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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.118 OF 2017

IOT Utkal Energy Services Ltd.

...Petitioner
(Original Respondent)

vs

IVECL Ltd.

...Respondent
(Original Claimant)

.....

Mr. J.P. Sen, Senior Counsel, a/w. Mr. Aditya Mehta, Counsel, Mr. Nishit Dhruva, Mr. Prakash Shinde and Mr. Chirag Bhavsar, i/b. MDP & Partners, for the Petitioner.

Mr. Dinyar D. Madon, Senior Advocate, a/w. Mr. Dharam Juman, i/b. Anish Wadia, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: AUGUST 1, 2017

P.C.:

. Heard learned Counsel for the parties.

2. This Arbitration Petition is filed by the Petitioner (original Respondent to the Arbitral Reference) under Section 14 of the Arbitration and Conciliation Act, 1996 (Act).

3. The disputes between the parties were referred to an Arbitral Forum of three Arbitrators. The matter was at the stage of recording of evidence. The Arbitral Tribunal, by its order recorded in the minutes of meeting dated 25 July 2016, had recorded that the

Petitioner would file an affidavit of evidence of its third witness (RW-3) by 1 August 2016 and had, accordingly, scheduled the next arbitration meeting on 2nd and 3rd September 2016. The Petitioner was unable to file the affidavit of evidence of RW-3 by 1 August 2016. As there was delay on the part of the Petitioner in filing the affidavit, the Respondent's representative, by an e-mail communication of 31 August 2016, indicated that it would not be possible to cross-examine RW-3 on the scheduled dates and requested the Arbitral Tribunal to pass appropriate directions in the matter. This request was particularly made in the context of an earlier communication of the Presiding Arbitrator, indicating to both parties that no application for adjournment would be entertained, except for extraordinary reasons, and only if the party applying for such adjournment had obtained a consent date prior to the making of such application. In these facts, on 31 August 2016, the Petitioner's Advocate called the Presiding Arbitrator and informed him of the difficulties in filing the affidavit of evidence of RW-3 and requested for an adjournment of the hearing scheduled on 2nd and 3rd September 2016. It is the Petitioner's own case that, during this telephonic conversation, the Presiding Arbitrator suggested that the hearing scheduled on 2 September 2016 could be utilized for the purposes of verification of documents with originals to determine if they ought to be exhibited, and if necessary, the hearing could be held in the Chambers of the Presiding Arbitrator. It is the case of the Petitioner that the Petitioner indicated its inability to do so on 2 September 2016 and reiterated its request for cancellation of the hearings scheduled on 2nd and 3rd September 2016. The Presiding Arbitrator, thereupon, requested the Petitioner's Advocate to make a joint application with the

Respondent, seeking cancellation of the hearings scheduled on 2nd and 3rd September 2016. Admittedly, no such application was made. On the other hand, on 31 August 2016, the Respondent's Advocate sent an e-mail communication to the Petitioner's Advocate indicating its inability to make a joint application for adjournment. The Petitioner, in the premises, on 31 August 2016, made a unilateral application for adjournment. The Presiding Arbitrator indicated in response that the application for adjournment would be decided at the hearing on 2 September 2016. It appears that on 1 September 2016, late in the evening, one of the Arbitrators, who was incidentally the Petitioner's nominee on the Arbitral Tribunal, communicated his inability to attend the scheduled meeting on 2 September 2016, due to an unfortunate incident involving one of his family members. Following these communications, ie. the communication of the Petitioner of 31 August 2016 and the communication of their nominee Arbitrator on 1 September 2016, there was no communication to the Petitioner from anyone, including the Presiding Arbitrator or the Respondent's nominee Arbitrator or the Respondent. It is the Petitioner's grievance that, despite all this, on 2 September 2016, two out of the three Arbitrators met for the scheduled meeting and in fact, by a telephonic communication, insisted on the Petitioner's presence at the meeting. The Petitioner communicated inability of its Counsel or Advocates to do so, since they had assumed that the matter would be adjourned due to unavailability of one of the Arbitrators and were not available at such short notice. It is the Petitioner's grievance that, despite the Petitioner having communicated its inability to present itself at the hearing on 2 September 2016, the two Arbitrators nevertheless went ahead and

