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

% *Date of decision: 22.05.2017*

+ O.M.P. (T) (COMM.) 16/2017

CHINTPURNI CONSTRUCTION CO. Petitioner
Through Mr.S.W.Haidar, Advocate

Versus

UNION OF INDIA Respondent
Through Mr.N.Prashant Kumar Nair, Advocate

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. The present petition is filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking termination of the mandate of the arbitral tribunal constituted by the respondent and appointment of an independent arbitrator in its place to adjudicate upon the claims of the petitioner amounting to Rs. 36,75,738/- (Rupees Thirty Six Lacs Seventy Five Thousands Seven Hundred Thirty Eight Only).

2. The case of the petitioner is that on 07.12.2006, the petitioner was awarded the work pertaining to linking of track from Km. 37.000 (excluding) Cholang to Km. 42.883 (including) Tanda' Urmur Yard in connection with Jalandhar- Pathankot-Jammu Tawi Doubling.

3. The disputes have been arisen between the parties on 11.04.2008, the petitioner invoked the arbitration clause. On 23.01.2009 the respondent

constituted the arbitral tribunal consisting of three arbitrators, namely Sh.R.K.Gupta as Presiding Arbitrator, Sh.N.K.Verma and Sh.Muktesh Mittal as Co-arbitrators. However, out of 23 claims raised by the petitioner, only 14 claims were referred for adjudication. In view of the same, the petitioner filed a petition bearing ARB. P. No.403/2009, under Section 11 of the Act seeking reference of the left out 9 claims before the arbitral tribunal. This petition was allowed on 08.02.2010.

4. It is the case of the petitioner that last hearing by the arbitral tribunal took place on 12.02.2014 and that thereafter for more than 3 years the arbitral tribunal has not sat for hearing. Hence, he submits that the present mandate of the arbitral tribunal be terminated and a fresh independent arbitrator be appointed by this court.

5. The learned counsel appearing for the respondent submits that in the present case, the arbitrator who was the nominee of the petitioner selected from the panel of the arbitrators prepared by the respondent, namely Sh.N.K.Verma resigned from the panel some time in 2014. It is urged that several communications were sent to the petitioner, namely, 21.07.2014, 22.08.2014 and 23.09.2014 requesting the petitioner to nominate a fresh arbitrator from already prepared panel. As no steps were taken by the petitioner, the respondent nominated Mr.Niraj Kumar on 18.12.2014. Hence, he submits that the delay was on the part of the petitioner.

6. Section 14 of the Act reads as follows:

“14. Failure or impossibility to act. – (1) The mandate of an arbitrator shall terminate if- (a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and (b) He withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.”

7. Hence, where there is an undue delay in completion of the arbitration, the mandate of the arbitrator can be terminated.

8. In the present case, in the reply itself the respondent admits that since 12.02.2014 no hearing had taken place by the arbitral tribunal. Even assuming that the resignation of Sh.N.K.Verma, one of the members of the arbitral tribunal necessitated some delay, it may be noted that no hearing has been taken place after 12.02.2014. Despite lapse of two and half years, the new tribunal has not taken any steps to pursue the arbitration proceedings. It may be noted that after filing of the present petition now the tribunal has commenced the proceedings. Along with reply, the minutes of the proceedings held on 12.05.2017 have been included. The next date of hearing is stated to be 25.05.2017.

9. The learned counsel appearing for the petitioner however submits that no notice was received by the petitioner for hearing of 12.05.2017. It is clear that there is an undue delay in concluding the proceedings being adjudicated by the learned arbitral tribunal.

10. It is clear that the invocation for arbitration was made by the petitioner in April 2008. The Arbitral Tribunal was constituted in 2009. Despite lapse of nearly seven years from the date of constitution of the Arbitral Tribunal, the proceedings have not been completed. Delay is manifest on the face of the record.

11. The Supreme Court in *Union of India (UOI) vs. U.P.State Bridge Corporation Ltd., (2015)2 SCC 52/MANU/SC/0837/2014* on termination of the mandate of an Arbitrator on account of delay held as follows:-

“13. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the Court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a pre-emptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the arbitral tribunal is flawless. This aspect of the impugned order is not even questioned by the Appellant at the time of hearing of the present appeal.”

12. Given the above legal and factual position, I terminate the mandate of the present Arbitral Tribunal.

13. The issue next arises is the appointment of a fresh Arbitrator. In the above judgment *Union of India vs. U.P.State Bridge Corporation Limited (supra)* on the said issue the Supreme Court held as follows:-

“18. First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the Arbitration Agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the Court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. (see *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* and Anr. MANU/SC/8227/2006: (2006) 6 SCC 204. However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in para 5 of *Tripple Engineering Works (supra)*. We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers Under Section 11 of account of 'default procedure'. We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above

principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in Singh Builders Syndicate (supra).”

14. In the light of the above, I deem it fit to appoint an independent Arbitrator to expeditiously conclude the arbitration proceedings.

15. I appoint Mrs.Anjali Vohra, Advocate (Mobile No. 9811087442) as a sole arbitrator to adjudicate upon the disputes between the parties. The learned Arbitrator will continue the proceedings from the stage at which they had reached before the previous Arbitral Tribunal. The old Arbitral Tribunal is requested to transfer record to the new arbitrator. The fees of the learned Arbitrator shall be fixed by the learned arbitrator in consultation of the learned counsel for the parties. The learned arbitrator may comply with the provision of Section 12(1) of the Act.

16. Petition stands disposed of.

JAYANT NATH, J.

MAY 22, 2017/v

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