

IN THE HIGH COURT OF JUDICATURE AT MADRASReserved on : **14.02.2019**Pronounced on : **19.03.2019**

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THE HONOURABLE MR. JUSTICE **R.SURESH KUMAR****Original Petition No.766 of 2018**

RPN Engineers Chennai Private Limited
Rep. by its Managing Director,
M-60, 9th Street, Anna Nagar East,
Chennai - 600 102.

.. Petitioner

vs.

1. The Union of India
Rep. by the General Manager,
Southern Railway,
Park Town, Chennai.
2. The Chief Engineer (Construction-East)
Southern Railway,
Construction Branch,
Egmore, Chennai - 8.
3. Mr.S.K.Agarwal (Presiding Arbitrator)
Chief Electrical General Engineer,
South Central Railway, Head Quarters Office,
Electrical Branch, Secunderabad.
4. Mr.P.Kalimuthu (Arbitrator)
Chief Engineer (Construction),
Metropolitan Transport Project (Railways),
Egmore, Chennai - 600 008.
5. Ms.M.R.Viji (Arbitrator)
Director Postal Accounts,
4th Floor, GPO Building
Trivandrum - 695 001.

.. Respondents

Petition filed under sections 14, 15 r/w 11 of the Arbitration and Conciliation Act, 1996, seeking an order to terminate the mandate of the present Tribunal (comprising of the 3rd, 4th and 5th Respondents) and appoint an independent Arbitrator to arbitrate all the disputes and claims arising out of the Agreement No.MTP/Civil/476/13(CN), dated 20.02.2013 and for costs.

For Petitioner : Mr.Amalaraj S.Penikilapatti

For Respondents : Mr.P.T.Ramkumar for R1 & R2

ORDER

This Original Petition has been filed seeking to terminate the mandate of the present Tribunal (comprising of the 3rd, 4th and 5th Respondents) and appoint an independent Arbitrator to arbitrate all the disputes and claims arising out of the Agreement No. MTP / Civil / 476 /13(CN), dated 20.02.2013.

2. The short facts of the case are as follows :

(i) The petitioner is a Private Limited Company having registered office at Chennai. The first respondent Department had invited tenders to do the work called "Royapuram-BG AC Satellite Loco shed to accommodate 50 to 100 Locos-proposed extension of medium and light lifting bay, Track work, GLR 1,00,000 litres capacity, Overhead Tank 50,000 litres capacity, road work, compound wall and other miscellaneous works.

(ii) The petitioner became the successful bidder, therefore a letter of acceptance was given by the first respondent Department on 03.10.2012. Pursuant to which, an agreement has been reached and it has been executed between the petitioner and the first respondent Department, dated 20.02.2013, which is herein after called as "Arbitration Agreement".

(iii) According to the contract, the time limit fixed for completion of the work was from 03.10.2012 to 02.10.2013, i.e., one year period. The value of the contract is for Rs.9,16,46,536/-.

(iv) In response to the contract awarded to the petitioner, it had started working with the said work and according to the petitioner, even though best efforts had been taken to complete the work in time, the progress of the work was frustrated due to various factors that can only be attributed to the respondent and not to the petitioner.

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(v) According to the petitioner, out of the total contract value of Rs.9.16 crores, it was able to complete the work valued at Rs.4.59 crores due to various hindrances and defaults allegedly on the

part of the respondent. The contract was extended only for just two months up to 02.12.2013 and thereafter the respondent Department terminated the contract on 04.12.2013.

(vi) In view of the termination of the contract, the petitioner vide his request, dated 29.10.2014, requested the first respondent to appoint an Arbitrator to adjudicate the dispute arising out of the said contract. Pursuant to the said request, the first respondent vide proceedings, dated 02.07.2015, appointed an Arbitral Tribunal consisting of Respondents 3 to 5, where the respondent 3 is the Presiding Arbitrator and Respondents 4 and 5 are the other Arbitrators. Thereafter on 17.07.2015, the terms of reference has been issued by the first respondent, which, according to the petitioner, is a truncated terms of reference.

