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

% ***Date of decision:* 21.09.2017**

+ O.M.P. (T) (COMM.) 41/2017

AEROCOMFORT ANUSHKA JV Petitioner
Through Mr.Dinesh C.Pandey, Ms.Jyoti
Pandey & Mr.Rajeev Gurung,
Advocates

versus

NORTHERN RAILWAY & ANR. Respondents
Through Mr.N.Prashant Kumar Nair, Advocate

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. This petition is filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to terminate the mandate of the arbitral tribunal and to appoint a sole arbitrator to adjudicate the disputes between the parties.
2. Some of the relevant facts are that respondent No.2 invited tender for Design, Supply, Installation, Testing & Commissioning of Air Cooled Screw Chiller A.C. Plant and airconditioning system complete with associated works in Central Hospital Building of Northern Railway at Chelmsford Road, New Delhi on 12.01.2009. The work was awarded to the petitioner on 18.12.2009.

3. It is the case of the petitioner that the plant in question was commissioned on 14.04.2011 and the respondents were duly intimated by letter dated 25.04.2011.

4. Disputes having arisen between the parties, the petitioner invoked the arbitration clause on 17.06.2014.

5. On 02.01.2015, the respondents nominated the arbitral tribunal comprising of three officers of respondent No.2. The petitioner is said to have filed his claim on 30.01.2015. It is the case of the petitioner that thereafter no proceedings took place before the arbitral tribunal. The petitioner, thereafter, filed a petition being OMP(T) No.33/2015, under Section 15 of the Act for substitution of the arbitral tribunal as well as appointment of a new arbitral tribunal. This petition was disposed of vide order dated 04.02.2016 directing that the arbitration proceedings be commenced within four weeks from the date of the order. On 22.02.2016, the arbitral tribunal fixed a meeting for 24.02.2016. On the said date, namely, 24.02.2016 the first proceeding took place. The arbitral tribunal asked the petitioner to file subject item wise details of the claim alongwith documentary proof in support of its claims despite the fact that claim had already been filed earlier by letter dated 30.01.2015. Five hearings have taken place before the learned arbitral tribunal including on 30.06.2016, 04.08.2016, 21.11.2016 and 30.01.2017, but there is no progress in the proceedings. Thereafter, it appears that Sh.R.K.Saxena, the Presiding Arbitrator was transferred and joined as Chief Electrical Engineer (Construction), Northern Railway and became the controlling officer of the department of respondent No.2 which is handling the present arbitration proceedings. In the last hearing that took place on 30.01.2017, the petitioner

protested pointing out that the Presiding Arbitrator Sh.R.K.Saxena is posted as Chief Electrical Engineer (Construction), Northern Railway who is also the controlling officer of the concerned department of respondent No.2. In the light of these facts, it was requested that the said Presiding Officer be changed. The learned arbitral tribunal noted the submission of the petitioner. Thereafter, it transpired that on 14.03.2017 the petitioner has received a communication from an officer of respondent No.2 pointing out that in place of Sh.R.K.Saxena, Sh.A.K.Pandey, CMM/M, Northern Railway, Baroda House, New Delhi has been appointed as Presiding Arbitrator. However, it is stated that despite change in composition of the arbitral tribunal, no hearing has been fixed by the arbitral tribunal. Hence, the present petition under Sections 14 and 15 of the Act has been filed on 20.05.2017 to terminate the mandate of the arbitral tribunal.

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

7. The learned counsel for the petitioner strenuously urged that the learned arbitral tribunal was composed on 02.01.2015. Despite lapse of more than two and half year, there is no progress in the disposal of the arbitration proceedings. He further submits that the respondents are repeatedly appointing their own employees to act as an arbitrator. He relies upon the judgments of the Supreme Court in the case of *Union of India & Ors. v. Uttar Pradesh State Bridge Corporation Ltd.*, (2015) 2 SCC 52 and *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523, to support his submission. He also relies on order of this court in ARB. P. 410/2016, dated 29.11.2016 titled as *Aercomfort Pvt. Ltd. v. General Manager, Northern Railways & Ors.*, wherein in a similar circumstance, this court has not

accepted the respondent's stand of appointing their own employees as an arbitrator despite the new amendments of the Act.

8. The learned counsel for the respondents has submitted that the learned arbitral tribunal has been conducting the proceedings. There was some delay as the respondents took some time to file reply. He further points out that further time was taken by the respondent as there are certain necessary documents required to adjudicate the case which are lying with CBI as the CBI had impounded the same.

9. Section 14 and 15 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.

15. Termination of mandate and substitution of arbitrator.—

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

Hence, where the arbitral tribunal fails to act without undue delay, the mandate of the tribunal can be terminated.

10. The Supreme Court in *Union of India & Ors. v. Uttar Pradesh State Bridge Corporation Ltd.* (supra), noted as follows:

“12. 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.

