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

\+ O.M.P. (COMM) 317/2016

OIL AND NATURAL GAS CORPORATION LTD.
ANKLESHWAR ..... Petitioner

Through Mr. Deepak Jain, Mr. Pradeep and Mr. Jaspreet, Advocates

versus

AIREFF DETOX PRIVATE LTD. ..... Respondent

Through None

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **27.04.2017**

VIBHU BAKHRU, J

1. None appears for the respondent (hereafter 'ADPL') even though the respondent stands served. In these circumstances, this petition is taken up for hearing in absence of representation on behalf of the respondent.

2. The petitioner (hereafter 'ONGC') has filed the present petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 03.03.2016 (hereafter 'the impugned award') passed by the sole arbitrator.

3. The principal controversy involved in the present petition is whether the impugned award is *non est* as the arbitrator had lost the mandate prior to making the impugned award.

4. Briefly stated, the relevant facts necessary to address the aforesaid

controversy are as under:

4.1 ONGC floated a tender inviting bids for the design, engineering, manufacturing, procurement, fabrication, civil & structural works, transportation, installation, instrumentation & electrical works, hook-up, testing, pre-commissioning, commissioning, test run and handing over in connection with the revamping of Effluent Treatment Plant at Ankleshwar, Gujarat. Consortium of ADPL and Zen Marketing Technologies Limited bid for the same, which was accepted and Notification of Award (NOA) dated 24.02.2010 was issued by ONGC. Subsequently, the parties entered into the agreement (hereafter 'the Agreement') on 30.04.2010.

4.2 Certain disputes arose between the parties and ADPL invoked the arbitration clause. In terms of the Agreement, ONGC appointed the sole arbitrator by a letter dated 19.11.2014 to adjudicate the disputes that had arisen between the parties in connection with the Agreement. The said letter of appointment expressly provided that the arbitral proceedings would be governed by the arbitration clause 1.3 of the Agreement. The arbitrator accepted the appointment and entered upon the reference.

4.3 Apparently, there was some controversy with regard to payment of fees payable to the arbitrator and ONGC contends that, by a letter dated 04.05.2015, the arbitrator withdrew his consent to act as such. Consequently, his mandate stood terminated on the said date.

4.4 In addition, ONGC also sent a letter (application) dated 02.06.2015 to the arbitrator claiming that his mandate as the arbitrator stood terminated in terms of clause 1.3.2.7 of the Agreement. In the said letter (application), ONGC stated that in terms of the arbitration clause, the arbitration award was to be rendered within a period of 8 months from the date of arbitrator entering into reference – that is, on or before 18.07.2015 - and since the arbitrator failed to render award within the said period, his mandate stood terminated.

4.5 Whilst, the aforesaid application was pending, the arbitrator issued a notice dated 29.01.2016 stating that the arbitration award would be published.

4.6 Thereafter, the parties were heard by the arbitrator on ONGC's application under section 15 (2) of the Act. The impugned award was published on 03.03.2016 whereby the arbitrator also rejected ONGC's application under section 15 (2) of the Act and *inter alia* held that his mandate was not terminated as there was no undue delay.

5. Before proceeding further, it would be necessary to refer to clause 1.3.2 of the Agreement, which is quoted below:-

> "1.3.2 **Arbitration**
>
> Except as otherwise provided elsewhere in the contract, if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, interpretation of the contract or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:
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> 1.3.2. 7 The arbitral tribunal shall make and publish the award within the stipulated as under:

Amount of Claims and Counter Claims (excluding interest)	Period for making and publishing of the award (counted from the date of first meeting of the arbitrators):
Upto Rs.5 crore	Within 8 months
Above Rs.5 crore	Within 12 months

The above time limit can be extended by the arbitrator for reasons to be recorded in writing, with the consent of the partiers."

6. ONGC's letter appointing the arbitrator expressly stipulated that "*the Arbitration proceedings will be governed by the Arbitration clause 1.3 of the above mentioned contract*." Thus, there can be no doubt that the arbitral award was to be rendered within a period of eight months of arbitrator entering upon reference as stipulated in sub-clause 1.3.2.7 of the Agreement. The said period could not be unilaterally extended without the consent of the parties.

