

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 14.12.2016

+ O.M.P. (T) (COMM.) 60/2016 & IA No.10971/2016

M/S HCIL, ADHIKARYA ARSS (JV)

..... Petitioner

versus

RAIL VIKAS NIGAM LTD.

..... Respondent

WITH

+ O.M.P. (T) (COMM.) 61/2016 & IA No. 10973/2016

M/S HCIL, ADHIKARYA ARSS (JV)

..... Petitioner

versus

RAIL VIKAS NIGAM LTD.

..... Respondent

Advocates who appeared in these cases:

For the Petitioner : Mr Arvind Minocha and Mr Mayank
Kshirsagar.

For the Respondent : Mr Aman Sinha, Senior Advocate with Mr Anil
Seth and Mr Parvesh Thakur.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'HCIL') has filed these petitions under Section 14 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that the Arbitral Tribunal constituted to adjudicate the disputes between the parties be declared as *de jure* and *de facto* incompetent to proceed and to terminate the mandate of the Arbitral Tribunal.

2. The material facts and the issues involved in both the petitions are common and, therefore, these petitions were heard together.

3. HCIL (the petitioner) is a joint venture company constituted by Harish Chandra India Ltd., PT Adhikarya and ARSS Infrastructure.

4. They were awarded the works for construction of road bed (excluding major bridges) facilities and general electrification for doubling of railway line between Barang-Rajatgarh, Cuttack-Barang and Barang-Khurda Road in Orissa and a contract dated 04.09.2006 was executed between the parties for the works valued at ₹1,51,95,56,306/-. On the same date, that is, 04.09.2006, a separate contract was also executed between the parties for construction of major bridges in connection with the doubling of the railway lines between Barang-Rajatgarh, Cuttack-Barang and Barang-Kurda Road in Orissa. The value of the works in the said contract were specified at ₹1,31,02,94,667/-. Both the contracts (hereafter referred to as 'the Contracts') were to be completed within a period of 24 months from 07.09.2006.

5. According to HCIL, there were various delays and defaults on the part of the respondent (hereafter 'RVNL'). It is further alleged that in order to cover up the lapses, RVNL terminated the Contracts on 30.11.2011, even though HCIL had completed almost 90% of the works awarded.

6. The Contracts include a similarly worded arbitration clause. In terms that clause, the disputes between the parties are to be adjudicated by an arbitral tribunal consisting of three arbitrators; one to be appointed by HCIL, another to be appointed by RVNL and the presiding arbitrator to be appointed jointly by the arbitrators appointed by the parties.

7. In view of the disputes between the parties, HCIL invoked the arbitration clause by separate letters dated 11.06.2015 and nominated Mr V.S. Karandikar as its nominee arbitrator. RVNL nominated Mr Surendra Kumar as an arbitrator and both Mr V.S. Karandikar and Mr Surendra Kumar appointed Mr Satish Kumar Singla as the Presiding Arbitrator. HCIL states that it became aware of the constitution of the arbitral tribunal on receipt of a letter dated 17.11.2015 sent by Mr Satish Kumar Singla, the Presiding Arbitrator, for convening the first meeting on 01.12.2015.

8. The controversy involved in these petitions relates to the eligibility of Mr Surendra Kumar as an arbitrator and HCIL's challenge to his appointment. According to HCIL, its challenge to appointment of Mr Surendra Kumar as an arbitrator was accepted and, therefore, the mandate of the Arbitral Tribunal - with Mr Surendra Kumar as a member - to proceed further stood *de jure* and *de facto* terminated. This is disputed by RVNL.

9. HCIL has also pleaded that there are circumstances existing which give rise to justifiable doubts as to the impartiality and independence of Mr Surendra Kumar as an arbitrator since he is also the Executive Director of RVNL. However, Mr Arvind Minocha, learned counsel appearing for HCIL fairly conceded that HCIL's challenge as to the appointment of the arbitrators could not be agitated in these proceedings; in terms of Section 13(5) of the Act, the issue would have to be agitated in the petition under Section 34 of the Act if the challenge as made under Section 12 read with Section 13(2) of the Act failed. He, however, submitted that HCIL had succeeded in its challenge and this was not a case where HCIL was required to await the publication of the award.