(vii) The reason for such claim on the side of the petitioner that it is a truncated reference is that, a number of legitimate claims on the side of the petitioner had been left out in the said reference. It is to be noted that, by communication, dated 17.07.2015, while issuing the terms of reference, the first respondent had also requested the Arbitrators to expeditiously adjudicate the dispute and to pass an award within six months from 17.07.2015.

(viii) Since the terms of reference given by the first respondent does not contain all the claims of the petitioner, the petitioner on 30.11.2015 requested the first respondent to amend the terms of reference. Pursuant to which, the first respondent on 06.01.2016 issued the amended terms of reference to the Arbitrators and requested the Arbitrators to expedite the adjudication and to pass Award.

(ix) The Arbitral Tribunal had its preliminary sitting on 13.10.2015 and on 25.01.2016, the Tribunal directed both parties to file their respective pleadings with supporting documents. Thereafter, according to the petitioner, the Tribunal had second, third and fourth sitting on 24.02.2016, 19.04.2016 and 20.06.2016. Thereafter since no progress on the expected line had been made to complete the adjudication by the Tribunal, the petitioner seems to have sent repeated communications and letters to the Tribunal to expedite the adjudication.

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(x) In this regard, it is the main grievance of the petitioner that, the Tribunal had its last sitting on 30.06.2017 and thereafter there had been no sitting at all. There has been no reason for such a

long gap in conducting the arbitration on the side of the Tribunal and therefore, according to the petitioner, after having tried its level best to persuade the Tribunal to expedite the proceedings and all its efforts since went in vain, it approached this Court in August 2018 by filing this Original Petition with the aforesaid prayer.

3. I have heard Mr.Amalaraj S.Penikilapatti, learned counsel appearing for the petitioner, who would submit that, after 30.06.2017 till the petitioner approached this Court in August 2018 by filing this Original Petition, no progress had been shown by the Tribunal, therefore the stand of the petitioner had been fully vindicated that, the respondents 3 to 5 who constitute the Arbitral Tribunal were lackadaisical in conducting the arbitration and from 06.01.2016 onwards for the past more than 32 months, no progress have been shown.

4. The learned counsel would further submit that, after filing this Original Petition, this Court in fact granted an interim order of status quo, that means, the Tribunal had been injuncted not to proceed further. In utter disregard to the orders passed by this Court, the Arbitral Tribunal by communication through email sent on 19.09.2018

fixed the date for arbitration on 04.10.2018 and 05.10.2018. Even the said date fixed by the Tribunal on 04.10.2018 and 05.10.2018 had been postponed by the communication of the Tribunal, dated 01.10.2018 due to unavoidable reasons. Subsequently the petitioner got an email on 08.11.2018 from the Presiding Arbitrator, whereby it postponed to hold the arbitration on 29.11.2018 and 30.11.2018 and directing the parties to attend the same.

5. By citing these incidents, the learned counsel appearing for the petitioner would submit that, from 30.06.2017, no sittings were fixed by the Arbitral Tribunal and after having made several attempts by sending several communication on the side of the petitioner and everything went in vain, when the petitioner approached this Court by filing this Original Petition and got an interim order, knowing well that this Court has seized of the matter and granted an interim order, the Arbitral Tribunal had issued communication to the petitioner fixing the date for sitting and thereafter sending another communication postponing the same for unavoidable reasons. All these attitude on the part of the Tribunal members would go to show that they are not only lackadaisical but also not in a position to conduct the arbitral proceedings in the manner known to law.

6. All these delay caused and the scant respect given by the Tribunal members to the successive request made by the petitioner is because of the fact, according to the learned counsel appearing for the petitioner, that, these Tribunal members are working officials of the first respondent Department, they are otherwise busy and in the meanwhile one of the official, i.e., one of the member of the Tribunal has been transferred and therefore there is absolutely no co-ordination among the Tribunal members, with the result, the very purpose of the arbitration proceedings commenced in this regard to have a speedy adjudication was completely defeated.

