

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

% **Judgment reserved on: 3rd August, 2016**
Judgment pronounced on: 5th August, 2016

+ **O.M.P. 1096/2014 & I.A. Nos.159/2015 & 19880/2015**

TAXUS INFRASTRUCTURE AND POWER PROJECTS PVT LTD

..... Petitioner

Through Mr.D.Ray Choudari, Sr. Adv. with
Mr.Madhu Sudan Bhayana, Adv.

versus

SCHNEIDER ELECTRIC INDIA PVT LTD

..... Respondent

Through Mr.Sujoy Kumar, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the petition under Section 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for seeking the directions about the Constitution of one Member Tribunal i.e. Mr. R.C. Lahoti, Former Chief Justice of India to act as sole Arbitrator in place of three learned Arbitrators and direct the Center of Arbitration as constituted by this Court to adjudicate the disputes between the parties.

2. Admittedly, disputes arose between the parties. On 29th August, 2012 Settlement Agreement was executed between the parties whereby the petitioner unequivocally and in full and final settlement was obligated to pay Rs.13.50 crores and hand over certain postdated cheques detailed therein.

3. By order dated 15th May, 2013 the petition being OMP No.427/2013 filed by the petitioner under Section 9 of the Act for restraining the respondent from encashing certain postdated cheques in relation to the Settlement Agreement dated 29th August, 2012 with liberty to the petitioner to approach the Arbitral Tribunal under Section 17 of the Act was dismissed.

4. On 13th July, 2013 Procedural order No. 1 was passed by the Arbitral Tribunal constituting of Mr. Justice R.C. Lahoti, Presiding Arbitrator, Justice (Retd.) C.M. Nayar, nominee Arbitrator of the respondent and Mr. Debashish Moitra, Advocate nominee Arbitrator of the petitioner.

5. The two nominee Arbitrators of the respective parties had appointed Justice (Retd.) R.C. Lahoti as the Presiding Arbitrator in terms of the Arbitration Clause contained in the Settlement Agreement dated 29th August, 2012 being clause 13 thereof which has been reproduced here as under:

"All disputes, differences, claims and counter claims between the parties arising out of the Agreement shall be referred to Arbitration under the provision of The Arbitration and Conciliation Act, 1996. Both parties, the Contractor and the Owner, shall nominate an Arbitrator representing them, and these two nominated Arbitrators shall, then appoint the Third Arbitrator who shall preside over the Arbitral Tribunal. The award of the Arbitral Tribunal shall be final and binding on both the parties. The Arbitration shall be conducted in English, and the venue of the Arbitration will be in Delhi"

By this procedural order No. 1 dated 13th July, 2013, the Arbitral Tribunal fixed the fee of the Arbitral Tribunal "In consultation with the learned counsel of the parties", which showed that the fee was fixed with the consent of the parties and the

petitioner was represented by their Senior Advocate and two lawyers as well as the representative of the petitioner”.

6. By order dated 11th October, 2013 the Arbitral Tribunal dismissed the application preferred by the petitioner under Section 17 of the Act. The respondent filed the counter-claim in the said arbitration proceedings.

7. On 19th December, 2013, Arbitral Tribunal passed procedural order No. 4 dated 19th December, 2013 and fixed the fee of the Arbitral Tribunal in relation to the counter claim over and above the fee fixed by procedural order No. 1 which related to the claim of the petitioner. The claim of the petitioner as per the statement of claim is Rs.78, 84, 15,000/- and interest thereon @ 18% p.a. The counter claim of the respondent is to the tune of Rs. 25 crores.

8. On 10th February, 2014, procedural order No. 5 was passed by the Arbitral Tribunal for fixing dates and schedule for filing of affidavits by way of examination in chief and also for the cross-examination of the witnesses.

9. It is stated that letter dated 22nd April, 2014 was addressed by the petitioner to the Presiding Arbitrator Mr. Justice R.C. Lahoti whereby it was stated that the additional fees towards counter claim may not be charged. In procedural order No. 7 dated 17th July, 2014 passed by the Arbitral Tribunal it was stated that the affidavits of three witnesses have been filed by the petitioner and two witnesses were present and further stated that the petitioner/claimant had sought one month time for paying the fee and if it was not paid, the respondent would be given an opportunity under Section 38 of the Act to pay the petitioner's share of fee and expenses.

10. Procedural order No. 8 dated 12th September, 2014 was passed by the Arbitral Tribunal whereby it was stated that the petitioner expressed its inability to pay the fee of the Arbitral Tribunal and that the respondent had communicated that it would not be able to pay the petitioner's share of the fee on the claim of the petitioner and that in view thereof the hearing in the proceeding be suspended and the petitioner be given time till 31st March, 2014 to pay fees failing which the hearing on the statement of claim of the petitioner should be terminated. The respondent was required to inform if it would be willing to depose the petitioner's share of fee for the purpose of the counter claim preferred by the respondent.

11. The respondent sent a communication by way of letter dated 11th October, 2014 to the Arbitral Tribunal with reference to the procedural order No. 8 dated 12th September, 2014 stating that the respondent was not in a position to pay the petitioner's share of fees for adjudication of the petitioner's claim but the respondent was agreeable to pay the fees for the counter claim.