10. In view of the above, the only question to be addressed is whether HCIL had succeeded in its challenge to appointment of Mr Surendra Kumar as an Arbitrator resulting in the termination of the mandate of the Arbitral Tribunal.

11. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

11.1 The Arbitral Tribunal held its first meeting on 01.12.2015. On that date, the Arbitrators made their disclosure under Section 12 of the Act. Although, Mr Karandikar (the Arbitrator nominated by HCIL) and Mr Singla (the Presiding Arbitrator) stated that they had never been associated with any of the parties as advisors or as their employees and had no association with the works in question. However, Mr Surendra Kumar (RVNL's nominee) disclosed that he was working as an Executive Director (HQ) of RVNL but was not associated with the works in question. The record of the proceedings of that date indicate that the HCIL expressed its reservations about the nomination of the members of the Arbitral Tribunal and sought time for filing their objections.

11.2 HCIL filed an application challenging the appointment of Mr Surendra Kumar as an Arbitrator under Section 12(3)(a) of the Act; the principal objection raised was that Mr Surendra Kumar being an employee of RVNL gave rise to justifiable doubts as to his independence or impartiality as also indicated in the Schedule V of the Act. The respondent contested the aforesaid objection on the ground that since the Arbitral proceedings had commenced prior to 23.10.2015, the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 - by virtue of which Schedule V was introduced in the Act - would not be applicable.

11.3 The challenge to the appointment of the Arbitrator was considered by the Arbitral Tribunal at a hearing held on 29.01.2016. The record of the proceedings indicate that oral arguments on the application filed by the HCIL challenging the appointment of Mr Surendra Kumar as an arbitrator were heard and concluded. Thereafter, the Arbitral Tribunal deliberated on the application and admitted the same. The Arbitral Tribunal further recorded that the detailed order of the Arbitral Tribunal will be issued separately for which an internal meeting will be held on 09.02.2016 at the office of RVNL. Mr Surendra Kumar recorded that his dissent note on the order sheet would follow.

11.4 Thereafter, the Arbitral Tribunal issued an email dated 20.02.2016 containing the minutes of the meeting held on 09.02.2016 whereby it was recorded that the detailed order would be published at the next meeting to be held on 11.03.2016. In the meanwhile, Mr Surendra Kumar circulated his dissent note on the order passed on 29.01.2016, *inter alia*, holding that the HCIL's application challenging the appointment of the Arbitrator was time barred and beyond the period of 15 days as stipulated in Section 13(2) of the Act.

11.5 On 06.03.2016, the Presiding Arbitrator circulated a letter cancelling the hearing scheduled on 11.03.2016 because the parties had failed to deposit a sum of ₹2 lacs as fees with each Arbitrator and had further failed to pay ₹1 lac to Mr Karindikar for boarding and travel expenses. The Presiding Arbitrator also called upon the parties to make a similar deposit in respect of the disputes relating to the contract for construction of major bridges [subject matter of OMP (T) (COMM.) 60/2016].

11.6 HCIL sent a letter to the arbitrators requesting them to fix a reasonable fee. On 21.07.2016, Mr Singla (Presiding Arbitrator) forwarded a copy of the order dated 09.02.2016 rejecting HCIL's application challenging the appointment of Mr Surendra Kumar as an Arbitrator. The said order was signed by Mr Singla and Mr Surender Kumar and by Mr Karandikar recording his dissent that he did not agree with the order passed.

11.7 On 03.08.2016, Mr Karandikar circulated a separate order. According to him, the Arbitral Tribunal - by majority (the Presiding Arbitrator and Mr Karandikar) - had allowed HCIL's challenge to the appointment of Mr Surendra Kumar. The Presiding Arbitrator had sought to review the said order on 09.02.2016. Mr Karandikar also accepted HCIL's challenge to the appointment of Mr Surendra Kumar on merits.

Submissions

12. Mr Minocha contended that on 29.01.2016, the Arbitral Tribunal had accepted HCIL's challenge to the appointment of Mr Surendra Kumar as an Arbitrator. He submits that this was clearly evident from the plain language of the order passed on that date, which specifically recorded that the parties were heard and HCIL's application was admitted. He further submitted that this decision was opposed by Mr Surendra Kumar who made an annotation on the order sheet specifically stating that his dissent note would be sent subsequently. Mr Minocha also referred to the separate order dated 03.08.2016 circulated by Mr Karandikar, which also indicated that Arbitral Tribunal had accepted HCIL's challenge on 29.01.2016 but had sought to review the same thereafter. He submitted that Arbitral

Tribunal having been accepted the HCIL's challenge, had no power to review its order.