7. In this context, the learned counsel appearing for the petitioner has relied upon some of the Judgments of this Court, where the very same first respondent Railway is a party. At least 3 orders, the learned counsel appearing for the petitioner has very much relied upon. The first one is Order in O.P.No.426 of 2015, dated 09.10.2015 of this Court made by the then Hon'ble Chief Justice of this Court (Presently the Hon'ble Supreme Court Judge), in the matter of M/s. Unique Builders v. The Union of India, Rep. by the General Manager, Southern Railway, Chennai and others, where the learned counsel relied upon para 5, 6 and 9 of the Judgment, which reads thus :

"5. The petitioner makes a grievance that such delay goes against the very basis of having an alternate dispute resolution mechanism and thus, has prayed for in the present petition to appoint an Arbitrator by this Court to proceed with the arbitration, the present petition being filed under sections 14 and 15 read with section 11 of the Arbitration and Conciliation Act, 1996.

6. The records of the Tribunal were called and perused by this Court. It is not in issue that the arbitration has not proceeded beyond the pleadings being completed. It may be pertinent to note that the kind of problem faced in this case is no different from many other cases of the Railways, where primarily on account of officers in service being appointed who find little time for arbitration, the matters drag on...

...

...

9. The tragedy of arbitration proceedings in our country permeates the present matter with disputes seeing no light of the day. If one may say, there is hardly any beginning, as only pleadings have been exchanges in the present matter. On account of the inordinate and inexplicable delay coupled with now even the transfer of one of the officers constituting the Tribunal, it is a fit case where the mandate of

the present Tribunal should be terminated and an Arbitrator be appointed by this Court."

8. The learned counsel relied upon another Judgment of this Court made in O.P.No.808 of 2014, dated 03.07.2015 in the matter of M/s. Y.Chinna Reddy v. The Union of India, represented by the General Manager, Southern Railway, Chennai and others, where the learned counsel relied upon the following paragraphs :

"4. If it may be said, the respondents have done it again. There are numerous cases which have come up before this Court where the Arbitral Tribunal constituted by the respondents completely neglected to perform their duties. It may possibly be because the serving officers are appointed as Arbitrators and they find little time for arbitration process. Possibly the fallacy lies in appointing serving officers as Arbitral Tribunal members.

5. Now after more than six months of this petition being filed, the aforesaid third Tribunal seeks to wake up and start proceedings in June, 2015, as per the submission of learned counsel for the respondents. Two sittings were fixed, but the petitioner has refused to participate, logically so, having seen the fate of the earlier Tribunals constituted.

6...The present case is also one of gross neglect of the Tribunal, having failed to perform its functions right from the year 2010 till date. Five years have elapsed with only pleadings being completed. This defeats the very purpose of arbitration."

9. The learned counsel also relied upon yet another Judgment of this Court made in O.P.No.418 of 2016, dated 09.09.2016 in the matter of G.A.Sridhar v. The Union of India, Rep. by the General Manager, Southern Railway, Chennai and others, where the learned counsel relied upon the following paragraphs, which reads thus :

"5. The petitioner finally issued a notice dated 09.02.2009 calling upon the respondents to appoint Arbitrators and for reference of all the disputes to arbitration in terms of Clause 64 of the General Conditions of Contract providing for arbitration for resolution of the disputes. But since there was no response, the petitioner filed O.P.No.381 of 2009 before this Court. During pendency of that O.P., the respondent-railways claimed more than Rs.5.40 Crores towards their risk and cost, apart from the other aspects. In the said petition, the matter was disposed of and the Arbitral Tribunal consisting of respondent Nos.4 to 6 was

constituted by respondent No.1 vide order dated 15.05.2013 with a direction to the Arbitral Tribunal to enter upon the reference and to publish the award within six months from the date of receipt of the memorandum.

6. Though not directly relevant, the petitioner pleads that CBI Court vide its judgment in C.C.No.31 of 2009 convicted the railway's then Deputy Chief Engineer and the risk-contractor, vide the judgment pronounced on 23.12.2014 and was sentenced to two years' rigorous imprisonment.

7. The petitioner filed claims vide covering letter dated 12.8.2015 and requested the Tribunal to expeditiously conduct the arbitration proceedings. However, the arbitration has not progressed an inch and even the respondent-railways has not filed the counter-affidavit. The Arbitrators are stated to have also been transferred atleast three times after being appointed as Arbitrators and practically unable to conduct the arbitration proceedings. It is, thus, the say of the petitioner that the mandate of the Tribunal of respondent Nos.4 to 6 is terminated as per Section 14 (1) (a) of the said Act and thus, the petitioner seeks appointment of an Arbitrator by this Court by filing the

petition under Sections 14 and 15 of the said Act.

