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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ARBITRATION APPLICATION NO.17 OF 2014

Pramod Kumar Agrawal,
Dwarka House, Station Road,
ITARSI, District Hoshangabad
(M.P.)

..APPLICANT

VERSUS

1. Union of India,
Through – General Manager,
Central Railway, C.S.T.,
MUMBAI (M.S.).

2. Sr. Divisional Engineer (South)
Central Railways, Bhusawal. ..RESPONDENTS

Mr L.V. Sangit, Advocate alongwith Mr. R.C.
Sobhani, Advocate for applicant;
Mr D.V. Soman, Advocate, for respondent No.2

CORAM : NITIN W. SAMBRE, J.
DATE : 31st OCTOBER, 2017

ORAL ORDER :

The applicant claims to be a Contractor with respondent-Railway Authority, who has entered into an agreement dated 28th November, 2001, which according to him, contains arbitration clause.

2. Since there exist dispute, he approached

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this Court in Arbitration Application No. 1 of 2011 claiming appointment of arbitrator, which application came to be allowed on 16th August, 2013 with following directions :

“ Therefore, in the peculiar facts of this case and in the light of judgment of the Supreme Court in case of Union of India and others v/s M/s Khazana Projects & Industries (supra), the General Manager, Central Railways is directed to appoint two officers out of names of four Gazetted Officers which are mentioned in para 3 of the affidavit-in-reply, within three weeks from today. The General Manager, Central Railways is also directed to forward panel of more than three Gazetted Officers to the applicant within two weeks from today and upon receiving such names of more than three Gazetted Railway Officers, the applicant to suggest his two names out of the panel within one week thereafter and after such exercise is done, the General Manager, Central Railway to appoint one out of two names suggested by the applicant as Contractor's nominee within one week thereafter. The General Manager, Central Railways shall appoint Presiding Arbitrator

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from amongst three Arbitrators so appointed within one week thereafter. The entire exercise has to be completed so as to constitute the Arbitral Tribunal within two months from today. The application is disposed of on above terms.

To ensure that the panel is constituted without any delay, list this matter on 8th October, 2013 for reporting compliance."

3. Pursuant to same, Arbitral Tribunal was constituted on 4th October, 2013.

4. It is claimed that since no proceedings were taken out by arbitral tribunal, the applicant on 16th July, 2014 moved to the respondent – railway authorities for substitution of arbitral tribunal. Such application came to be moved on the ground that General Manager of Central Railway failed to take action as per clause-64 of the arbitration agreement. Prayer as such is made to appoint independent arbitrator under Section 11(6) and 11(8) of the Arbitration and Conciliation Act,

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1966, (hereinafter shall be referred to as 'Act' for sake of brevity) be passed. It is claimed that earlier arbitral tribunal appointed on 4th October, 2013 be terminated and same be substituted by reconstituting fresh arbitral tribunal.

5. Per contra, learned Counsel for the respondent, while opposing the request made in the application, submits that very application moved is not maintainable, as arbitration proceedings are not terminated in accordance with the provisions of the Act. According to him, General Manager of Central Railway constituted arbitral tribunal on 4th October, 2013 consisting of following officers.

(1) Shri. Amit Verma, Dy. CMM (EL) Mumbai CST as Presiding Arbitrator.

(2) Shri. S.B. Mohalkar, Dy. FA & CAO, MBCST, as Railway Nominee, Co-Arbitrator.

(3) Shri. L.Y. Manpage, Dy. CE(C) HQ Mumbai CST as Contractor's/applicant's nominee.

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6. It is claimed that the present applicant has not submitted the claim before the said tribunal. The Presiding Arbitrator by its communication dated 25th August, 2015, 7th October, 2015 and 4th November, 2015 intimated the applicant to submit his claim. According to him, present proceedings, as such, are not maintainable and are liable to be dismissed. Rejoinder filed by the applicant claiming that the applicant has issued communication dated 19th September, 2015 and 19th December, 2015 stating that mandate of existing arbitral tribunal has already been revoked.