13. Mr Aman Sinha, learned Senior Counsel appearing for RVNL countered the submissions made by Mr Minocha. He submitted that on 29.01.2016, the Arbitral Tribunal had merely admitted HCIL's application and this did not mean that they had allowed the same. He contended that the Arbitral Tribunal had decided to deliberate upon the application and, thereafter, render its decision. He also emphasized that it is common for Courts to form a preliminary view, admit petitions and render their decisions thereafter. He also referred to the dissent notes circulated by Mr Surendra Kumar and submitted that he had opposed the admission of the application as according to him, the application should have been dismissed at the threshold.

Reasons and conclusion

14. It is apparent from the record or proceedings held on 29.01.2016 that HCIL had pressed its application challenging the appointment of Mr Surendra Kumar. The parties had been heard at length on that application. The Arbitral Tribunal (by majority) had thereafter recorded that the application is admitted and a detailed order would follow. The relevant extract of the said proceedings reproduced below:-

"The parties presented their oral arguments on the application filed by the claimant challenging the appointment of Shri Surendra Kumar as nominee arbitrator for RVNL and concluded the same. The AT thereafter held internal meeting and deliberated on the application. The AT admitted the application of the claimant. The detailed order of the AT will be issued separately for which the internal

meeting will be taken on 9th February, 2016 at 10:30 hrs. in the office of the RVNL, Bhikaji Cama Place, New Delhi."

15. It is clear from the above that no further hearings on the application were contemplated since the parties had been already heard. Therefore, the contention that the Arbitral Tribunal had merely admitted the application, cannot be accepted. It is also apparent that the Arbitral Tribunal had formed an opinion; if this was not so, there was no occasion for Mr Surendra Kumar to indicate that his dissent note would follow. It is apparent that the Arbitral Tribunal had admitted the application and thereby meaning that HCIL's challenge was allowed and only a detailed order providing reasons was to be delivered. Mr Surendra Kumar had dissented from the view of the majority and therefore, made a annotation "*my dissent note will follow on this order sheet*". Plainly, the question of dissenting from a view did not arise if the majority of the arbitrators had not formed and indicated their view.

16. The contention that Mr Surendra Kumar had merely dissented with the view of the majority that the application be considered is not persuasive. Surely, it cannot be accepted that an arbitrator would dissent for an application to be considered and deliberated upon considering that the Arbitral Tribunal was bound to pronounce a reasoned order on the said application.

17. The Arbitral Tribunal had met on 09.02.2016 and this meeting was only to issue the detailed order. However, no such order was circulated immediately after the said meeting. On the contrary, Mr Singla, the Presiding Arbitrator circulated a note calling upon the parties to deposit the Arbitrator's fees and indicated that the order would be published at the next

meeting to be held on 11.03.2016. Since the fees as indicated by the Arbitrator were not deposited, the hearing scheduled to be held on 11.03.2016 was cancelled. However, even at that stage, the presiding arbitrator did not circulate the reasoned order in respect of HCIL's application.

18. The Arbitral Tribunal's order of 09.02.2016 was circulated by the Presiding Arbitrator on 21.07.2016 - more than five months after the said order was purportedly passed. Curiously the said order was only signed by Mr Surendra Kumar and the Presiding Arbitrator. It is difficult to understand - and even more difficult to countenance - the delay in circulating the order of 09.02.2016.

19. It is at least apparent from the order dated 09.02.2016 circulated on 21.07.2016 that Mr Karandikar had not agreed to review the decision taken by the Arbitral Tribunal on 29.01.2016. Thus, it would be plainly evident that whether the Arbitral Tribunal (as constituted) would function or not would be a contentious matter. Yet, the presiding arbitrator thought it fit to first insist on deposit of fees before even disclosing the said order. This Court has serious reservation as to the manner in which the members of the Arbitral Tribunal have conducted the proceedings. However, given the limited scope of the present proceedings, this Court is refraining from expressing any view or passing any effective orders in regard to the same.