13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application Under Section 11 of the Act or there is a room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in Tripple Engineering Works (supra). Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In para 5 of the said decision, those judgments where departure of the aforesaid "classical notion" has been made are taken note of. It would, therefore, be useful to reproduce the said para along with paras 6 & 7 herein below:

6. The "classical notion" that the High Court while exercising its power Under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : (2007) 5 SCC 304 wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India v. Bharat Battery Manufacturing Co. (P) Ltd. MANU/SC/7792/2007 : (2007) 7 SCC 684 wherein following a three Judges Bench decision in Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638 it was held that once an aggrieved party files an application Under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The

implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in *Ace Pipeline (supra)* and *Bharat Battery Manufacturing Company (P) Ltd. (supra)* was reconciled by a three Judges Bench of this Court in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Co. Limited* MANU/SC/7953/2008 : (2008) 10 SCC 240 where the jurisdiction of the High Court Under Section 11(6) of the Act was sought to be emphasized by taking into account the expression "to take the necessary measure" appearing in Sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of Sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corporation Limited and Ors. v. Raja Transport Private Limited* MANU/SC/1502/2009 : (2009) 8 SCC 520. Paragraph 48 of the report wherein the scope of Section 11 of the Act was summarized may be quoted by reproducing Sub-paragraphs (vi) and (vii) herein below:

(vi) The Chief Justice or his designate while exercising power Under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.

8. The above discussion will not be complete without reference to the view of this Court expressed in *Union*

of India v. Singh Builders Syndicate MANU/SC/0490/2009 : (2009) 4 SCC 523 wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in paragraph 25 of the report in Singh Builders Syndicate (supra) this Court had suggested that the government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in Deep Trading Co. v. Indian Oil Corporation and Ors. MANU/SC/0275/2013 : (2013) 4 SCC 35 followed the legal position laid down in Punj Lloyd Ltd. (supra) which in turn had followed a two Judges Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. MANU/SC/0651/2000 : (2000) 8 SCC 151. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings Under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Company (supra) subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Administration (supra) not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction Under Section 11(6) of the Act.

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19. The appointment of arbitrator by the Court, of its own choice, departing from the arbitration clause, is therefore not unknown and has become an acceptable proposition of law

which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Reasons for debating such a course of action are not far to seek and already taken note of above.”

11. No doubt, the plea of the petitioner that the respondents are repeatedly appointing only their own employees to act as an arbitrator may not have any relevance given fact that the arbitration proceedings are being conducted under the un-amended act. The Supreme Court in ***Aravali Power Company Pvt. Ltd. v. Era Infra Engineering Ltd., 2017 SCC OnLine, SC 1072*** had noted that in pre-amendment proceedings, the fact that the named arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or partiality or lack of independence on his part.

12. The facts of the above case speak for themselves. For the last two and half years there has been no progress in the arbitration proceedings. Five hearings have taken place but the matter is lingering on. Twice the composition of the arbitral tribunal has been changed. Firstly, on 22.02.2016 and now again on 14.03.2017. These changes were necessitated on account of the Government Officers who have been appointed as arbitrators being transferred.

13. I may note that the above position exists despite the fact that earlier the petitioner had filed a petition under Section 15 of the Act being OMP(T) No.33/2015 praying for substitution of the arbitral tribunal and appointment of a new arbitral tribunal. This court on 04.02.2016 directed the panel to commence the arbitral proceeding within four weeks and to adjudicate the disputes between the parties. Despite the direction of the court other than starting the arbitration proceedings there is hardly any progress in the

proceedings. The directions of this court have been taken in a cavalier manner.

14. In my opinion, it is manifest from the facts stated above that there is undue delay in completion of adjudication by the arbitral tribunal. In the facts of this case, it is a fit case to terminate the mandate of the arbitral tribunal.

15. I, accordingly, terminate the mandate of the arbitral tribunal. The next issue is to appoint a fresh arbitral tribunal. Clause 64(3)(a)(ii) of the Agreement provides that in case the total value of claim in question exceed Rs.25 lacs, a panel of three Gazetted Railway Officers not below the JA Grade or etc. be appointed as arbitrators.

16. However, in my opinion, appointing a panel of three Gazetted Railway Officers would again lead to the same situation as noted above. Further it would lead delay in constitution of a fresh arbitral tribunal. As noted by the Supreme Court in the case of ***Union of India & Ors. v. Uttar Pradesh State Bridge Corporation Ltd.***(supra), the appointment of arbitrator by the Court, of its own choice, departing from the arbitration clause, is not unknown and has become an acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court.

17. Accordingly, I direct that the arbitration proceeding shall be conducted under the aegis of Delhi International Arbitration Centre, New Delhi (*in short 'The DIAC'*). The Centre shall nominate a sole arbitrator from its panel to adjudicate the disputes between the parties. The learned arbitrator will carry out the proceeding at the stage at which it reached from the previous arbitral tribunal. The previous arbitral tribunal is requested to

transmit the record to the DIAC. A copy of this order be sent to the DIAC.

18. The petition stands disposed of as above.

JAYANT NATH, J.

SEPTEMBER 21, 2017/v