7. An arbitrator derives his mandate from the agreement between the parties and has no power to render the award contrary to the agreement. In this case, the mandate of the arbitrator to make the award ended with the expiry of the period of eight months from the date of the arbitrator entering upon the reference; that is, on or before 18.07.2015. There is no dispute that the said time period for making the award, was not extended by the parties. Accordingly, the arbitral award rendered on 03.03.2016 is without jurisdiction and the same is liable to be set aside on this ground alone.

8. The Supreme Court in the case of ***N.B.C.C. Ltd. v. J.G. Engineering Pvt. Ltd***: **(2010) 2 SCC 385** considered the question whether an arbitrator can enlarge the time to publish the award beyond the specified period and

held as under:-

> "A perusal of the arbitration agreement quite clearly reveals that the arbitrator has the power to enlarge the time to make and publish the award by mutual consent of the parties. Therefore, it is obvious that the arbitrator has no power to further extend the time beyond that which is fixed without the consent of both the parties to the dispute. It is an admitted position that the respondent did not give any consent for extension of time of the arbitrator. Thus given the situation, the arbitrator had no power to further enlarge the time to make and publish the award and therefore his mandate had automatically terminated after the expiry of the time fixed by the parties to conclude the proceedings.
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> ….The Arbitrator was bound to make and publish his award, within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time. Therefore, the condition precedent for enlargement of time would depend only on the consent of the parties, that is to say, that if the parties agree for enlargement of time. If consent is not given by the parties, then the authority of the arbitrator would automatically cease to exist after the expiry of the time limit fixed. In the present case, the arbitrator had failed to publish the award within the time limit fixed by the parties, and hence, the High Court was justified in terminating the mandate of the arbitrator….
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> It has been correctly observed by the High Court that the arbitrator had become functus officio in the absence of extension of time beyond 30th of September, 2005 to make and publish the award. After the said date, the arbitrator had no authority to continue with the arbitration proceedings."

9. A Division Bench of the Bombay High Court in the case of ***Bharat Oman Refineries Ltd. v. Mantech Consultants*** : **2012 (2) ArbLR 482 (Bom)** had held as under:

> "19 …..The Arbitrator is required to adjudicate the disputes in view of the agreed terms of contract and the agreed procedure. All are bound by the agreed terms. Therefore, the Arbitration proceedings should be governed and run by the terms. The Arbitrator, therefore, cannot go beyond the Arbitration Agreement clauses……..
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> 20. In view of the agreed clause itself, after lapse of agreed time, the Arbitrator loses his jurisdiction as per the mandate of Sections 14 and 15 of the Act. Such defect is incurable…..
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> 21. The delay by the Arbitrator, to pass the award in such fashion itself, in our view, is a misconduct as contemplated under the Act. It is also illegal as it is not in pursuance of the agreed clause and is in breach of terms.
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> 23. It is relevant to note that in the present case the parties have already agreed that the award should be declared within a particular time limit. Each and every matter will depend upon the facts and agreement in each case. Once the matter is closed for orders, after hearing both the parties, yet, considering the scope and purpose of the Act, which itself requires that the Arbitrator must pass Award without delay, therefore, there is no jurisdiction that Arbitrator, without giving any reason whatsoever, can pass such delayed Award after more than two years and four months."

10. It is also relevant to note that by letter dated 04.05.2015, the arbitrator had withdrawn his consent to act as an arbitrator. The relevant extract of the said letter reads as under:-

> "In light of the aforesaid fact-situation, the undersigned is of the firm opinion that the undersigned would not like to compromise in any manner whatsoever with the respect, dignity and decorum that go with the office of an Arbitral Tribunal. Hence, the undersigned hereby withdraws consent

> to act as a Sole Arbitrator from all pending arbitrations wherein ONGC is a party. The respective parties are requested to collect their papers, and their cheque (wherever applicable) after fixing prior appointment."

11. Undisputedly, ONGC did not at any point of time, after receipt of the letter dated 04.05.2015, consent for the arbitrator to proceed with the reference. Therefore, the arbitrator had no mandate from the parties to act as such after having withdrawn his consent in terms of the letter dated 04.05.2015.

12. In view of the above, it is not necessary to examine the other grounds pleaded by ONGC to assail the impugned award. The impugned award is plainly, without any jurisdiction and cannot be sustained.

13. In view of the above, the present petition is allowed and impugned award is set aside. No order as to costs.

VIBHU BAKHRU, J

APRIL 27, 2017
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