

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.08.2018

+ **W.P.(C) 3883/2017**

UNITY-TRIVENI-BCPL (JV)
versus

..... Petitioner

RAIL VIKAS NIGAM LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner	:Ms Kiran Suri, Senior Advocate with Mr Hitendra Nath Rathi, Advocate.
Respondent	:Mr Udit Seth, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Article 226 of the Constitution of India, *inter alia*, praying that directions be issued to respondent to implement the Office Memorandum dated 05.09.2016 issued by NITI Aayog (hereafter 'the OM') for ensuring that the arbitration between the parties is conducted in terms of the provisions of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (hereafter 'the Amendment Act').
2. There are certain disputes between the parties and the petitioner had invoked the arbitration clause seeking reference of the disputes to

arbitration. Since, the same was prior to the enactment of the Amendment Act, the process of constituting the Arbitral Tribunal had commenced in terms of the arbitration clause and according to the provisions of the A&C Act as existing prior to the amendments introduced by the Amendment Act. The petitioner now claims that the Arbitral Tribunal is required to be re-constituted in accordance with the Amendment Act as according to the petitioner, the same is required in terms of the OM. The respondent (hereafter ‘RVNL’) disputes the same.

3. In view of the above, the principal controversy to be addressed is whether the OM mandates reconstitution of the arbitral tribunals in respect of arbitrations that had commenced prior to the Amendment Act coming into force.

Factual Background

4. The petitioner is a joint-venture of three companies and was formed for execution of the work of construction of “3rd line between Goelkera-Posotia-Mahoharpur on Chakradharpur Division of South Eastern Railway in the State of Jharkhand” (hereafter ‘the works’). Notice Inviting Tender (NIT) for the works was issued on 21.03.2011. The petitioner’s bid for the works was accepted and a Letter of Acceptance (LoA) was issued by RVNL on 12.09.2011. Thereafter, on 02.11.2011, the parties entered into a formal contract for execution of the works.

5. The petitioner alleges that RVNL failed to fulfill its primary

obligations in terms of the contract. The petitioner also disputes the reduction of variation rates as communicated by RVNL. In view of the aforesaid disputes, the petitioner invoked the dispute resolution clause by a letter dated 23.03.2015 and invited the concerned authority for a decision in respect of the disputes. The concerned authority (a Committee constituted by RVNL) rejected the claims raised by the petitioner. This led the petitioner to invoke the arbitration clause by a letter dated 14.09.2015.

6. RVNL responded to the aforesaid notice by a letter dated 28.09.2015, whereby it communicated a panel of five proposed arbitrators and called upon the petitioner to choose one person from the aforesaid panel. By a letter dated 27.10.2015, the petitioner nominated Sh Arun Kumar – one of the five persons named in the letter dated 28.09.2015 – as an arbitrator.

7. By a letter dated 25.01.2016, RVNL nominated its arbitrator. In the meanwhile, the petitioner issued two letters dated 13.01.2016 and 25.01.2016 calling upon RVNL to reconsider the procedure for constitution of the Arbitral Tribunal. The petitioner claims that the same is contrary to the provisions of Section 12(5) of the A&C Act as introduced by the Amendment Act. It is relevant to note that the petitioner also stated in its letter dated 13.01.2016 that the same be treated as a notice under Section 11(5) of the A&C Act.

8. Thereafter, on 06.02.2016, the Arbitral Tribunal was constituted with the appointment of the Presiding Arbitrator.

9. On 27.04.2016, the petitioner filed its Statement of Claims as well as an application under Section 12 of the A&C Act challenging the constitution of the Arbitral Tribunal.

10. On 05.09.2016, NITI Aayog issued the OM. Thereafter, by a letter dated 08.11.2016, the Railway Board, Ministry of Railways (Railway Board) communicated its approval for implementing the OM by the Indian Railways.

11. In view of the above, the petitioner sent a letter dated 19.12.2016 requesting that the Arbitral Tribunal be dissolved and an arbitral tribunal be constituted afresh in terms of the provisions of the Amendment Act and the OM issued by the NITI Aayog. The Arbitral Tribunal declined the aforesaid request. This has led the petitioner to file the present petition.

Reasons and Conclusions

12. Ms Kiran Suri, learned Senior Counsel appearing for the petitioner referred to the arbitration clause and contended that in terms of the arbitration clause, RVNL is bound to ensure that the arbitration was conducted in accordance with the provisions of the A&C Act as amended by the Amendment Act. She further contended that this was also necessary in terms of the OM issued by the NITI Aayog.