8. The counter-affidavit filed by the respondent-railways really says nothing much, otherwise than broadly admitting the sequence of facts, though denying the allegations of the petitioner. In fact, the conviction by the CBI is stated to be irrelevant, even though, it is in respect of the same contract and the subsequent risk purchase.

9. This Court had faced repeatedly matters on account of the failure to conduct the arbitration proceedings by the railways. It is this which persuaded the Court to record on 29.7.2016 that the Railway Board should have a re-look on the cumbersome arbitration clause and the repeated failure of setting in motion the arbitration process. To the Court query, again there is no response and all that is stated it is the matter to be looked by the Railway Board.

...

15. In so far as the issue of the Railway Board in reviewing the arbitration clause is concerned, since there is no information, this Court is inclined to seek the personal presence of the General Manager, Southern Railway. However, the learned counsel for the railways states that he will obtain requisite instructions from the

Railway Board in this behalf and it is made clear that it is for this purpose alone the matter has been listed and in the failure to do so, there is little option but to call for the presence of the General Manager, Southern Railway or someone from the Railway Board for appropriate information. The respondent-railways are granted eight weeks' time to obtain the requisite instructions."

10. In all these matters, the very same first respondent Railway is the party, where this Court repeatedly has pointed out the lethargic and lackadaisical attitude on the part of the Arbitral Tribunal constituted by the Railway and in each of such cases, ultimately this court after terminating the mandate of the Arbitral Tribunal, had appointed independent Arbitrators, i.e., Retired Judges of this Court.

11. By relying upon these decisions referred to above, the learned counsel appearing for the petitioner would submit that, in view of the factual matrix of this case, which is squarely falls within the ambit of the cases referred to above, where indulgence have been shown by this Court, by invoking Section 11 of the Arbitration and Conciliation Act and while terminating the mandate of the Tribunal constituted by the Respondent Railway, had in fact appointed

independent Arbitrators, therefore such an indulgence is very much required in this case also, he had contended.

12. Per contra, Mr.P.T.Ramkumar, learned standing counsel appearing for the first and second respondent Railway would submit that, initially terms of reference was made by the first respondent on 17.07.2015, however, subsequently on the request of the petitioner, further amended reference had been issued and after having issued the amended reference, the first respondent, in fact requested the Arbitral Tribunal to adjudicate the matter expeditiously and pass an Award preferably within six months period.

13. In this regard, according to the learned counsel appearing for the respondents, there is no delay on the part of the respondent Railway. He would further submit that, on 21.05.2016, the Tribunal directed the parties to file the pleadings and thereafter, regular sitting went off. After the 5th sitting, dated 30.06.2017, the Tribunal could not proceed further, because of the attitude on the part of the petitioner, as who wrote a letter on 20.06.2017 to the first respondent to incorporate the final bill payment worth Rs.8,13,428/-, as yet another claim in terms of reference. In this regard, the learned counsel

relied upon the letter of the petitioner, dated 20.06.2017, which reads thus :

"Vide our above cited letters 4 & 5, we requested your goodoffice to incorporate the final bill payment worth of Rs.8,13,428/- as yet another claim in the Terms of Reference, pertaining to the arbitration for the above said work. The copy of the letter along with the acknowledgement, has been enclosed for your ready reference, which is self explanatory. Whereas, we are not in receipt of any addendum to incorporate the final bill payment as yet another claim in the existing TOR."

14. Immediately on receipt of the said letter, dated 20.06.2017 from the petitioner, the first respondent on 04.07.2017, forwarded the same to the Chief Administrative Officer of the Railway to respond and in this regard, he relied upon the letter, dated 04.07.2017, which reads thus :

"Further to this office letter cited 1 above, please find enclosed another copy of the letter received from the above said contractor dated 20.06.2017 which is self-explanatory, i.e., request for incorporating additional claim in the TOR (Final Bill of Rs.8,13,428/-).

Kindly examine the case on merits and the

contractor may be suitably addressed in this regard. In case if it is decided, for incorporating the above said claim then the case file may be sent to this office for issuing Addendum following the usual procedure in vogue."

