

\$~OS-17

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

%

Date of decision: 12.07.2017

+ O.M.P. (T) (COMM.) 24/2016

SCORPION EXPRESS PVT. LTD

..... Petitioner

Through Mr.Ashish Mohan and Mr.Chetan,
Advs.

versus

UNION OF INDIA THROUGH SECRETARY MINISTRY OF
RAILWAYS & ANR.

..... Respondents

Through Mr.N.Prashant Kumar Nair, Adv. for
UOI

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. Present petition is filed under section 14 of the Arbitration and Conciliation Act, 1996 seeking to terminate the mandate of the Arbitrator Captain Retired J.P.Singh who was appointed as an Arbitrator to adjudicate the dispute between the parties.
2. The petitioner was awarded a lease agreement for a period of three years for 4 tonnes parcel leasing space in 1st compartment in Train No.2444 Ex./NDLS to BBS. A formal contract was signed between the parties w.e.f. 21.3.2009 to 21.3.2012. It was the case of the petitioner that in accordance

with the parcel leasing policy all leaseholders were entitled to extension of two years over and above the original lease contract of three years. As the respondent failed to do the needful the petitioner filed a Writ Petition before this court. The writ petition was disposed of by a consent order dated 3.5.2012 whereby a direction was issued that the designated authority shall take steps to appoint an Arbitrator within 15 days. The Arbitrator was to enter upon reference and endeavour to conclude the arbitration proceedings within a period of four months. Interim orders that were passed in favour of the petitioner were to continue to operate till the arbitration proceedings.

3. It is the case of the petitioner that the present Arbitrator was appointed by the concerned authorities on 6.6.2014. It is urged that the learned Arbitrator had only four months to complete the arbitration proceedings. Yet, he has in April 2014 after lapse of almost 2 years entered into reference and requested the petitioner to file this claim petition. Hence, the present petition seeking termination of the mandate of the learned Arbitrator.

4. I have heard learned counsel for the parties.

5. Learned counsel for the petitioner has relied upon judgment of the Supreme Court in ***NBCC Limited vs. J.G.Engineering Private Limited, (2010) 2 SCC 385*** and judgment of this court in ***Shyam Telecom Ltd. vs. ARM Ltd., 2004(3) R.A.J.459 (Del)*** to contend that where the parties have fixed a time limit for the learned Arbitrator to complete the adjudication and pass an award, on expiry of the time limit the mandate of the Arbitrator expires. It has been urged that the order of the Division Bench dated 3.5.2012 was a consent order and hence the time period of four months was fixed by the consent of the parties.

6. Learned counsel appearing for the respondent has sought to argue that

there is an element of acquiescence on the part of the petitioner inasmuch as when the learned Arbitrator requested the petitioner to file the Statement of Claim the petitioners had taken several opportunities and have thereafter filed the Statement of Claim sometimes in December 2014. Hence, it is urged that in these facts the mandate of the Arbitrator cannot be terminated. It is also urged that there were two matters with identical facts and issues that were involved. He submits that the learned Arbitrator has gone sequentially and has first taken up the other matter and thereafter commenced hearing of the present matter.

7. Section 14 of the Arbitration and Conciliation Act, 1996 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.”

8. Hence, a mandate of an Arbitrator has to be terminated if he fails to act without undue delay. The Supreme Court in **NBCC Limited vs. J.G.Engineering Pvt. Ltd. (supra)** was dealing with the case where the High

Court had passed a direction to the appointing authority to appoint an arbitrator and that the learned arbitrator so appointed may conclude the proceedings within a period of six months from the date of his appointment. The arbitrator so appointed failed to do the needful. Parties extended the time to conclude arbitration proceedings. Even in the enlarged time the arbitrator could not conclude the proceedings. Hence, one of the parties filed a petition under Section 14 of the Act for termination of the mandate of the arbitrator. The High Court allowed the petition. The Supreme Court upheld the order of the High Court and held as follows:-

“22. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time under the Act unlike Section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an award. It is true that apparently there is no provision under the Act for the Court to fix a time limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the Arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them.”