20. Mr Karandikar's order circulated on 03.08.2016 clearly indicates that the Arbitral Tribunal had accepted HCIL's challenge on 29.01.2016. The relevant extract of the said order is given below:-

"4. The parties presented their oral arguments on the above application in the hearing of the AT held on 29.01.2016 at

New Delhi and concluded the same. The AT thereafter held internal meeting and deliberated on the application. During deliberations, the AT examined the written submissions made by the parties and also considered their oral arguments. The AT by majority of Shri S.M. Singla, Presiding Arbitrator and Shri V.S. Karandikar, Arbitrator came to a conclusion that there is merit in the application of the Claimant and the same needs to be allowed. Third Arbitrator, Shri Surendra Kumar, whose appointment had been challenged by the Claimant, was asked by the Presiding Arbitrator whether he would like to recuse himself from the arbitration. Shri Surendra Kumar replied that he does not intend to recuse himself and he would give his Dissenting Order separately.

5. Accordingly, the AT by majority pronounced operative part of the order on merits allowing the application of the Claimant with the reasons to follow. The AT also pronounced the order orally before the parties that the application of the Claimant is allowed by the majority decision of the Tribunal.

6. The consequence of the pronouncement of the decision on the Application under section 12 and 13 of the Arbitration & Conciliation Act, 1996 is that the mandate of Shri Surendra Kumar is terminated and in the absence of the appointment of a substitute Arbitrator as per section 11 and 15 of the Arbitration & Conciliation Act, 1996 the Tribunal had no jurisdiction to transact any business apart from issuance of the reasons for the majority decision and issuance of the dissenting order by Shri Surendra Kumar.

7. In the meeting of the AT held on 9th February, 2016 Shri S.M. Singla, Presiding Arbitrator informed that he would like to review the Order issued on 29.01.2016 and reject the application of the Claimant challenging appointment of Mr Surendra Kumar as Arbitrator. Pertinently, there was no oral or written Application by any of the party to the Arbitration to review the order dated 29.01.2016. Moreover the Tribunal had lost the jurisdiction to transact any other business except to write detailed

reasons for termination of the mandate of Shri Surendra Kumar and by Shri Surendra Kumar to write his dissenting order. Pertinently Shri Surendra Kumar has written his dissenting order dated 09.02.2016 which he has circulated to the parties and to the Arbitrators. Shri Singla drafted a detailed order, quashing and rejecting the application of the Claimant and the same was signed by Shri Surendra Kumar. Being not convinced by the above order or)legality, propriety, jurisdiction and merits, I am giving my separate order in the matter as detailed herein below.

21. In view of the above, this Court is not persuaded to accept that on 29.01.2016 Mr Singla and Mr Karandikar had merely agreed to deliberate upon the point in issue and Mr Surendra Kumar had dissented with that course of action. However, on 09.02.2016, he had joined in the deliberations and had persuaded Mr Singla, the Presiding Arbitrator to accept his view and rejected the application.

22. This Court is inclined to accept the version of Mr Karandikar as stated in his order dated 03.08.2016. Further, it has been affirmed on behalf of HCIL that on 29.01.2016, the Arbitral Tribunal had informed the parties that HCIL's challenge to Mr Surendra Kumar as an arbitrator was accepted.

23. Thus, in my view, the mandate of Mr Surendra Kumar stood terminated on 29.01.2016 and there was no occasion for Mr Surendra Kumar to continue to act as an Arbitrator thereafter.

24. The amendments introduced in Section 12 of the Act by virtue of the Arbitration and Conciliation (Amendment) Act, 2015 are, inter alia, to ensure that an Arbitral Tribunal is constituted by independent and impartial arbitrators. Given the object of the statutory amendments, I find no reason

as to why the same ought not to be adhered to while appointing arbitrator notwithstanding that the arbitration may have been invoked prior to 23.10.2015. Indisputably, in view of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the amendments to Section 12 would not be applicable to any arbitral proceedings that had commenced prior to the Amendment Act coming into force. However, RVNL is a Government of India Enterprise and is enjoined to act reasonably and fairly. In the circumstances, it would be incumbent upon RVNL to appoint an independent arbitrator in place of Mr Surendra Kumar.

25. The petitions are disposed of with the aforesaid observations. The pending applications are also disposed of. No order as to costs.

DECEMBER 14, 2016
RK/MK

VIBHU BAKHRU, J