The Presiding Arbitrator Mr. Justice R.C. Lahoti on 12th December, 2014 informed the parties that he was not willing to be a sole Arbitrator in response to the request of the petitioner for arbitration by a sole Arbitrator. This communication was also referred in the order dated 14th January, 2015 passed by this Court in OMP No. 1096 of 2014 and held that prayer (A) of the petition does not survive and thus, adjourned the proceedings to 28th April, 2015.

12. By procedural order No. 9 passed on 5th February, 2015, the Arbitral Tribunal re-notified the proceedings to 11th and 12th May 2015 in view of the order dated 14th January, 2015 passed by this

Court in OMP 1096/2014. This Court by order dated 28th April, 2015 adjourned the hearing of the said petition to 18th September, 2015 while directing that there is no stay of the arbitral proceedings. On 11th and 12th May, 2015 the procedural order No. 10 passed by the Arbitral Tribunal suspended the hearing on the claims of the petitioner and further recorded that the cross-examination of the respondent's witness was not concluded and would be continued on 12th May, 2015 and further dates for cross-examination of the petitioner's witnesses confined to the counter claim would be fixed. The cross-examination of the respondent's witness was concluded on 12th May, 2015. The Arbitral Tribunal further recorded that the Senior counsel for the petitioner stated that they would only rely on the affidavits of two witnesses which would be produced before the Tribunal for cross-examination by the respondent/counter-claimant and the proceedings were adjourned to 6th, 7th and 8th August, 2015 and 20th, 21st and 22nd August, 2015.

13. On 6th August, 2015 procedural order No. 11 passed by the Arbitral Tribunal recorded that none of the petitioner nor their witnesses were present and on the totality of the circumstances directed that the fees on the counter claim should be paid within time mentioned therein and thereupon the hearing would be resumed on 20th August, 2015 and to be continued on the dates mentioned therein.

14. On 19th August, 2015, the Presiding Arbitrator sent a mail to the parties stating that he was not inclined to continue as the Presiding Arbitrator for the reasons stated therein and he recuses himself from the proceedings and the party nominated Arbitrators were being requested to fill the vacancy at the earliest so the

proceedings could be held on 20th, 21st and 22nd August, 2015 unhindered. On 20th August, 2015 Mr. Justice (Retd.) C.M. Nayar sent the mail informing the parties that the nominated Arbitrators had appointed Mr. Justice A.D. Singh (Former Chief Justice of Rajasthan High Court) as the Presiding Arbitrator and the sittings would be held on 21st, 22nd August 2015. The learned counsel for the petitioner also sent a mail to the nominee Arbitrators stating that they had lost confidence in their nominee Arbitrators and the Arbitral Tribunal had allegedly become nullity and it should not conduct any further proceedings.

15. On 21st August, 2015 Procedural order No. 12 was passed by the Arbitral Tribunal presided by Mr. Justice (Retd.) Anil Singh. As there was no appearance on behalf of the petitioner, the proceedings were adjourned to 22nd August, 2015. On 22nd August, 2015 another mail was sent by the learned counsel for the petitioner stating that their nominee Arbitrator has conspired with the respondent and he should immediately resign and that no Tribunal exist.

16. The procedural order No. 13 was passed on 2nd August, 2015 by the Arbitral Tribunal. As no one appeared for the petitioner, they were proceeded ex-parte and the arbitration proceedings were adjourned to 5th October, 2015 for arguments with liberty to the petitioner to join the proceedings for addressing the arguments.

17. On 26th August, 2015 an application being I.A No. 19880/2015 was filed by the petitioner in OMP 1096/2014 i.e. the present proceedings seeking for a declaration that the Arbitral Tribunal which was originally constituted is unable to perform their function and is a nullity and after the resignation of the Presiding Arbitrator, the nominee arbitrators cannot act; the substitution of the Presiding

Arbitrator and the orders passed by the nominee arbitrators are illegal and without jurisdiction and all proceedings after the appointment of the Presiding Arbitrator subsequent to the resignation of Mr. Justice R.C. Lahoti are nullity.

18. Learned counsel for the respondent has informed that thereafter the matter has been adjourned from time to time and lastly, the matter was fixed on 2nd June, 2016 for final arguments in the matter. The present petition was filed by the petitioner on 9th September, 2014 and thereafter, subsequent events have happened. Even, the petitioner by letter dated 20th August, 2015 has taken the plea that it has lost the confidence in its nomination after the earlier Presiding Arbitrator had recused himself because of the reason that one of the members of the Arbitral Tribunal had appointed the Presiding Arbitrator. According to the petitioner, such appointment is not as per the law. I do not want to express any opinion at this stage because the present petition was filed in 2014 and many subsequent events have happened thereafter including in the appointment of Presiding Arbitrator by the member. The petitioner is at liberty to take the steps, if so required, under the law, but as far as the present petition is concerned, the prayer made in the same has become infructuous. As far as the prayer of an appointment of sole Arbitrator is concerned, the same cannot be considered in the present petition once the same has become infructuous because of the reason that the Presiding Arbitrator himself has recused from the matter on 19th August, 2015. The present petition is accordingly disposed of, as no further orders are required to be passed. As and when any fresh petition is filed, the

same will be considered. Pending applications also stand disposed of.

**(MANMOHAN SINGH)
JUDGE**

AUGUST 05, 2016

