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HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for Order on : 10.05.2019

Order Passed on :26/06/2019

ARB. R. No. 34 of 2018

M/s. Mehrotra Buildicon (P) Ltd., having its registered and corporate office at 9, Industrial Estate, Rewa Road, Satna, M.P.
(Represented By Its authorized representative Mr. Syed Qayam Ali, aged about 65 Years, residing at Nazirabad Satna, M.P., Vide Board of resolution dated 29-08-2016, Bearing Sl. No. 43.

---- Applicant

Versus

1. Deputy Chief Engineer (Con.), South East Central Railway, Raipur.
2. Chief Engineer (Con.-II) South East Central Railway, Bilaspur.
3. General Manager, South East Central Railway, Bilaspur.

-----Respondents

For Applicant	: Mr. Jatin Sehgal with Ms. Devna Soni and Mr. Jai Prakash Shukla, Advocates
For Respondents	: Mr. Abhisek Sinha, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

C A V ORDER

26/06/2019

1. This application under Section 11 (6) read with Section 15 (2) of the Arbitration and Conciliation Act, 1996 (in short 'the Act, 1996') has been brought with prayer to appoint a sole arbitrator to arbitrate the dispute between the parties.

2. The applicant is a construction company. Respondents floated an advertisement inviting tender on 17.10.2006. The applicant was successful bidder, who was awarded work by letter of acceptance dated 02.04.2007 by the respondents. An agreement was entered between both the parties and the construction was to be completed within 18 months as per the terms of the contract. Due to failure on the part of the respondents in providing the applicant with drawing and due to price variations, the execution of the work was delayed, however, the work was completed on 25.12.2010. Outstanding payment was not cleared by the respondents despite various request and reminders sent by the applicant. The applicant then sent a notice dated 12.01.2012 requesting the respondents to refer the dispute to Arbitral Tribunal in accordance with the terms and the conditions of contract dated 17.08.2007. The respondents constituted Arbitral Tribunal consisting of three members, who were the officers of railway consequent to the notice given. The applicant submitted his claims before the Arbitral Tribunal on 10.12.2012. Subsequent to that change was made in the appointment of arbitrators without the consent of the applicant in a unilateral manner on more than one occasion. It is submitted that on account of such changes, the dispute between the parties could not be adjudicated by the Arbitral Tribunal and was kept pending for almost six years. The applicant then filed a petition under Section 14 of the Act of 1996 before the Commercial Court, Naya Raipur, praying for

termination of the mandate given to the Arbitral Tribunal. The learned Commercial Court has vide order dated 17.09.2018 allowed the petition and terminated the mandate of the Arbitral Tribunal, therefore, under these circumstances, the applicant prays for appointment of sole arbitrator.

3. Reliance has been placed on the judgment of Delhi High Court in case of ***Orissa Concrete and Allied Industries Ltd. Vs. Union of India***¹. Placing reliance on the judgment of Hon'ble Supreme Court in case of ***Union of India Vs. Singh Builders Syndicate***², it is submitted that Hon'ble Supreme Court has deprecated the constitution of Arbitral Tribunal by appointing serving officers posted at far away places and it has also been observed that delay and frequent change in Arbitral Tribunal make a mockery of the process of arbitration. It was further held that appointment of retired judge of Delhi High Court as sole arbitrator was proper. It was also observed in the same judgment that where the Arbitral Tribunal appointed has not functioned then it becomes necessary to make fresh appointment, the Chief Justice or designated is not powerless to make appropriate alternative arrangement to give effect to the provision of arbitration.
4. Similarly reliance has been placed on the judgment of Supreme Court in case of ***North Eastern Railway and Others Vs. Tripple Engineering Works***³, Applied ***Communication and Controls***

1 2016 SCC OnLine Del 3463

2 (2009) 4 SCC 523

3 (2014) 9 SCC 288

Vs. Union of India & Anr.⁴, M/s. G.M. Malhotra represented by G.S. Malhotra Vs. Union of India & Anr.⁵, Gammon Encee Consortium JV Vs. Rites Limited⁶, Ratna Infrastructure Projects Pvt. Ltd. Vs. Meja Urja Nigam Private Limited⁷, M/s. Padmini Chandran Menon Vs. Vijay Chandran Menon & Ors.⁸, Pallav Vimalbhai Shah and Ors. Vs. Kalpesh Sumatibhai Shah & Ors., Pet. Under Arbitration Act No.15 of 2017 decided on 04.08.2017, Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd.⁹

