The relevant portion of which is read below:

“Respondent counsel drew attention of the Tribunal to make disclosure as per the Sixth Schedule of the Arbitration and Conciliation Act, 1996 (amended) as noted in the Order Sheet dated 15th December 2015. The Tribunal notes that the Arbitration and Conciliation (Amendment) Act, 2015 becomes applicable to any appointment after 23rd October, 2015. As the declaration has been made as per the format of the ICA, the Tribunal is not required to make any further declaration.”

24. Mr. Mukhopadhaya urges that the refusal by Captain Berry and Mr. Chakraborty to make a full disclosure in terms of Section 12 of the Act is not only surprising but it untenable. It raises justifiable doubts about their lack of independence and impartiality. A reference is made by Mr. Mukhopadhaya to the decision of the Bombay High Court in ***Satyendra Kumar v. Hind Constructions Limited AIR 1952 Bom 227*** in which it was observed as under:

"4. Now, in order to decide this question, we must try and lay down clear principles which should apply to the conduct of arbitrators. There can be no doubt that an arbitrator must show *unberrima fides* to the parties whose disputes he is going to arbitrate and who have constituted him their domestic forum. In a sense the position of an arbitrator is different from that of a Judge. If a party goes to the Court, he has got to submit to a decision of the Judge. He has no choice in the appointment of the Judge. But when parties go to a domestic forum and want their matters to be determined by arbitration; they have every choice as to the person whom they should select as their arbitrator, and therefore, it is clear that highest faith should be shown by the arbitrator. It also follows that the arbitrator must disclose to the parties all facts which are likely or calculated to bias him in any way in favour of one or the other party. A circumstance or a fact may in fact not bias the decision of the arbitrator. The arbitrator may have too strong a character, too deep a sense of justice to be influenced by any consideration extraneous to or foreign to the evidence which he has got to consider. But the Question is not what is likely in fact to happen, but what is likely to tend or is calculated to tend to a particular result. Therefore, if the Court comes to the conclusion that there are any facts or any circumstances which are likely to affect the decision of the arbitrator which are likely to bias him, it would be incumbent upon the arbitrator to disclose those facts to the parties. If he fails to disclose these facts, then his award would be liable to be successfully challenged.

.....
6. An interesting argument has been advanced before us by Mr. Desai as to what is the nature of the interest which a Judge is bound to disclose, which, if not disclosed, would result in the judgment of the Judge being set aside. It is unnecessary to launch upon that inquiry in this case, because, as I have just pointed out, the case of the Arbitrator stands on a higher footing and whatever the nature of the interest may be which a Judge is bound to disclose, as far as an arbitrator is concerned, he must disclose all facts, all circumstances which are likely to influence his judgment or bias his mind....."

25. Mr. Mukhopadhyaya also referred to the decision in *Priknit Retails*

Limited v. Aneja Agencies 198 (2013) DLT 763 where it was pleaded that it is not enough that there be a mere legal disability for invocation of Section 14 but the said disability must relate to the ability to function, and the Court observed as under:

“22. It is one thing to say that the arbitrator could not have appointed at the first place and his appointment is bad due to lack of consent by the party but **it is altogether different thing to say that the arbitrator possesses legal disqualifications leading to inability to perform his function.** The distinction is blurred but not such which can be said to be unidentifiable. (emphasis added)

26. A reference is also made to the decisions in ***Union of India v. Tolani Bulk Carriers Limited 2002 (2) Bom CR 256*** and ***Gas Authority of India Limited v. Ketu Construction (I) Limited (2007) 5 SCC 38.***

27. In reply to the above submissions, Mr. Abhinav Vashisht, learned senior counsel appearing for BMPL, first submitted that the petition is in abuse of process of law. It was filed by SAIL only to delay the conclusion of the arbitration proceedings which is at an advanced stage of evidence of SAIL. Mr. Vashisht points out that even in the case of ***Gas Authority of India Limited (supra)***, the Court reminded that

“24. ... where a party raises a plea that the Arbitral Tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the Arbitral Tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the Arbitral Tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on model law clearly illustrates the aforesaid legal position.”

28. Consequently, Mr. Vashisht points out that for the purpose of the Fifth Schedule and in particular Item 24, a party cannot seek disclosure of something which is already within its knowledge. In the present case SAIL was itself a party to the Seaspray Award which was issued by a three-member AT comprising both Captain Berry and Mr. Chakraborty. It cannot therefore be said that SAIL was unaware of those proceedings.

29. Before examining the above submissions, the Court would like to advert to the scheme of the Act as far as the challenge to the arbitrator is concerned. This essential scheme of the Act has not undergone a significant change except it has been made more explicit under Section 12 as to what can give rise to justifiable doubts about the impartiality of the Arbitrator.

30. While Section 12 sets out the grounds of challenge, Section 13 sets out the challenge procedure. Where the challenge procedure fails, the aggrieved party has to wait for the pronouncement of the Award to challenge one of the grounds i.e., partiality of the arbitrator. This is apparent from Section 13 (4) read with Section 13 (5) of the Act which read as under:

“13 (4). If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

13 (5). Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.”