15. However before the said issue was examined at the Railway and to respond to the Tribunal as to whether the said additional claim made by the petitioner also to be included as an additional reference for adjudication before the Tribunal, the petitioner had sent yet another letter, dated 19.03.2018, whereby still he enhanced the value of additional claim from Rs.8,00,000/- to Rs.10,01,623/- and in this regard the learned counsel relied upon the letter of the petitioner, dated 19.03.2018, which reads thus :

"Vide your above cited letter 4, we had been advised to submit our claim of final bill as an amendment to the original claim. As per your instruction, we hereby attached the details regarding our final bill for the value of Rs.10,01,623/- and the copy of the same has been sent to the respondent and other arbitrators also

Kindly incorporate our genuine claim for the final bill payment of Rs.10,01,623/- along with the existing Terms of Reference and do the needful at the earliest."

16. By relying upon these letters, the learned counsel for the Railway submits that, in view of these repeated claim made by the petitioner and one after another enhancing his claim, seeking such enhanced claim also to be included as additional reference for adjudication before the Tribunal, the matter got delayed. Therefore if at all any delay to be caused after 30.06.2017, the delay was not caused either due to the lackadaisical attitude on the part of the Tribunal or the alleged inaction anything on the part of the Railway, but only because of the attitude on the part of the petitioner, therefore for the delay, if at all somebody be blamed, the petitioner has to be blamed himself and not the respondent or the Tribunal.

17. Therefore the learned counsel appearing for the Railway would submit that, while the Tribunal fixed the date sometime in September / October 2018 to continue the arbitration process, only the petitioner approached this Court by filing this Original Petition and obtained an interim order, therefore the proceedings had been stopped abruptly, therefore all these delay caused only by the petitioner. Hence, he cannot seek any plea before this Court by invoking Section 11 of the Arbitration and Conciliation Act either to terminate the mandate of the Tribunal or to appoint any independent Arbitrator.

Therefore the learned counsel would submit that, the present Original Petition is liable to be rejected.

18. I have considered the said submissions made by the learned counsel appearing for both sides and have perused the materials placed before this Court.

19. There is no dispute with regard to the fact that, there had been an arbitration clause under which an Arbitral Tribunal has to be constituted with serving officials of the Railway by the first respondent, which was requested by the petitioner to refer the matter to the Arbitrator. Accordingly, the first respondent has constituted the Arbitral Tribunal consisting of the respondents 3 to 5, by communication, dated 02.07.2015. Thereafter terms of reference had been issued by the first respondent on 17.07.2015, then the Tribunal had its preliminary sitting on 13.10.2015, thereafter on the request of the petitioner, the left out claims also was requested to be included as an additional terms of reference, which was also had been made by the first respondent on 06.01.2016 by way of amended terms of reference. Thereafter the Tribunal directed both the parties on 25.01.2016 to submit their pleadings before the Tribunal at the second meeting on 24.02.2016

and the third meeting on 19.04.2016. After the third meeting on 19.04.2016, there had been a considerable delay in having the next meeting, which the Tribunal had only on 06.01.2017.

20. In the minutes, dated 19.04.2016, i.e., the third meeting of the Tribunal, the respondent Railway were directed to submit copies of the final bill passed and the copy of measurement book before 29.04.2016. Thereafter by communication, dated 10.06.2016, the Tribunal fixed the date for next meeting as 20.06.2016. On 20.06.2016 according to the minutes, the respondent Railway requested for some more time for making further submission on a particular claim. Therefore the Tribunal minuted that, the said issue has been kept open for next hearing. Therefore after 20.06.2016, i.e., the fourth meeting of the Tribunal, no hearing seems to have been fixed by the Tribunal for a longer period, i.e., more than six months and only on 27.12.2016, the Tribunal fixed the next meeting, i.e., the fifth meeting to be held on 06.01.2017, that too after the petitioner made a request on 19.12.2016 stating that there had been a lapse of six months, since the last meeting of the Tribunal, therefore it requested the Tribunal to conduct and conclude the Arbitral Proceedings at the earliest. Why the Tribunal had not fixed any sitting

between June 2016 and January 2017 has not been explained by the respondent.