13. The petitioner has, essentially, founded the present petition on the provisions of the OM issued by NITI Aayog. The relevant clause of the OM, which is relied upon by the petitioner, reads as under:-

“In case of contracts/concessions where the process of arbitration was initiated under the pre-amended Arbitration Act, the PSUs/Department may seek the consent of the contractors/concessionaires to transfer the pending cases under the amended Arbitration Act, wherever possible. The shift to amended Arbitration Act is expected to make the arbitration process more cost effective and help in settlement of the disputes in a timely manner;”

14. A plain reading of the aforesaid clause also indicates that it does not mandate either re-commencing of the arbitration proceedings or re-constitution of the arbitral tribunal. The words “wherever possible” clearly indicates that the provisions of the A&C Act as amended by the Amendment Act would be implemented only where the same is feasible. The said clause cannot be read to mean that the arbitral tribunals constituted prior to issuance of the OM are required to be re-constituted.

15. In the aforesaid view, this Court is unable to accept that the relief as sought for by the petitioner can be granted.

16. There is yet another important aspect that is necessary to be borne in mind. Section 5 of the A&C Act clearly mandates that no judicial authority would intervene in the arbitral proceedings except as so provided under the A&C Act. In the aforesaid view, the present petition, which essentially seeks for re-constitution of the arbitral tribunal, is not maintainable. It is stated that the petitioner has already filed an application under Section 12(5) of the A&C Act challenging the constitution of the Arbitral Tribunal which has not been decided as

yet. Thus, entertaining the present petition would in effect amount to interfering with the arbitral proceedings, which is impermissible (See. ***SBP & Co v. Patel Engineering & Anr: 2005 8 SCC 618***).

17. Before concluding, it would be relevant to refer to the arbitration clause as included in the contract between the parties. The relevant extract of the said clause is set out below:-

“20.3 Arbitration: Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Domestic or foreign Contractor related to any matter arising out of or connected with this contract, the disputes shall be settled in accordance with the Indian Arbitration Act, 1996 and any statutory modification or re-enactment thereof. Further, it is agreed between the parties as under:

- (i) Number of Arbitrators: The arbitral tribunal shall consist of 3(Three) arbitrators.
- (ii) Procedure for Appointment of Arbitrators: The arbitrators shall be appointed as per following procedure;
 - (a) Employer will forward a panel of 5 names to the contractor and contractor will give his consent for any one name out of the panel to be appointed as one of the Arbitrators.
 - (b) Employer will decide the second Arbitrator out of the remaining four names in the panel as mentioned in para (a) above.
 - (c) The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of

the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties the presiding Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi.

(iii) Qualification and Experience of Arbitrators: The arbitrators to be appointed shall have minimum qualification and experience as under:

(a) One member of the tribunal shall be necessarily a working (not below the rank of SAG) or a retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of Indian Railway Accounts Service having experience in financial matters related to construction contracts.

(b) One member shall be a technical person having degree in Engineering and may be working (not below the rank of SAG) or retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of any Engineering service of Indian Railways or equivalent service in RVNL, and having knowledge and experience of the Railway working.

(c) The Presiding Arbitrator shall necessarily be a serving railway/RVNL officer and he shall have same minimum qualification and experience as specified above for either of the two arbitrators.

(d) Out of 3 Arbitrators not more than One shall be a retired officer.

(iv) No person other than the persons appointed as per above procedure and having above qualification and experience shall act as arbitrator. ”

18. As noticed above, the petitioner invoked the arbitration clause by a letter dated 14.09.2015, which was prior to the Amendment Act coming into force. In terms of Section 21 of the A&C Act, the Arbitration commenced on the date on which the request that the disputes be referred to arbitration was received by RVNL.

19. Section 26 of the Amendment Act makes it amply clear that the Amendment Act would not be applicable to arbitration proceedings that had commenced prior to the Amendment Act coming into force (which came into force on 23.10.2015). It is also material to note that the petitioner had acted in terms of the arbitration clause and had nominated an arbitrator from the panel of five persons provided by RVNL.

20. Undisputedly, the arbitration clause provides that the disputes shall be settled in accordance with the A&C Act and “any other statutory modification or re-enactment thereof”. However, prima facie, that cannot be construed to mean that the parties were required to recommence the arbitration proceedings or to re-constitute the Arbitral Tribunal. It is not apposite for this Court to examine this controversy in any detail, as the petitioner has its remedies and, as stated earlier, the Court cannot interfere with the arbitral proceedings except as provided under the A&C Act.

21. In view of the above, the present petition is dismissed. It is

clarified that nothing stated herein should be construed as precluding the petitioner from availing such remedies as available in law. All rights and contentions of the parties are reserved.

VIBHU BAKHRU, J

AUGUST 30, 2018

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