

IN THE HIGH COURT OF JUDICATURE AT PATNA
Request Case No.196 of 2017

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Hindustan Construction Company Ltd., a Company Registered under the Companies Act, 1956 having its Registered office at HINCON House, Lal Bahadur Shastri Marg, Vikhroli (West), Mumbai- 400083 through its authorized representative, Sri Rajendra Kumar Mahajan, S/o- Late Madhukar Mahajan, R/o- B/303, Lok Manya Society, Veer Savarkar Marg, Thane (W)- 400602

... .. Petitioner/s

Versus

Kanti Bijlee Utpadan Nigam Ltd. Through its Chairman cum Managing Director having its registered office at: NTPC Bhawan, Core-7, SCOPE Complex-7, Industrial Area, Lodi Road, New Delhi- 10003 and its Branch Office at Vidyut Bhawan, Bailey Road, Patna, P.S. Kotwali, Pin- 800001.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Mrigank Mauli, Advocate Mr. Prince Kumar Mishra, Advocate
For the Respondent/s	:	Mr. Anil Kumar Sinha, Advocate Mr. Abhimanyu Deo, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
CAV JUDGMENT

Date : 20-12-2017

This is an application filed by the applicant invoking the jurisdiction of this Court under Section 14 of the Arbitration and Conciliation Act, 1996 read with Sections 11(6) and 12 thereof seeking termination of the mandate of an Arbitrator already appointed and proceeding to adjudicate the dispute, on the ground that the Arbitrator becomes de jure unable to perform his function in view of Section 14 and the amendment made by the Arbitration and Conciliation Act, 2015 which came into force vide notification issued on 01.01.2016 with effect from 23rd of October, 2015.



It is stated that in view of the prohibition created under Section 12(5), the Arbitrator's mandate should be terminated and an independent Arbitrator appointed. This in sum and substance is the grievance of the petitioner and the same is based on the fact that under Clause 56 of the general conditions of the contract, all amendments in the rules and regulations and the statute will apply to the contract in question.

Petitioner company was awarded a contract for construction of "Main Plant, Civil Works, Offsite Civil Works, Chimney, Chimney Elevator Package etc. of the Muzaffarpur Thermal Power Plant- Stage-II, located at Kanti, Bihar. The contract was awarded vide Annexure-P/1 on 04.02.2011 and the formal contract agreement was executed on 11.03.2011 vide Annexure-P/2 and it is an admitted position that the contract contains an arbitration agreement. The arbitration is by a sole Arbitrator who happens to be the nominee of the company and Clause 56 of the general conditions of the contract, as is contained in the letter (Annexure-P/5 and P/6) dated 19.02.2015 speaks about the contract being subject to the provisions of all amendments made from time to time in the statute. In fact Clause 56 available at Page 110 of the Paper Book stipulates that any statutory modification or re-enactment in the



Arbitration Act and the rules framed thereunder from time to time shall apply to the arbitration proceeding under this clause. It, is, by emphasizing on this clause argued that now the Arbitrator who is nominated by the company cannot proceed and an independent and impartial Arbitrator should be appointed.

Be it as it may be, the fact remains that in the execution of the agreement in question, as certain disputes arose, the Chief Executive Officer of the respondent Company was appointed as sole Arbitrator to adjudicate the dispute between the parties. Records indicate that the Arbitrator proceeded with the arbitration proceedings, first hearing of the proceedings commenced on 18.03.2015, as is evident from Annexure-P/7. The petitioner filed their statement of claim before the Arbitrator on 26.05.2015 vide Annexure- P/8. The original Arbitrator one Sri Tufani Ram was replaced by Sri Rajiv Kumar Sinha, the new Executive Officer. The new Arbitrator held the first arbitration proceedings on 14.10.2015. Before the new Arbitrator on 15.01.2016 the statement of claim was filed and it was at this point of time that the petitioner raised an objection vide Annexure-P/10 and indicated that in view of Clause 56 of the general terms and conditions and



amendment to the Arbitration Act by Act of 2015 the matter should be transferred and a new Arbitrator, independent in nature, appointed. It was also emphasized that the NITI Aayog vide circular dated 05.09.2016 (Annexure-P/12) has instructed all Public Sector Undertakings to transfer pending proceedings under the amending Act to the new Arbitrator. Grievance of the petitioner is that instead of accepting this application, the Arbitrator has proceeded with the matter and has not relinquished or withdrawn from the proceedings. It is argued that he is disqualified to proceed with the arbitration in view of the amendment made to Section 12. He being an officer of the department cannot proceed with the arbitration as he is not an independent person.