21. Even thereafter adjudication was inconclusive on 06.01.2017, i.e., at the fifth meeting, thereafter on 17.01.2017 and 01.02.2017, the petitioner written letters to expedite the adjudication. However only on 21.04.2017, the Tribunal issued a communication fixing the next hearing on 05.05.2017. However on 04.05.2017, that meeting also was postponed to 10.05.2017. On 10.05.2017, being the sixth meeting of the Tribunal, again the adjudication was inconclusive, therefore on 20.06.2017, the Tribunal fixed the next meeting, i.e., seventh meeting on 30.06.2017. Even on 30.06.2017, it seems that, no much progress had been shown as the adjudication was inconclusive. Thereafter absolutely no move forward by the Tribunal, as the issue had been kept pending all along from 30.06.2017 till August 2018, when the petitioner approached this Court by filing this Original Petition.

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22. Thereafter on 19.09.2018, this Court granted an interim order, however after the interim order passed by this Court, some move seems to have been taken by the Tribunal to fix the hearing

sometime in October or November 2018, since the notice from this Court had been received, the same seems to have been cancelled.

23. This wide gap between one sitting and another sitting to the extent of months together or even more than a year, have not been explained by the respondent. There is absolutely no materials to show that, only because of the petitioner's additional claim, it got delayed as the additional claim letter, dated 22.06.2017 has been promptly replied by the Chief Administrative Officer of the first respondent Railway as early as on 28.08.2017 with a copy marked to the Presiding Arbitrator. The relevant portion of the said letter is extracted hereunder for easy reference :

"With reference to your letter cited regarding inclusion one more claim in the "Terms of Reference", the matter has been reviewed and it is advised that as per Clause 64(i)(iv) of modified GCC-2014 "No new claim shall be added during proceedings by either party".

However a party may amend/supplement the original claim or defence thereof during course of arbitration proceedings subject to acceptance by tribunal having due regard to the delay in making it.

You may therefore approach the arbitral

tribunal further for inclusion of your claim of Final bill for discussion.

Yours faithfully

(R.Amal Raj)

Dy.CE/CN/Stores/MS

Copyto : DGM/G/MAS for information with reference to his letter No. G . 16 / DGM / ARB /2015/45, dated 08.08.2017.

Shri.S.K.Agarwal, Presiding Arbitrator & Chief Electrical & Traction Er for Information."

24. Since the additional claim made by the petitioner as early as in June 2017 since had been answered on behalf of the first respondent on 28.08.2017 and the same has been communicated to the Presiding Arbitrator also, the arguments advanced by the learned counsel appearing for the first respondent Railway that, because of the additional claim made by the petitioner, the proceeding got delayed, cannot be accepted.

25. Yet another complaint also has been made by the learned counsel appearing for the petitioner that, some communications have been made between the Arbitral Tribunal and the first respondent without keeping the petitioner informed. In this regard, the learned counsel has relied upon a communication, dated 16.02.2018. The

reference column, subject and the contents of the letter is hereby extracted for easy reference :

"No.G.16/DGM/ARB/2014/45 Date 16.02.2018

Shri.S.K.Agarwal

CEGE/SCR &

Presiding Arbitrator

Sub : Agt. No.MTP/Civil/476/13(CN), dated 20.02.2013 - Contractor - M/s.RPN Engineers Chennai, Pvt., Ltd., Chennai - Arbitration - Reg.

Ref : 1. Your letter dated 09.02.2018

2. This office letter of even No.dated 08.08.2017

3. Dy.CE/CN/Stores/MS letter No.W.148M/911/CN, dated 28-08-2017 addressed to the Contractor, DGM/G/MAS and Presiding Arbitrator of the Tribunal.

With reference to above, please find enclosed a copy of the letter addressed to the concerned Executive and reply from the Executive Department sent to the Contractor with copy to all concerned is sent herewith for information and further necessary action at your end.

The tribunal is requested to proceed with the case and publish an award early.

Encl : As above

(S.SUBRAMANIAN)

DGM/G

for General Manager

Copy to : CAO/CN/MS for kind information Pl.

Sr.P.Kalimuthu, CE/CN/C/MS &

Arbitrator for kind inf. pl

Smt.M.R.Viji, Dy. Post Master /

Accounts/O/o. the Post Master / General
Head Post Office, Trivandrum

Dy.CE/CN/Stores/MS for inf. and necessary
action pl."