7. So as to substantiate the contentions, the applicant has relied upon the judgment in the matter of ***M/s. Sahil Projects and Planning Private Limited vs Eastern Railway through Chief Administrative Officer (Con) Construction Department***, decided on 4th August, 2017 in Arbitration Application No.12 of 2017 by High Court of Jharkhand at Ranchi so as to canvass that the

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provisions of Section 12(5) amended act would apply, in cases wherein parties have agreed to be governed by modification or re-enactment and rules made under the Act of 1996 for the time being in force shall apply to the Arbitral Proceedings.

8. In addition, he would also rely upon the judgment of Delhi High Court in the matter of **RATNA INFRASTRUCTURE PROJECTS PVT. LTD., Vs. MEJA URJA NIGAM PRIVATE LIMITED (MUNPL)** decided on 11th April, 2017, particularly paragraphs-22 and 23 thereof on the same legal issue cited above.

9. He would also draw support from the judgment of this Court in the matter of Afcon Infrastructure Limited vs. Konkan Railway Corporation Ltd., and others, delivered by this Court on 22nd April, 2013 at its Principal Seat.

10. According to him, in view of amendment to the Arbitration Act, particularly Amending Act of 2015, there has to be reconstitution of arbitral

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tribunal, as officers of the respondent Railway Authorities are not able to continue with the arbitral proceedings in view of the fact that they being interested persons and Railway Authorities having agreed that they shall abide by statutory amendments, re-enactment and rules, the change of the arbitral tribunal be ordered.

11. He would also draw support from the judgment of the Apex Court in the matter of ***Union of India vs Uttar Pradesh State Bridge Corporation Ltd.***, reported in ***2014(6) R.A.J. 407 (SC)*** so as to claim that if respondent has nominated officers as arbitrators, who are not able to give time to arbitration proceedings and if are unable to perform such job because of frequent transfers etc., the Court should not feel helpless and go ahead with appointment of arbitrators keeping aside the procedure which parties have agreed to. He would draw support from paragraph-19 of the said judgment. According to him, though arbitrator is appointed by virtue of order of this Court, the

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proceedings have not travelled since 2013 and as such, this Court should appoint fresh arbitrator.

12. Per contra, learned Counsel for respondent No.2 would invite attention of this Court to the latest judgment of the Apex Court in the matter of **Aravali Power Company Pvt. Ltd., vs Era Infra Engineering Ltd.** reported in **2017 SCC Online SC 1072**. According to him, considering 2015 Amendment to 1996 Arbitration Act, the Apex Court has analyzed the effect of Amending Act on the pending proceedings. In the backdrop of law laid down by the Apex Court on the issue of termination of mandate following observations are sought to be relied upon.

"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

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ipso facto a ground to raise a presumption of bias or partially 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 contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

(ii) Unless the cause for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of 1996 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

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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 amended 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.

26. The observations of the High Court in paragraphs 37-38 as quoted above show that the exercise was undertaken by the High Court, "in order to make neutrality or to avoid doubt in the mind of the petitioner" and ensure that justice must not only be done and must also be seen to be done. In effect, the High Court applied principles of neutrality and impartiality which have been expanded by way of Amendment Act, even when no cause of action for exercise of power under Section 11(6) had arisen. The procedure as laid down in unamended Section

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12 mandated disclosure of circumstances likely to give rise to justifiable doubts as to independence and impartiality of the arbitrator. It is not the case of the Respondent that the provisions of Section 12 in unamended form stood violated on any count. In any case the provision contemplated clear and precise procedure under which the arbitrator could be challenged and the objections in that behalf under Section 13 could be raised within prescribed time and in accordance with the procedure detailed therein. The record shows that no such challenge was raised within the time and in terms of the procedure prescribed. As a matter of fact, the Respondent had participated in the arbitration and by its communication dated 04.12.2015, had sought extension of time to file its statement of claim.

27. In the circumstances, the High Court was clearly in error in exercising jurisdiction in the present case and it ought not to have interfered with the process and progress of arbitration. We therefore accept the challenge raised by the Appellant and reject that raised by the Respondent. Consequently, appeals arising out of Special

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Leave Petition (Civil) Nos. 25206-25207 of 2016 are allowed while those arising from Special Leave Petition (Civil) Nos. 503-504 of 2017 stand dismissed. The arbitration, in pursuance of the appointment of the Arbitrator on 19.08.2015, shall proceed in accordance with law."