Learned counsel appearing for the petitioner took me through the provisions of Clause 56 of the agreement, the amendment incorporated vide Amending Act of 2015, incorporation of Section 12 thereof, the requirement of Schedule-VII and argued that by virtue of the amendment the Arbitrator becomes de jure unable to perform his functions and, therefore, his mandate should be terminated under Section 14. Learned counsel heavily relied upon a judgment of the Delhi High Court in this regard filed as Annexure-P/15, a decision



rendered in ARB.P. 537/2016 on April 11, 2017 in a dispute between **Ratna Infrastructure Project Pvt. Ltd. Vs. Meja Urja Nigam Private Limited [MUNPL]** to say that once the Amending Act of 2015 comes into force and the Arbitrator appointed by the department is not found to be an independent person, his mandate can be terminated. That apart, learned counsel invited my attention to a judgment of the Supreme Court in the case of **Indus Mobile Distribution Private Limited. Vs. Datawind Innovations Private Limited and others- (2017) 7 SCC 678** with regard to rebuttal to the question of jurisdiction raised by the respondent and maintainability of the proceeding before this Court and their objection that the proceedings are not maintainable in Patna, it has to be raised before the appropriate Court at Delhi. Learned counsel also relied upon another judgment in the case of **Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd.-(1999) 9 SCC 334** in support of his contention that the mandate of the Arbitrator is required to be terminated now and the entire amendment made to Section 12 by the Amending Act of 2015 will apply in the present case and, therefore, it is a fit case where the mandate of the Arbitrator should be terminated.

Elaborate arguments were raised in support of the



aforesaid contention to say that the application should be allowed.

Respondents have raised three objections, one with regard to territorial jurisdiction of this Court in dealing with the matter by contending that the parties have agreed to submit to the jurisdiction of the Courts in Delhi. The second argument is that even if the mandate of the Arbitrator is liable to be terminated under Section 14, it can be done only by a Court coming within the purview of a Court as defined under Section 2(e) of the Arbitration and Conciliation Act and as this Court is not the Court of original jurisdiction, as defined under Section 2(e), the application is not maintainable. Finally, placing reliance on a judgment of the Supreme Court recently rendered on 12th of September, 2017 in the case of **Aravali Power Company Pvt. Ltd. Vs. M/s Era Infra Engineering Ltd.- (2017) SCC OnLine SC 1072** it was argued that similar contentions advanced has been rejected by the Hon'ble Supreme Court, this application is liable to be dismissed.

I have heard learned counsel for the parties at length and perused the record.

It is clear that the amendment to the Arbitration and Conciliation Act by the Amending Act of 2015 was gazetted on



1st of January, 2016 and according to Section 1(2) of the Amending Act, it is deemed to have come into force with effect from 23rd of October, 2015.

Even though from the arguments advanced by learned counsel for the petitioner *prima facie* it can be held that the amending provisions would apply to the present arbitration proceedings by virtue of the terms and conditions of the arbitration agreement particularly Clause 56 of the general terms and conditions, it is an admitted position further that in this case the Arbitrator was appointed much before coming into force of the amendment and in fact the statement of claim was filed before the Arbitrator on 18.03.2015 and I am informed that the entire arbitration proceedings is now in the final stage of adjudication.

Be it as it may be, after considering various submissions made before me at length, I find that the dispute involved in the matter and the legal question involved stands answered by the Hon'ble Supreme Court in the case of **Aravali Power Company Pvt. Ltd.** (supra) cited by learned counsel for the respondents before me. In the said case also a contract was awarded in the matter of construction of a township for Indira Gandhi Super Thermal Power Project at Jhajjar, Haryana and in



the execution of the agreement certain dispute arose. In that contract also clause 56 of the general conditions of the contract was exactly like the one in the present case. In fact, in both these cases i.e. in the case before this Court and before the Hon'ble Supreme Court the contract was awarded by NTPC and the arbitration agreement are identical in nature. In the case before the Hon'ble Supreme Court, the dispute arose and the dispute was referred for arbitration on 07.10.2015. The parties appeared before the Arbitrator on 07.10.2015 and the proceedings commenced thereafter. Like in this case in the case before the Hon'ble Supreme Court also the arbitration proceedings commenced prior to coming into force of the amending Act of 2015. In that case also an application under Section 14 and Section 11 for terminating the mandate of the Arbitrator as prayed for before this Court was allowed by the High Court and identical prayer made as is made before me was accepted. On a challenge made to the said order passed by the learned High Court of Delhi the Supreme Court examined the matter in detail and found that in the case before the Hon'ble Supreme Court invocation of the arbitration was made on 27.09.2015. The Arbitrator was appointed on 19.08.2015, parties appeared and submitted their statement of claim before the