31. The above provisions came up for consideration before the Division Bench of this Court in ***Progressive Career Academy Pvt. Ltd. v. FIITJEE Limited* 180 (2011) DLT 714**, wherein it was held that where the party fails to challenge the procedure, such party cannot thereafter raise a challenge under Section 14 of the Act seeking termination of the mandate of the arbitrator. The Court has categorically ruled that such party will have to wait till the passing of the Award and if it is adverse to the party, raise the ground under Section 13 (4) read with Section 13 (5) of the Act at the time of challenging the Award under Section 34 of the Act.

32. It may be mentioned here that the above judgment was followed by this Court in ***MBL Infrastructures Limited v. Telecommunication Consultants India Limited* 217 (2015) DLT 212** which has been stayed by the Supreme Court. The fact remains, however, that the decision of the DB in ***Progressive Career Academy Pvt. Ltd. V. FIITJEE Limited* (supra)** has not been stayed by the Supreme Court.

33. Mr. Mukhopadhyaya sought to distinguish the above judgments stating that those arose under the provisions of the un-amended Act and did not explicitly refer to the grounds that gave rise to justifiable doubts about the lack of independence and impartiality of the Arbitrator. According him, the amended Sections 12 and 14 are applicable to the present case. Consequently, it is submitted that the decision for the purpose of Section 13 of the Act had to be taken by the AT itself and could not have delegated to MAC of the ICA. Further, the said procedure is stated to be in violation of the principles of natural justice since neither a oral hearing was ordered nor was SAIL's request for a copy of the so-called speaking order allowed

by the ICA. Reliance has also been placed on the decision of the Punjab & Haryana High Court in *Imaging Solutions Pvt. Ltd. v. Hughes Communications India Limited* 2013 (1) Arb.LR 433 (P&H) and *Yashwitha Constructions (P) Limited v. Simplex Concrete Piles India Limited* 2008 (4) ALT 266.

34. The Court is not persuaded by the submissions of Mr. Mukhopadhaya in the present case that it should intervene to terminate the mandate of Mr. Chakraborty and Captain Berry and replace them with two other arbitrators. The reasons are as under:

- (a) The essential scheme of the Act regarding challenge procedure has not undergone change even after the amendment to the Act with effect from 23rd October, 2015;
- (b) The parties have consciously agreed that the arbitration would be governed by the MAC Rules in terms of which the decision of the MAC on the challenge to the arbitrators is binding and final on the parties. The MAC has negated SAIL's challenge to both these arbitrators;
- (c) Having failed in such challenge, SAIL has to necessarily wait for passing of the Award to raise a ground to challenge such Award, assuming it is adverse to SAIL. In other words, one of the grounds to the challenge under Section 34 of the Act is the challenge to the impartiality of the members of the AT.

35. At this stage, the Court will consider whether the members of the AT were justified in the stand that they were not required to make a disclosure other than that they had already made. In other words, the Court will

consider at this stage whether it was incumbent on the arbitrators to have abided by the requirements in terms of the Fifth Schedule and in particular, Item 24 thereof. The Court will also consider Explanation 2 to Section 12 (1) which grants possible exception where it is the custom and practice for parties to appoint the same arbitrators in different cases.

36. As already noticed, the decision of the Division Bench of the Court in ***Progressive Career Academy Pvt. Ltd. v. FIITJEE Limited*** (*supra*) has not been challenged in the Supreme Court and still holds good. Being a decision of the Division Bench, it is binding on this Court. The Court, therefore, does not have the option of not following the said decision only because an SLP is pending against the subsequent decision of the learned Single Judge in ***MBL Infrastructures Limited v. Telecommunication Consultants India Limited*** (*supra*).

37. The effect of the failure by the ICA to furnish a copy of the speaking order passed by the MAC rejecting the challenge by SAIL to two of the arbitrators has also to be considered by the Court at the time of challenge to the Award under Section 34 of the Act. The decisions cited by Mr. Mukhopadhaya on the replacement of the arbitrators whose impartiality was doubted were delivered at the stage of challenge to the Award itself and not at any interim stage.

38. The scheme of the Act and, in particular, Section 5 thereof does not permit interference by the Court in arbitral proceedings at intermediate stages unless expressly permitted *per se* by other provisions of the Act. The Court is not persuaded to hold that the Petitioner has been able to

make out a case on the alternative ground viz., that by declining to make a disclosure in terms of Fifth Schedule of the Act, the arbitrators have rendered themselves “unable to perform their functions” in terms of Section 14 (1) (a) of the Act. In any event, as held in ***Progressive Career Academy Pvt. Ltd. v. FIITJEE Limited*** (*supra*), once a party has adopted the challenge procedure under Section 13 of the Act, it cannot seek to invoke Section 14 of the Act but will have to wait for the pronouncement of the Award.

39. For all the aforesaid reasons, the petition is dismissed but, in the facts and circumstances of the case, with no order as to costs.

OCTOBER 20, 2016

Rm

S. MURALIDHAR, J.