conducted the meeting. Though the order passed on that date indicates that the Arbitrators did not directly transact any significant business at this meeting, they nevertheless (i) decided their authority to sit as a forum consisting merely of two out of three Arbitrators, (ii) issued some directions concerning the filing of affidavit of evidence of RW-3 and (iii) ordered costs against the Petitioner. The Petitioner thereafter approached the Arbitral Tribunal alleging bias or justifiable doubt as to the independence or impartiality of the Arbitrators triggered by the events narrated above. That challenge was argued before the Arbitral Tribunal. The challenge was repelled with the Arbitrators holding that no circumstance likely to give rise to any to justifiable doubts as to the independence or impartiality of the Arbitrators was made out by the Petitioner. After this unsuccessful challenge under Sections 12 and 13 of the Act, the Petitioner has approached this Court under Section 14 of the Act, purportedly on the footing that by acting in the manner that they did, the Arbitrators have become *de jure* or *de facto* unable to perform their functions and, accordingly, their mandate may be treated as terminated.

4. Mr. Sen, learned Senior Counsel appearing for the Petitioner, relies on several judgments, one of the Supreme Court and the others of various High Courts, in support of his contentions, which are briefly indicated below :-

(i) It is submitted that it was incumbent on each of the three Arbitrators to be present at each meeting so that the parties may have recourse to the acumen, experience and judgment of each Arbitrator at

every stage of the proceedings. It is submitted that the composition of the Arbitral Tribunal in the present case (i.e. the meeting conducted by two Arbitrators in the absence of the third) is contrary to the basic principles of natural justice and vitiates the judicial character of the proceeding.

(ii) It is submitted that this act on the part of the Arbitrators implies a serious misconduct on their part in the matter of the Arbitration Reference. Relying on the judgment of the Supreme Court in the case of **Juggilal vs. General Fibre Dealers**¹ it is submitted that an award or an order, which is liable to be set aside on account of misconduct, renders the arbitrator incapable of thereafter deciding the dispute due to such misconduct.

5. Mr. Madon, learned Senior Counsel appearing for the Respondent, submits that there was no effective hearing in the meeting of 2 September 2016. Learned Counsel submits that, at any rate, the business to be transacted at the meeting of 2 September 2016 was a ministerial business of comparing copies of the documents with their originals. Learned Counsel submits that the Petitioner has already availed of the challenge procedure under Sections 12 and 13 of the Act on the basis of the very same set of allegations, as are contained in the present application, purportedly filed under Section 14 of the Act. Learned Counsel, relying on a judgment of our Court in the case of **Hasmukhlal H. Doshi vs. M.L. Pendse, Retired Chief Justice, Karnataka High Court**² submits that it is no longer open to the

¹ AIR 1962 SC 1123

² 2000 (3) Mh. L.J. 690

Petitioner to challenge the authority of the Arbitrator to continue the proceedings under Section 14 of the Act, once having availed of the remedy under Sections 12 and 12 of the Act.

6. It is no doubt true that remedies under Sections 12 and 13 of the Act on the one hand and under Section 14 and 15 of the Act on the other, are separate remedies. It is also true that circumstances, which may give rise to an application under Sections 12 and 13 of the Act, may also in an appropriate case give rise to an application under Section 14 of the Act. At the same time, it cannot be that on the basis of the same set of facts a party can approach the Arbitral Forum under Section 12 and 13 of the Act, and after its refusal to recuse itself, on the ground of want of independence and impartiality, on the self-same set of facts and alleging the same ground of lack of independence or impartiality, knock the doors of the Court under Section 14 of the Act. Mr. Sen, however, contends that the present application before the Court under Section 14 may be on the basis of the same set of facts which give rise to justifiable doubt as to independence or impartiality of the Tribunal, but this set of facts also gives rise not only to justifiable doubt as to the independence or impartiality of the Tribunal but also renders them *de jure* or *de facto* unable to perform their functions. Learned Counsel submits that this second aspect of the matter could never have been brought before the Arbitrators in a challenge under Section 12 and 13 and can only be brought before this Court under Section 14 of the Act. As a matter of principle, learned Counsel may be right, though it sounds ludicrous that the same set of facts should be adjudicated on different standpoints both before the Arbitral Forum and