Arbitrator on 07.10.2015 well before the date on which the amending Act came into force i.e. 23.10.2015 and similar argument advanced was considered. Hon'ble Supreme Court from Paragraph 17 onwards took note of the statutory provisions i.e. Sections 12, 13 and 14, Clause 56 of the general terms and conditions of the agreement and various judgments of the Supreme Court in the matter of giving effect to the arbitration agreement, the principle governing appointment of an independent Arbitrator, amendment to the Arbitration Act brought into force in the year 2015 and after elaborately dealing with various aspects of the matter in Paragraph 25 crystallizes the legal principle in the following manner:-

“25. The principles which emerge from the decisions referred to above are:-

A. In cases governed by 1996 Act as it stood before the Amendment Act came into force:-

(i) The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person



was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

(ii) unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

(iii) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(iv) while exercising such power under sub section (6) of Section 11, if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate



may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

B. In cases governed by 1996 Act after the Amendment Act has come into force:-

If the arbitration clause finds foul with the amendment provisions, the appointment of the Arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the Court would be within its powers to appoint such arbitrator(s) as may be permissible.”

Sub Para A of the aforesaid Paragraph 25 clearly indicates that merely because the named Arbitrator is an employee of one of the parties it is not *ipso facto* a ground to rise a presumption of bias or partiality or lack of independence. The Court further goes to hold that unless a cause of action for invoking the jurisdiction under Clause (a), (b) or (c) of sub section (6) of Section 11 does not arise, there is no question to exercise power under sub section (6) of Section 11 and thereafter in Paragraphs 3 and 4 it has been held that the Chief Justice or his designate while exercising power under sub section (6) of Section 11 has to give endeavour to give effect to



the appointment procedure prescribed in the arbitration clause and while exercising such power if circumstances exist giving rise to justifiable doubt as to the independence or impartiality of the person nominated, by recording reasons, a fresh Arbitrator can be appointed. Under sub clause (B) the cases governed after the amendment have been crystallized. Thereafter, the order passed by the High Court for terminating the mandate of the Arbitrator merely on the basis of amendment has been set aside.

That being so, now, in the backdrop of the aforesaid principle of law laid down, this Court is required to apply the principle of law laid down by the Supreme Court as indicated hereinabove and take a decision. Admittedly, this is a case where the Arbitrator was appointed prior to amendment which came into force on 23.10.2015 and the case would be governed by the principle concerned stipulated in Paragraph 25A above and to invoke the jurisdiction of this Court to terminate the mandate of the Arbitrator or even to invoke the jurisdiction under sub section (6) of Section 11 there has to be circumstances existing giving rise to justifiable doubt as to the independence or impartiality of the person nominated or circumstances have to be pointed out warranting appointment of an independent Arbitrator. If the requirement, as envisaged by



the Hon'ble Supreme Court in the aforesaid case, is scrutinized in the present case, it would be found that except for contending that by virtue of Clause 56 all amended provisions, rules and regulations will apply and now in view of the amendment brought into force with effect from 23.10.2015 if independent Arbitrator should be appointed not an iota of evidence, whisper or assertion is made to show that circumstances exist which give rise to a case for invoking the jurisdiction of this Court under Section 11 sub Section (6) and there are existing grounds and circumstances giving rise to a justifiable ground about the independence or impartiality of the person nominated as an Arbitrator and circumstances do exist for appointing an independent Arbitrator. Except for contending that the independent Arbitrator should now be appointed by virtue of the amendment brought into force, none of the factual circumstances or ingredients necessary to bring the case within the purview of parameters laid down by the Hon'ble Supreme Court in Paragraph 25A are made out in the present case. Merely because the amendment brought into force on 23.10.2015 will apply to the present proceedings, that by itself is not a sufficient ground to allow this application. To change the Arbitrator, as laid down by the Supreme Court in the case of



Aravali Power Company (supra), it is further necessary to establish that the circumstances and ingredients necessary, as detailed in Paragraph 25A, are made out. It is only if both these conditions are fulfilled that the jurisdiction of this Court can be invoked. In the present case, the second condition i.e. the circumstances justifiable in nature for changing the Arbitrator having not been made out in a case governed under Paragraph 25A, this Court cannot make any indulgence into the matter.

That being so, once the legal principle for invoking the jurisdiction of this Court as laid down by the Hon’ble Supreme Court in the case of **Aravali Power Company** (supra) is not made out, in the present case, I see no reason to make any indulgence into the matter.

The application is, therefore, dismissed.

(Rajendra Menon, CJ)

P.K.P.

AFR/NAFR	N.A.F.R.
CAV DATE	13.12.2017
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