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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 20th July, 2018

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O.M.P.(MISC.)(COMM.) 149/2018

SSANGYONG ENGINEERING & CONSTRUCTION CO., LTD.

..... Decree Holder

Through: Mr.Navin Kumar with Mr.Rashmeet
Kaur and Ms.Arpana Majumdar,
Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA(NHAI)

..... Judgement Debtor

Through: Mr.Ankur Mittal with Mr.Abhay
Gupta and Ms.Nidhi Mittal,
Advocates.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This application has been filed by the petitioner under Section 29A (4) of the Arbitration and Conciliation Act 1996 (hereinafter referred as to the 'Act') seeking extension of time for making of the Arbitral Award by the Arbitral Tribunal consisting of three Arbitrators adjudicating the disputes that have arisen between the parties in relation to the contract of Construction of about 54KM of National Highway 26 in the State of Madhya Pradesh, being contract package No.ADB-II/C-8.
2. The Arbitral Tribunal had entered upon the reference pursuant to the appointment of the Presiding Arbitrator on 12.12.2016. During the course

of Arbitration Proceedings there have been amendments in the statement of claim and the Arbitral Tribunal by its order dated 14.05.2018 has fixed a schedule for completion of pleadings and for further hearing. The time for making of the Award was extended by the parties under Section 29A(3) of the Act as recorded in the orders dated 21 and 22nd July, 2017 passed by the Arbitral Tribunal.

3. The learned counsel for the respondent submits that while there is no objection to the extension of time being granted for making of the Arbitral Award, this Court in exercise of its powers under Section 29A(6) of the Act should order substitution of the Arbitral Tribunal or at least the Presiding Arbitrator. In support of this submission he has drawn my attention to the order dated 20.09.2017 passed by the Arbitral Tribunal wherein the Arbitral Tribunal has held that the period for the purpose of Section 29A of the Act in relation to the issue of delay in performance of the works, shall be considered as having commenced only from the date of the said order. He submits that this finding of the Arbitral Tribunal is legally incorrect as there cannot be a different date for the commencement of the Arbitration proceedings in relation to this claim. He further draws my attention to the orders dated 14.04.2018 and 14.05.2018 passed by the Arbitral Tribunal wherein the Arbitral Tribunal, while fixing the schedule for completion of pleadings, has directed the proceedings to be fixed for hearing without even framing issues and allowing the parties to lead oral evidence in support of their claims.

4. I have considered the submissions made by the counsel for the respondent, however, I do not find the same to be of any relevance, at this stage, to order substitution of the Arbitral Tribunal. It is not the case of the

respondent that it had not consented to or challenged the above orders passed by the Arbitral Tribunal and the Arbitral Tribunal has not considered such challenge. These orders have been passed in the presence of the respondent and seem to have been passed with its consent. If the respondent has any objection to the procedure being adopted by the Arbitral Tribunal, it can raise such grievance before the Arbitral Tribunal itself, however, the same cannot be a ground for seeking the substitution of the Arbitral Tribunal or the Presiding Arbitrator in an application under Section 29A (4) of the Act. I may only refer to Sections 18 and 19 of the Act which allow the parties to agree upon the procedure to be followed by the Arbitral Tribunal in conducting its proceedings.

5. The second submission raised by the learned counsel for the respondent for seeking substitution of the Presiding Arbitrator is that the Presiding Arbitrator did not make an honest disclosure under Section 12 of the Act. It is submitted that the Presiding Arbitrator had acted as a Presiding Arbitrator in two other arbitration proceedings involving the parties herein. This fact was not disclosed by the Arbitrator in his disclosure statement under Section 12 of the Act. The respondent, on becoming aware of this fact, had filed an application under Section 13 of the Act before the Arbitral Tribunal, however, the same has been dismissed by the Arbitral Tribunal vide its order dated 23.03.2018. He submits that in another arbitral proceeding involving the parties to the present petition, the Presiding Arbitrator recused himself, while he refused to do the same in the present case.

6. I have considered the submissions made by the learned counsel for the respondent, however, I do not find any merit in the same. Admittedly, the

two other arbitration proceedings were between the same parties to the present petition. The respondent was therefore, aware that the Presiding Arbitrator is or has acted as a Presiding Arbitrator in the other two arbitration proceedings and cannot plead ignorance of this fact.

7. Section 12(4) of the Act states that an Arbitrator in whose appointment a party to the proceedings had participated, can be challenged only for those reasons of which the party becomes aware after the appointment has been made. In the present case, the respondent was well aware of the circumstances and cannot rely solely on the disclosure statement made by the Presiding Arbitrator.

8. In any case, the challenge having been rejected by the Arbitral Tribunal vide its order dated 23.03.2018, in terms of Section 13(5) of the Act, the same can be challenged only along with and in accordance with Section 34 of the Act. The respondent cannot circumvent this procedure at this stage, while the court is considering an application for extension of time for making of the Arbitral Award under Section 29-A of the Act.

9. In the case of *Orissa Concrete and Allied Industries Ltd. vs. Union of India & Anr.* [OMP (Misc.) (Comm.) 10/2018], this Court vide order dated 05.03.2018 has held that any issue with respect to the conduct of the arbitration proceedings, except one relating to expeditious disposal of the arbitration proceedings, cannot be raised by the respondent at this stage.

10. In view of the above, I find no merit in the prayer made by the respondent for seeking substitution of the Arbitral Tribunal including the Presiding Arbitrator. The respondent shall, however, be at liberty to raise all these issues in accordance with law at an appropriate stage and by way of filing an appropriate application.

11. The time for making of the Arbitral Award by the Arbitral Tribunal is extended by a further period of nine months with effect from today. It is expected that all the parties shall co-operate with the Arbitral Tribunal in ensuring expeditious disposal of the Arbitration proceedings.

12. The petition is allowed in the above terms with no orders as to costs.

NAVIN CHAWLA, J.

JULY 20, 2018

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