9. Similarly, this court in *Shyam Telecom Ltd. vs. ARM Ltd., (Supra)* in paras 14 and 15 held as follows:-

“14. The moot question which falls for consideration, Therefore, is whether an Arbitrator becomes unable to perform his functions on his failure to render the Award within the time limit prescribed by the Arbitration agreement. Mr. Sanghi,

learned counsel representing the petitioner has not disputed that not making the Award within the prescribed period will not visit the Arbitrator with any de facto inability (incapacity) to continue with the mandate but his submission is that this would make the Arbitrator de jure unable to act legally whenever he is visited with any such legal disability. The expression "de jure" means the 'legal right' or 'authority' or 'according to law'. The Blacks Legal Dictionary defines "de jure" to be "existing by right or according to law". P. Ramanatha Aiyar's Law Lexicon, Second Edition, 1997 defines "de jure" as "of right; legitimate; lawful; by right and just title".

15. In the opinion of this Court, the expression "de jure" is amply wide so as to cover a situation like the case in hand. This view is based on the settled legal position that Arbitration agreement is the fountain head of the Arbitrator's power and authority and the parties as well as the Arbitrator are governed and controlled by the terms of the said Arbitration agreement. Unless parties agree to the contrary, the terms of Arbitration agreement must operate in full. The consequence of the Arbitrator not concluding the proceedings and rendering the Award within the period prescribed under the Arbitration agreement as in the present case would unclothed the Arbitrator of his legal authority to continue with the proceedings unless the parties agree to extend the period of making the Award or a party waives his right to such an objection. It must, Therefore, be held that expiry of the prescribed period for making the Award, would render the Arbitrator 'de jure' unable to continue with the proceedings and has the effect of termination of the mandate of the Arbitrator within the meaning of Section 14 of the Act."

10. The facts of the present case are somewhat similar to the above two cases. The Division Bench had by consent of the parties in the present case passed a direction whereby the learned Arbitrator was to conclude the arbitration proceedings within a period of four months. The learned

Arbitrator was appointed on 6.6.2014 and he has failed to complete the proceedings till now. It is manifest that on expiry of the term as per order of the Division Bench dated 3.5.2012 the mandate of the learned Arbitrator has expired. As far as the two contentions of the respondent are concerned the same are without merits. The contention of the respondent that there is acquiescence in continuation of the Arbitrator is misplaced. Other than filing a claim petition before the Arbitrator no further steps have been taken by the petitioners. The proceedings were at a very initial stage whereupon the petitioners have moved this court for termination of the mandate of the learned Arbitrator. Merely because some adjournments were sought to file the Claim Petition cannot lead to a conclusion that there was acquiescence on the part of the petitioner to the continued mandate of the learned Arbitrator. Regarding the second contention, it was an admitted fact that the other arbitration proceedings were pursuant to an entirely different contract which was not connected with the present contract. In case there was identity of facts and issues involved, the learned Arbitrator ought to have commenced two proceedings together. There is nothing on record which warrants the action of first taking up one proceedings and to await the conclusion of the same before starting the second proceedings.

11. In view of the legal position, the mandate of the learned Arbitrator cannot continue. Accordingly, I allow the petition and terminate the mandate of the Arbitrator.

12. In terms of the arbitration agreement between the parties it is appropriate that the concerned authorities, namely, General Manager, Northern Railways, Baroda House, New Delhi appoints a fresh Arbitrator in terms of Clause 26 of the Agreement between the parties dated 13.4.2009.

While making the appointment the said functionary will ensure that no Arbitrator whose appointment is forbidden under section 12(5) of the Act is so appointed as an Arbitrator.

13. Petition stands disposed of as above. The concerned authority may ensure nomination of an Arbitrator within two months from today.

14. A copy of this order be given dasti to counsel for the respondent, as prayed.

JULY 12, 2017/n

JAYANT NATH, J.

