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

+ **O.M.P. (T) (COMM.) 14/2017**

**INTERNATIONAL ENGINEERS AND PROJECT
CONSULTANTS LIMITED (IEPCL)**

..... Petitioner

Through: Ms Rachna Gupta with Mohd. Quais,
Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr Jagjit Singh, Mr Ashok Singh and
Mr Preet Pal Singh, Advocates for
Railways.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
09.05.2017

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VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* praying that the mandate of the sole arbitrator (Mr Yogendra Kumar) be terminated and an independent and impartial person be appointed in his place.

2. The facts of this case clearly demonstrate the failure of the alternate dispute mechanism (arbitration) to provide an expeditious resolution of the disputes. The arbitration proceedings commenced on 26.12.2000 and more than sixteen years later are as yet far from being concluded. This has led the petitioner to file the present petition.

3. The petitioner invoked the arbitration clause by its letter dated

26.12.2000 and called upon the respondents to appoint an arbitrator. The respondents did not accede to the request of the petitioner for appointment of an arbitrator. The petitioner was, therefore, constrained to file an application under Section 11 of the Act (AA No.8/2002) which was disposed of by this Court on 20.11.2002 directing respondent no.3 therein- the General Manager, Central Organisation of Railway Electrification (CORE), Ministry of Railways, Civil Lines, Allahabad, to appoint an arbitrator within eight weeks on the receipt of the said order.

4. The respondent did not comply with the aforesaid order and instead called upon the petitioner to nominate its arbitrator from the nominees as suggested. The petitioner, repeatedly, called upon respondent no.2 to appoint a sole arbitrator as directed by this court but the respondents failed to do so. In the circumstances, the petitioner once again approached this Court (by filing an application - IA No. 2636/2003 in AA No. 8/2002) requesting for appointment of an arbitrator. The said application was disposed of on 05.03.2003 on the statement made on behalf of the respondents that they would appoint an arbitrator within a period of 15 days from the said date.

5. In compliance with the aforesaid order, Mr Rastogi, a serving officer of CORE (Arbitrator No.1) was appointed as the sole arbitrator. Mr Rastogi entered upon the reference and issued a notice dated 13.03.2003 calling upon the petitioner to file its claims alongwith the relevant documents.

6. The petitioner challenged the appointment of Mr Rastogi as an arbitrator on the ground that he was involved in the decision making process relating to the contract in connection with which the disputes had arisen.

7. The respondent thereafter appointed another serving officer Ms Tanuja Pandey, Dy. FA & CAO/II (Arbitrator no.2) as the sole arbitrator for adjudicating the disputes. This was communicated to the petitioner by letter dated 16.06.2003. The petitioners objected to the appointment of Ms Tanuja as well and called upon her to make the necessary disclosure under Section 12 of the Act.

8. By a letter dated 21.05.2004, Sh. Lallo Singh, Chief Engineer CORE Allahabad (Arbitrator no. 3) was appointed as the sole arbitrator by the respondents in place of Ms Tanuja Pandey as she was transferred to another organisation.

9. By a letter dated 02.09.2004, Sh. Lallo Singh called upon the petitioner to submit the statement of claim within a fortnight.

10. No significant progress was made in the arbitration proceedings for the next several years and Sh. Lallo Singh resigned as a sole arbitrator on 08.03.2013; that is almost nine years after he had entered upon the reference. Thereafter on 26.04.2013, the respondent appointed Sh. D.K. Sinha (Arbitrator no. 4) as the sole arbitrator.

11. It is stated that the petitioner received a letter dated 20.09.2013 informing the petitioner that Sh. Yogendra Kumar, Chief Material Manager, CORE Allahabad (Arbitrator No. 5), was appointed in place of Sh. D.K. Sinha. Thereafter the petitioner also received a letter dated 03.02.2014 from Sh. Yogendra Kumar informing the petitioner that he had entered upon reference.