the Court, under different provisions of law. Be that as it may, I do not propose to decide this matter simply on this ground. Fundamental issue in this petition is whether, by reason of having conducted themselves the way they did on 2 September 2016, the Arbitrators can be said to have rendered themselves *de jure* or *de facto* unable to perform their functions. The only basis, on which such argument is advanced, is that the Arbitrators have misconducted themselves. At the outset, it is important to note that all types of misconduct, which may have been earlier grounds for interfering with an award, are not open as grounds of challenge to the award under the new Act. Though, of course, there will be some misconducts, which would give rise to a proper challenge under Section 34 of the new Act. What is it that the Arbitrators did on 2 September 2016 to attract this charge. By all accounts, it is clear that the meeting was scheduled to be held on 2nd and 3rd February 2016 and the Petitioner's application for adjournment, made by its earlier communication, was rejected by the Arbitral Tribunal. There is nothing wrong *per se* in the two Arbitrators meeting on 2 September 2016 in the absence of the 3rd Arbitrator so long as they do not transact any material business on that date. The Arbitrators themselves clearly indicated, and it is not even disputed by the Petitioner, that the business to be transacted on 2 September 2016 was anyway only a ministerial exercise of comparing copies of the documents with the originals, since the Petitioner had not anyway filed affidavit of evidence of RW-3 and there was nothing for the Respondents to cross-examine. In the backdrop of these facts, if the two Arbitrators met on 2 September 2016 presumably to carry out a ministerial exercise (the Arbitrators may have even expected the Petitioner to agree to such an exercise being carried out), it

cannot be said that the Arbitrators have actually misconducted themselves in a sense that after that meeting, they can be said to have rendered themselves incapable *de jure* or *de facto* to act as arbitrators. They could not have forfeited their mandate as arbitrators simply because they met on that date. Anyway, apart from the business of comparison of documents, the other business to be transacted by the Arbitrators was to extend the time for the Petitioner to file the affidavit of evidence of RW-3. This the Arbitrators anyway did after taking into account the third Arbitrator's view. To that extent, the three Arbitrators can be said to have applied their mind to the business of granting further time to the Petitioner for filing of affidavit of evidence of RW-3. That leaves only the question of costs. No doubt, the fact that the Arbitrators levied costs for two meetings to be held on 2nd and 3rd September 2016 leaves much to be desired, but that cannot by itself be fatal to their character as Arbitrators. Firstly, the order of costs in respect of the meeting to be held on 3 September 2016 was subsequently cancelled by the Arbitrators and secondly, just as this part of the order was cancelled by the Arbitrators, even the earlier part, that is to say, costs for the meeting of 2 September 2016, could certainly have been waived by the Arbitrators. This was, after all, a matter pertaining to an ongoing trial and it was certainly open to the Petitioner to apply for variation of this order. If eventually the Arbitrators did not do it, it would be a matter which could always be taken up in a challenge under Section 34 of the Act.

7. In sum, therefore, neither by reason of the fact that they decided about their authority to proceed as an Arbitral Forum consisting

merely two out of three Arbitrators, nor they having adjourned the matters upon granting time to the Petitioner to file affidavit of evidence of RW-3 or their levying costs on the Arbitrator, the Arbitrators could be said to have misconducted themselves in a manner so as to render themselves incapable of acting as an Arbitral Tribunal.

8. For all these reasons, there is no merit in the Arbitration Petition. The petition is dismissed. The Petitioner shall pay costs of this petition calculated at Rs.50,000/- to the Respondent.

(S.C. GUPTE, J.)