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

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*Date of decision:* 18.09.2017

+ **O.M.P.(MISC.)(COMM.) 1/2017**

BHARAT HEAVY ELECTRICALS LTD. .... Decree Holder.

Through: Mr.R.Chandrachud, Advocate

versus

M/s CAPITAL CONTROL INDIA PVT.LTD ...Judgment Debtor

Through: Mr.Dilip Taur, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J. (ORAL)**

1. This petition has been filed under Sections 29A, (4) and (5) of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act'), seeking to extend the mandate of the learned Sole Arbitrator for passing of the Award.

2. It is the case of the petitioner that on 14.1.2008, the petitioner issued a purchase order to the respondent for supply and also for supervision of erection, testing and commissioning of an Electro Chlorination System for 4 X 125 MW Units at Kosti TPP, Sudan.

3. The disputes having arisen between the parties, the petitioner on 4.01.2016, in terms of the arbitration clause, appointed Mr. Vipin Chandra, Retd. A.G.M.(Law), BHEL as Sole Arbitrator in terms of Section 33 of the General Conditions of Contract to adjudicate the dispute between the parties. On 11.1.2016, the learned Arbitrator is said to have entered into reference. On 11.3.2016, the petitioner filed a statement of claims. On 11.4.2016, the

respondent after expiry of the time to file reply vide Email, requested for copies of documents. On 14.10.2016, the respondent having not chosen to file his reply, filed an application under Sections 12 and 13 of the Act raising doubts about the independence and impartiality of the learned Arbitrator on the ground that he was an Ex. employee of BHEL. In the third arbitral proceedings that took place on 17.10.2016, it is urged that the respondent did not appear. The petitioner was asked to file a reply to the said application. On 09.11.2016, the respondent did not attend the fourth arbitral meeting. Learned arbitrator after hearing the petitioner, reserved his order on the application of the respondent. On 15.11.2016, the arbitrator dismissed the application of the respondent. On 02.01.2017, the respondent has filed his reply and counter-claim and sought one week's time to submit annexure. On 03.01.2017, the respondent conveyed that they are not agreeable for extension of time under Section 29 A of the Act to the arbitrator to proceed with the matter. The arbitrator has adjourned the matter *sine die*.

4. I have heard the learned counsel for the parties.

5. Learned counsel for the respondent has averred that learned arbitrator appointed by the petitioner is a retired employee of the petitioner and is hence ineligible to be appointed as arbitrator. Hence he submits that it is in the interest of justice that this court instead appoint an independent arbitrator to adjudicate the dispute between the parties. He has relied upon the judgment of this court in the case of **Vil JV vs. Rail Vikas Nigam Ltd. (2016) SCC onlineDel 2567** and **Afcons Infrastructure v. Rail Vikas Nigam Ltd.** in Arb.P.21/2017 dated 29.05.2017 to support his submissions.

6. Learned counsel for the petitioner has submitted that under Schedule VII of the Act a retired employee is not prohibited from being appointed as

an arbitrator. He relies upon the judgment of the Madras High Court in case of **Offshore Infrastructure v. BHEL 2016 SCC Online Mad 31837**, to support his contentions.

7. A perusal of the Seventh Schedule to the Act would show that there is no reference to retired employee. Clause 1 of the Seventh Schedule however mentions an employee which reads as follows:

1. “The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.”

8. However entry 31 of the Fifth Schedule reads as follows:-

31. “The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.”

9. Hence, a former employee who has retired three years ago is not covered within Fifth Schedule. The Madras High Court in **Offshore Infrastructure Ltd. v. BHEL (supra)** held as follows:-

“26. I find myself in agreement with the opinion of the Chief Justice, S.J. Vazifdar of the Punjab and Haryana High Court and more so in the context of Clause (31) of the Fifth Schedule. It is common cause that while sub-section (1) of Section 12 of the said Act read with Explanation (1) sets out the circumstances in which there can be justifiable doubts as to the independence or impartiality of an arbitrator, sub-section (5) of Section 12 of the said Act read with the Seventh Schedule prescribes an absolute bar. In a sense, it is presumed that on the existence of the said relationships, it would be not permissible for a person to act as an arbitrator.

27. There are two expressions used in the Fifth and Seventh Schedule. The Fifth Schedule in Clause (31) uses the expression “former employee”. The natural corollary is there is a difference between an employee and ex-employee. Thus, while being an

employee is sufficient for justifiable doubts, such justifiable doubts would arise in case of an ex-employee only if he is within the window of three years from the date of ceasing to be an employee.

28. The Seventh Schedule does not have any clause for an ex-employee. Clause (1) of Seventh Schedule is identically worded to Clause (1) of the Fifth Schedule. Thus, the expression “employee” has to be understood similarly at both the places. The absence of any clause for ex-employee in the Seventh Schedule itself implies that there is no prohibition in the appointment of an ex-employee as an arbitrator per se. However, the use of expression “former employee” in Clause (31) of the Fifth Schedule would show that if the proposed arbitrator has ceased to be an employee within the window of three years, there would be justifiable doubts to the independence or impartiality of the arbitrator, though there is no absolute bar as under the Seventh Schedule.

29. It is not as if being an employee implies that the said equation continues for all times to come and as observed in the judgment in Reliance Infrastructure Ltd., case, supra, the equations between the parties itself changes, i.e., an employer and an employee and an employer and an ex-employee.”

10. It is not in dispute that the learned arbitrator has retired more than three years ago from the petitioner-company. Hence it cannot be argued that the appointment of the learned arbitrator can be challenged under Section 12 or his mandate can be terminated under Section 14 of the Act. Hence this plea of the respondent to support his submission that time to extend the mandate of the learned Arbitrator be declined is without merits.

11. Learned counsel for the petitioner has also pointed out that the delay in completion of the adjudication of the proceedings took place on account of the non-cooperation of the respondent who has repeatedly taken adjournments and has belatedly filed his reply. In fact, he has pointed out

that the proceedings before the learned arbitrator took place on 29.01.2016, 01.10.2016, 17.10.2016 and 09.11.2016. Other than the first hearing, respondent has not attended any of the hearings. On 23.12.2016, the respondent's Advocate entered appearance, filed vakalatnama and sought further three weeks' time to file reply/counter-claim. Time was granted till 02.01.2017. Reply has been filed by the respondent now.

12. I agree with the learned counsel for the petitioner that the delay has taken place partly on account of the time taken to adjudicate the application filed by the respondent under Section 12 of the Act before the learned arbitrator seeking withdrawal of the learned arbitrator from the arbitration proceedings.

13. I see no reason or justification for not giving an opportunity to the learned arbitrator to complete arbitration proceedings. Accordingly, I extend time for making of the award by the learned arbitrator by a period of nine months. It is made clear that no further extension shall be granted in this regard.

14. The petition stands disposed of.

**JAYANT NATH, J.**

**SEPTEMBER 18, 2017**

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