12. On 03.03.2014, Sh. Yogendra Kumar (hereafter 'the arbitrator') sent another letter calling upon the petitioner to file the statement of claim within

a period of two months and also directed the respondent to file the counter claims, if any, within a period of 30 days thereafter and fixed a hearing on 10.06.2014. Thereafter, the arbitrator extended the time for filing the claims/counter claims on 08.09.2014.

13. The petitioner submitted its statement of interim claims on 25.10.2014. In the meanwhile, the petitioner had also filed an application for discovery of certain documents and records, which according to the petitioner were necessary for filing the statement of claims.

14. The learned counsel for the petitioner stated that no order has been passed on the petitioner's application for discovery of documents and records and, therefore, the petitioner was constrained to file a statement of interim claims. Thereafter by a letter dated 13.03.2015, the petitioner also informed the arbitrator that its interim claims be treated as its statement of claims.

15. On 23.03.2015, the arbitrator issued an order fixing a hearing on 30.03.2015. The petitioner claims that this order was received by the petitioner on 26.03.2015 and, therefore, the petitioner by its letter dated 28.03.2015 requested that hearing be deferred and 15 days prior notice be given for fixing the next hearing.

16. On 30.03.2015, the arbitrator directed the respondent to file a reply within a period of 60 days. The petitioner objected to grant of further time by its letters dated 16.06.2015 and 04.07.2015. On 08.07.2015, the arbitrator once again granted further time to the respondent to file its counter reply/counter claims and hearing was fixed on 21.07.2015.

17. The arbitrator held arbitral proceedings on 21.07.2015, however, none

was present for the petitioner at that hearing. Thereafter, the arbitrator sent a communication dated 21.07.2015 stating that the respondent had filed its counter claims/reply and the petitioner was called upon to submit its reply. The arbitrator did not fix any other hearing, however, it was stated in the said letter that the "*the next Arbitration hearing shall be fixed suitably and the intimation in advance will be sent to both the parties.*" It is stated that the petitioner has not received any communication from the arbitrator after the said letter.

18. Mr Singh, learned counsel appearing for the respondent did not dispute that arbitration proceedings had been unduly delayed; however, he submitted that it was the petitioner who is responsible for the delay as the petitioner had been consistently objecting to the appointment of serving officers as arbitrator. The petitioner had also approached this Court on more than one occasion for appointment of an independent arbitrator, which request was rejected. However the petitioner did not rest content and appealed to the Supreme Court against the order of this Court rejecting the petitioner's request for appointment of an independent arbitrator. And, that petition (Civil Appeal No. 1765/2005) was also dismissed by an order dated 01.12.2009. He stated that the arbitration proceedings could not be proceeded due to pendency of the matter before this Court as well as the Supreme Court. He further contended that the petitioner had also repeatedly raised objections as to the impartiality and the independence of the arbitrator under Section 12 of the Act which also impeded the progress of the arbitration proceedings.

19. He referred to the decision of a Coordinate Bench of this Court in ***Ahluwalia Contracts (India) Ltd. v. Housing & Urban Development***

Corporation & Anr.: 2008 (100) DRJ 461 in support of his contention that the mandate of the arbitrator could not be terminated on an apprehension of impartiality and bias. He also relied on the earlier decision of this Court in ***Gangotri Enterprises Ltd. v. NTPC Tamil Nadu Energy Co. Ltd. : 237 (2017) DLT 690*** in support of his contention that the petitioner could not make a grievance of the delay in conclusion of the proceedings as the petitioner was itself responsible for such delay.

20. The facts of the present case clearly demonstrate that the arbitral proceeding had been inordinately delayed. Mr Singh's contention that the petitioner was responsible for the delay and, therefore, cannot make a grievance, is unmerited. The petitioner had consistently maintained that serving officers from CORE would not be impartial and independent and, therefore, had objected to the said appointment.