As such, according to respondent No.2, the application lacks merit and be dismissed.

13. After having considered rival claims of the respective parties, from record, it depicts that pursuant to the order of this Court passed on 6th August, 2013 in Arbitration Application No.1 of 2011 under the provisions of Section 11(6) of the Act, undisputedly arbitral tribunal was constituted on 4th October, 2013 i.e. after about period of two months. For and on behalf of tribunal, the applicant was intimated vide communication dated 4th October, 2013 to submit details of the above dispute/claim before the tribunal at the time, date and place fixed by them. In the said communication, the point of arbitration was also mentioned including that of amount.

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14. Subsequent thereto, present applicant issued communication dated 16th July, 2014, intimating the respondent that though arbitral tribunal was constituted vide communication dated 4th October, 2013, no further date of seating of tribunal was communicated so as to facilitate present applicant to place detailed claim before the said tribunal. According to him, since nine months have passed after constitution of tribunal, still there was no progress in the matter. He moved for substitution of arbitral tribunal for the reasons of delay.

15. It is immediately thereafter the applicant has proceeded to file present application before this Court some time in October, 2014 and as such, the application remained pending before this Court, which was never circulated for hearing. For the first time, the matter got listed before this Court on 6th June, 2016, wherein this Court ordered notice.

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16. Taking aforesaid basis, the applicant is claiming substitution of arbitral tribunal. In addition, he has also canvassed that the officers of the tribunal are officers of the respondent - employee, hence there is justifiable apprehension about independence or impartiality of such member even though one of the member is nominee of the applicant.

17. To this claim of applicant, on 28th August, 2015, Presiding Arbitrator informed applicant to submit claim and also copy be forwarded to co-arbitrator, which instructions were again repeated on 7th October, 2015, 4th November, 2015. In fact, arbitration proceedings were fixed on 27th November, 2015 at 15.30 hours.

18. In response to the above, the applicant has placed on record two communications dated 19th September, 2015, whereby revoking arbitral tribunal constituted on 4th October, 2013 and by later

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communication directing Presiding Arbitrator not to proceed with the hearing of the arbitration proceedings till matter is decided by the High Court.

19. From the aforesaid conduct of the applicant, what could be gathered is, the applicant is trying to blame tribunal or respondent for not intimating him place and date of arbitration proceedings as is reflected in communication dated 4th October, 2013. It was always open for the applicant to submit his detailed claim and to enter into communication with the arbitral tribunal and respondent for fixing date of hearing by submitting his claim, which obviously, the applicant has not taken recourse to. Rather, from communications dated 28th August, 2015, 7th October, 2015 and 4th November, 2015, it is inferred that arbitral tribunal was ready and willing to proceed with the hearing of the matter. However, the applicant himself by communications dated 19th September, 2015 and 19th December, 2015 has asked the arbitral

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tribunal not to proceed with the hearing, as present proceedings are pending before this Court.

20. From the aforesaid conduct of the applicant, one thing is required to be noted that without requesting arbitral tribunal for taking up the proceedings, he has straightway approached this Court seeking termination of mandate and reconstitution of arbitral tribunal in October, 2014 and kept the present application pending without any adjudication or without moving the same before this Court. When the arbitral tribunal tried to proceed ahead with the matter, citing reasons of pendency of present proceedings before this Court, he has instructed arbitral tribunal not to proceed ahead with the hearing of the arbitration proceedings.

From the conduct as is observed in the foregoing Para., it is amply clear that the applicant by his own undesirable conduct has created the grounds for initiating this proceeding.

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21. Whether in such circumstances, the applicant is entitled to terminate mandate and claim of reconstitution of arbitral tribunal is required to be appreciated.