5. Written reply has been submitted by the respondents submitting that this application is not maintainable. The applicant had approached the Commercial Court making prayer for termination of mandate of the Arbitral Tribunal and for appointment of Arbitrator/Arbitrators. The learned Commercial Court has partly allowed the application by terminating the mandate of the Arbitral Tribunal, whereas, the prayer for appointing arbitrator/arbitrators has been denied. Therefore, this jurisdiction under Section 11 (6) of the Act, 1996 can not be invoked. The applicant had option to approach the respondents with respect to the appointment of new panel of arbitrators in which he has failed, whereas, the respondents had not failed in any respect. The arbitration clause very clearly stipulates that dispute shall be arbitrated by Arbitral

4 2018 SCC OnLine Del 9039
5 2017 SCC OnLine Jhar 3650
6 2015 SCC OnLine Cal 1777
7 2017 SCC OnLine Del 7808
8 2018 (2) ArbLR 24
9 (1999) 9 SCC 334

Tribunal consisting of a panel of three gazetted officer not below the J.A. grade. Relying on the judgment of Supreme Court in case of **Rajasthan Small Industries Corporation Ltd. Vs. Ganesh Containers Movers Syndicate¹⁰, Northern Railway Administration Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.¹¹** it is submitted that, it has been observed by the Hon'ble Supreme Court that on bare reading of scheme of Section 11 of the Act, 1996, it is clear that emphasis has been given to the terms of agreement being adhered to and/or given effect to as closely as possible. In other words, the Court may ask to do what has not been done. Reliance has also been placed on the judgment of Supreme Court in case of **Union of India Vs. Parmar Construction Company**, in Civil Appeal No.(s). 3303 of 2019 and batch of connected cases decided on 29.03.2019 and it is submitted that there is clear direction of the Supreme Court that it is the duty of the High Court to first resort the mechanism in appointment of an arbitrator as per the terms of contract as agreed by the parties, therefore, in this case, the applicant should be directed to approach the respondents for reconstitution of Arbitral Tribunal. Hence, the application brought by the applicant is premature.

6. In reply, it is submitted by the counsel for the applicant that subsequent to the amended provision of Section 12 (5) of the Act, 1996, the arbitrator appointed according to the arbitration clause

10 2019 (3) SCC 282

11 2008 (10) SCC 240

in the agreement suffer from ineligibility to act as an arbitrator. It is submitted that reliance of the respondent on the judgment of Supreme Court in ***Union of India Vs. Parmar Construction Company (Supra)*** is not applicable in the particular circumstances of this case in view of the observation made by the Supreme Court in case of ***Union of India Vs. Singh Builders Syndicate (Supra)***, therefore, it is prayed that the application be allowed.

7. I have heard the learned counsel for the parties at length and perused the documents placed on record.
8. It is not disputed that Arbitral Tribunal consisting of railway officers, which was constituted in the year 2012 was changed and substituted time to time by the respondents, even then this tribunal has not functioned and adjudicated the dispute between the parties up till the year 2018. Then the applicant was compelled to file a petition under Section 14 of the Act, 1996 praying for termination of the mandate of the Arbitral Tribunal. The learned Commercial Court, Naya Raipur has in M.J.C. No.52/2016 by order dated 17.09.2018, after detailed discussion has held that the Arbitral Tribunal has failed to act without undue delay to perform its function and on that basis, the mandate of the Arbitral Tribunal was ordered to be terminated.

9. Section 14 of the Act, 1996 provides as under :-

Section 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.

10. This provision was amended in the year 2016, which reads as under :-

Amendment of Section 14 – In Section 14 of the principal Act, in sub-section (1), in the opening portion, after the words “The mandate of an arbitrator shall terminate, the words “and he shall be substituted by another arbitrator, if” shall be substituted.

11. Section 15 (2) of the Act, 1996 provides as under :-

Section 15- Termination of mandate and substitution of arbitrator-

(1) X X X X X X

(a) X X X X X

(b) X X X X X

(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.