21. The arbitrators appointed by the respondent were required to consider the said objections and pass appropriate orders under Section 13 of the Act. In the event the arbitrators rejected the said challenge, they were required to proceed and make an award in terms of Section 13(4) of the Act. The fact that the petitioner had been raising objections as to impartiality and independence of the arbitrators is no ground for the arbitrator(s) not to have proceeded further.

22. There may be merit in the contention that the petitioner had also delayed filing statement of claims and/or by raising needless objections. However, that too is no reason for the arbitrator not to proceed in accordance with the Act. In terms of Section 32 of the Act, the arbitrator could terminate the proceedings in the event he came to the conclusion that it was unnecessary for himself to proceed further with the proceedings.

Clearly failure of a claimant to file a statement of claim within a reasonable period would be a ground for the arbitrator to terminate the proceedings (if not objected to by the respondent). However, it is not open for the arbitrator to remain inactive and not conclude the arbitral proceedings.

23. If the arbitrator fails to proceed with the arbitration, any party would be justified in approaching this Court for termination of the mandate of the arbitrator on the ground that he has failed to act without undue delay.

24. In this case, the last communication received from the arbitrator was on 21.07.2015. In his letter, the arbitrator had indicated that he would be fixing an arbitral hearing and informing the parties in advance. However, no proceedings have taken place for almost two years. In the circumstances, there is no scope for any doubt that the arbitrator has failed to act without undue delay and consequently, his mandate to act as an arbitrator stands terminated. There is good precedent where the courts have set aside arbitral awards rendered after significant delays (See: *Harji Engg. Works Pvt Ltd. v. Bharat Heavy Elecricals Ltd and Anr.*: *Manu/DE/1419/2008* and *BWL Ltd. v. UOI & Anr.*: *Manu/DE/5699/2012*).

25. The reliance placed by Mr Singh on the decision in the case of *Ahluwalia Contracts (India) Ltd.* (*supra*) is misplaced. In that case, the question before the Court was whether the mandate of an arbitrator could be declared to be terminated on the grounds as specified under Section 12(3) of the Act; that is, (a) there are circumstances likely to give rise to justifiable doubts as to his independence or impartiality and (b) that he does not possess the qualification agreed to by the parties. In the present case, although the petitioner had alleged that there are justifiable doubts as to the independence and impartiality of the arbitrator but that is not the ground on

which the termination of the arbitrator's mandate is sought. The failure of the arbitrator to act without undue delay - as in this case - would clearly be a ground for seeking termination of its mandate under Section 14(1) of the Act.

26. The decision in the case of *Gangotri Enterprises Ltd.* (*supra*) also does not further the case of the respondent. In that case, the arbitrator had closed the right of the Gangotri Enterprises Ltd. (GEL), the claimant therein, to file a statement of claims and, thus, effectively terminated the proceedings in respect of the disputes raised by the GEL. GEL relying on the decision of the Supreme Court in *Lalitkumar v. Sanghavi (D) Th. L.Rs. Neeta Lalit Kumar Sanghavi & Anr. v. Dharamdas V. Sanghvi & Ors. III: (2014) 7 SCC 255* had approached this Court impugning the order of the arbitrator closing it's right to file the statement of claims. That was not a case where the termination of arbitrator's mandate was sought on the ground of his failing to act without undue delay.

27. In view of the above, this Court is of the view that the mandate of the arbitrator is terminated and an arbitrator is required to be appointed in his place.

28. Accordingly, Justice Sunita Gupta (Retired) a former judge of this court is appointed as the sole Arbitrator to adjudicate the disputes between the parties. This is subject to the arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act. The arbitrator shall fix her fees in consultation with the counsel for the parties. It is expected that the arbitrator shall make an award within a period of 12 months from entering upon reference notwithstanding that the provisions of Section 29A of the Act may not *stricto sensu* apply.

29. The petition is disposed of. In the circumstances the parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 09, 2017
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