22. The Apex Court in the matter of ***Union of India vs Uttar Pradesh State Bridge Corporation, Ltd.***, cited supra, had occasion to consider the provisions of Section 11(6) read with Sections 14 and 15 of the Act, particularly on the factual issue of non conclusion of proceedings by the arbitral tribunal. The Apex Court in paragraph-19 of the said judgment has observed that if officers who are nominated as arbitrators are unable to devote time to the arbitration proceedings or have become incapable of acting as arbitrators because of frequent transfers etc., then it is always open for the Court to resort to the principle of default procedure and the Court can substitute the arbitrator. Similar views are expressed in other judgments cited by the applicant in the matter of

Afcons Infrastructure Limited, Ratna Infrastrucutre Projects Pvt. Ltd., and M/s. Sahil Projects and Planning Private Ltd., in which cases Arbitrator appointed in terms of agreement has shown their inability to work as Arbitrator.

23. If the law laid down by the Apex Court, this Court and Delhi High Court is appreciated in the factual matrix of this case, what is required to be noted here is, the applicant till date has not submitted his detailed claim to the arbitral tribunal and entered into communication of claiming termination of mandate, further asking tribunal not to proceed with the hearing. He initiated the present proceedings before this Court and taking undue advantage thereof has not participated in the arbitration proceedings though arbitral tribunal, as is apparent from the various communications have shown willingness to take up the proceedings. As such, the case as could be inferred from the conduct of the applicant is, the applicant on one hand, is claiming that arbitral tribunal is not

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proceeding with the arbitration proceedings and such delay should result to appointment of separate arbitrator by terminating mandate of tribunal and on the other hand, he is not permitting the tribunal to proceed ahead with the matter, by filing present proceedings and also not submitting his detailed claim, and asking tribunal not to proceed ahead. Such conduct on the part of applicant, in my opinion, dis-entitle him for any relief, much less of substitution of arbitral tribunal by terminating mandate of existing tribunal. As such, case of the applicant that the Court should terminate mandate and constitute fresh tribunal is not established and the said contention of the applicant is rejected.

24. So far as next contention of the applicant qua apprehension about independence or impartiality of the members of the tribunal being employee of respondent-Railway is concerned, no material whatsoever is produced or demonstrated so as to draw such inference. Merely because statute has undergone a change does not *ipso facto* confers

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power on the applicant to claim change of or termination of the mandate of arbitral tribunal. The issue is no more *res-integra* as Apex Court in the matter of **Aravali Power Company Pvt. Ltd.**, cited supra has made observations in paragraph-25 thereof, as produced herein above.

25. In the wake of above, though the claim is sought to be put forth of likelihood of biased or partiality in the approach of tribunal, cannot be presumed in absence of any material brought on record by the applicant. In clause-B of the Paragraph-25 of the above judgment, the Apex Court though has provided certain scope making it permissible to appoint arbitrator, provided arbitration clause finds foul with the amended provisions. However, in the present case, once arbitral tribunal is constituted pursuant to order dated 6th August, 2013 and said tribunal is seized with the matter, it is not open for the present applicant to claim that mandate is required to be terminated because the officers of respondent are members of the arbitration tribunal. Applicant has

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tried to rely upon clause-64 of the arbitration agreement so as to submit that the provisions of the Act and Rules thereunder and statutory modification thereof shall apply to the arbitration proceedings, seeking change of arbitrator in view of 2015 Amendment to the Act. However, so as to claim that there has to be appointment of new arbitrator does not appear to very intent of the said clause No.64 unless statutory requirement is satisfied. The said clause does not mean to read down that earlier arbitral tribunal has to be abandoned, by terminating its mandate and there has to be fresh constitution of arbitral tribunal in view of the said clause. At least, same does not appear to be mandate of amended provisions of Section 11 of the Act.

26. In the backdrop of above observations, in my opinion, no case for interference is made out. Present application, as such, fails and stands rejected.

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27. However, it will be appropriate, in my opinion, to issue following directions to expeditiously disposed of the arbitration proceedings.

(a) The applicant shall submit his claim to the arbitral tribunal with appropriate number of copies and documents by 30th November, 2017 with copy thereof be served on the respondent-Railway authority.

(b) The authority shall thereafter submit his reply to the claim by 1st January, 2018.

(c) The arbitral tribunal shall thereafter make every endeavor to conclude the arbitration proceedings, as expeditiously as possible, in any case, within a period of nine months thereafter.

(NITIN W. SAMBRE, J.)

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