12. It was held by the learned Judge of Commercial Court that in this particular case, the provision of amended Act of 1996 are not applicable and it was also held that Commercial Court has jurisdiction to terminate the mandate of the Arbitral Tribunal under the provisions of Section 14 of the Act, 1996. As regards the substitution of arbitrator, there is no specific provisions to point out as to who shall be the authority to appoint and substitute the arbitrator, whose mandate has been terminated.
13. Section 15 (2) of the Act, 1996 simply speaks that a substituted arbitrator shall be appointed according to the rules that were applicable for appointment of the arbitrator being replaced.
14. Clause 64 (3) (a) (iii) of the general conditions of contract reads as under :-

“Clause 64 (3) (a) (iii) - If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacate his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).”

15. Clause 64 (3) (a) (iii) does not provide for any rule to make appointment of arbitrator after the mandate is terminated by the competent Court. Further in the above mentioned clause, there is no duty cast upon the applicant to approach to respondents requesting for appointment of substituted arbitrators. Therefore, according to the same clause, it clearly appears that it was the duty of the respondent to make appointment of the arbitrator in which they failed. Clause 64 (3) (a) (iii) empowers them to make such appointment, which is not done. It is a case of failure on the part of the respondent in appointing the arbitrators after the mandate of earlier Arbitral Tribunal was terminated, therefore, it is not a failure on the part of the applicant.
16. In case of ***Union of India Vs. Singh Builders Syndicate (supra)***, it was observed in paragraph 14 & 15, which reads as

under :-

“14. It was further held in Northern Railway Case that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of sub-section (8) of Section 11 of the Act are kept in view. This would mean that invariably the Court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.

15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise

power under Section 11 of the Act, can step in and pass appropriate orders.”

17. The Hon'ble Supreme Court in ***North Eastern Railway & Ors. Vs. Tripple Engineering Works (Supra)*** has observed in Para 6, 8 & 10, which are as under :-

“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 Corpn. Ltd. 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 Mfg. Co. (P) Ltd. wherein following a three-Judge Bench decision in Punj Lloyd Ltd. V. Petronet MHB Ltd. 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.

8. The above discussions will not be complete without reference to the view of this Court expressed in Union of India V. Singh Builders Syndicate 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 been concluded for over a decade, making a mockery of the process. In fact, in Para 25 of the Report in Singh Builders Syndicate 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.

10. In the present case Clauses 64(3)(a)(ii) and (iii) of the general conditions of contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be Railway Officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6), in an appropriate case to depart therefrom. In Singh Builders Syndicate pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of the process. In the present case, admittedly the award in respect of disputes and differences arising out of Contract No. CAO/CON/722 is yet to be passed. Though the appellant Railways has in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said contract has been finalised, no material, whatsoever, has been laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and

differences arising out of Contract No. CAO/CON/738 has not even commenced. A period of nearly two decades has elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts. The situation is distressing, and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein. In a situation where the procedure and process under the Act has been rendered futile, the power of the Court to depart from the agreed terms of appointment of the arbitrators must be acknowledged in the light of the several decisions noticed by us.”

18. Reliance of the respondent on ***Rajasthan Small Industries Corporation Ltd. Vs. Ganesh Containers Movers Syndicate (supra)*** and ***Northern Railway Administration Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd. (supra)*** is not very clearly applicable in this case, for the reasons that Rule 15 (2) of the Act, 1996 does not specifically speak or confines that substituted appointment shall be made only in accordance with the arbitration clause as agreed between the parties. Further it has been found that arbitration clause 64 (3) (a) (iii) does not specifically provide for substituted appointment in case after termination of the mandate of the Arbitral Tribunal.
19. In conclusion I am of this view that as per the settled principles of law there is a requirement of appointment of substituted arbitrator

in accordance with the rules applicable in absence of specific rule in this respect, the rule as provided under Section 11 (6) of the Act, 1996 has its applicability.

20. Therefore, on the basis of discussions made hereinabove, this conclusion is arrived at, that it is fit case for exercise of power under Section 11(6) of the Act, 1996. Therefore, by exercising power under Section 11 (6) of the Act, 1996 under the authority given by Hon'ble the Chief Justice, I hereby appoint Hon'ble Shri Justice Dhirendra Mishra, former Judge of this High Court to arbitrate the dispute between the parties. Registry is directed to communicate this order to Hon'ble Shri Justice Dhirendra Mishra, who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act, 1996. Learned arbitrator is requested to dispose off the matter within the time prescribed in the Act, 1996 as amended.
21. The remuneration of the arbitrator shall be settled by the parties with the mutual consent.
22. The petition is disposed off with the aforesaid directions.

Sd/-
(Rajendra Chandra Singh Samant)
Judge