26. This letter, dated 16.02.2018 was issued by the first respondent to the Presiding Arbitrator, where in the reference column, he referred about a letter said to have been issued by the Presiding Arbitrator, dated 09.02.2018 and in the second reference column, he mentioned about the first respondent's letter, dated 08.08.2017.

27. By relying upon these two references, the learned counsel appearing for the petitioner contended that, these communications are only unilateral between the Presiding Arbitrator or Arbitral Tribunal and the first respondent and in this regard, the petitioner has been completely kept in dark.

28. Therefore by relying upon these communications, the learned counsel appearing for the petitioner has made a submission that, there is no neutrality on the part of the Arbitral Tribunal, as their attitude to have a separate channel of communication between the respondent Railway and the Tribunal discloses or establishes that, their partition in attitude and therefore on that ground also, the prayer sought for herein can be granted.

29. In order to verify the veracity of such allegation, since the respondents 3 to 5 are not available before this Court, even though they are party to the proceedings, however prima facie it suggest that, there had been some communication between the Arbitral Tribunal and the respondent Railway and this kind of channel of communication without taking in to confidence of the petitioner side during the Arbitral proceedings, is not appreciable. Therefore this Court finds that, there is some force in the said contention made by the learned counsel for the petitioner in this regard.

30. At one point of time, while making the arguments on behalf of the first respondent Railway, the learned standing counsel submitted that, assuming that if ultimately this Court comes to a conclusion that,

because of the reasons mainly on the reason of delay, the mandate of the Tribunal is to be terminated, the Arbitration Proceedings commenced well before the amended Act 2015 came into effect (23.10.2015), therefore once the mandate is terminated once again a new Arbitral Tribunal to be constituted only in accordance with the terms of the agreement between the parties, which means that, such Tribunal be constituted or appointed only by the first respondent Railway within the meaning of Section 15(2) of the Principal Act.

31. To dwell with the said legal submission made by the learned counsel appearing for the respondent Railway, let me take the relevant provisions of the Principal Act as well as the amending Act. Section 15 of the Principal Act reads thus :

"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 subsection (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."

32. Section 26 of the Amendment Act, 2015 reads thus :

"26. Act not to apply to pending proceedings :

- Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the Principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

33. Section 26 of the 2015 Amendment Act makes it abundantly clear that, the Act shall apply to the Arbitral Proceedings commenced in accordance with Section 21 of the Principal Act before the commencement of the Act, unless the parties otherwise agree.

34. Here in the case in hand, admittedly the Arbitration Proceedings commenced by appointment of Arbitrator dated 02.07.2015 and the terms of reference was made on 17.07.2015, however the amending Act came into force only on 23.10.2015. Therefore no doubt that, the amending Act would not have an application in an Arbitration Proceeding, which commenced prior to the Act came into effect.

35. Therefore the effect of the amending Act shall have no bearing on the present issue, where the Arbitration Proceedings admittedly commenced well before 23.10.2015.

36. That apart, the learned counsel appearing for the Railway has relied upon a recent decision of the Hon'ble Supreme Court, dated 23.01.2019 in Civil A.No.1039 of 2019 in the matter of Rajasthan Small Industries Corporation Ltd., v. M/s.Ganesh Containers Movers Syndicate.

37. In the said Judgment, their Lordships, after having taken into account the factual matrix of the case, has held in para 27 and 28, which reads thus :

"27. To fortify our view, we can usefully refer

to the decision of this Court in Aravali Power Company Private Limited v. Era Infra Engineering Limited (2017) 15 SCC 32. In this case, the invocation of arbitration was on 29.07.2015 and the arbitrator was appointed on 19.08.2015 and the parties appeared before the arbitrator on 07.10.2015 well before 23.10.2015 i.e. date on which the Amendment Act was deemed to have come into force. It was held that the statutory provisions that would therefore govern the controversy are those that were in force before the Amendment Act 20 came into effect. This Court has therefore directed that the arbitration, in pursuance of the appointment of the arbitrator on 19.08.2015, shall proceed in accordance with law.

Whether the High Court was right in terminating the mandate of the arbitrator appointed as per the agreement:-

28. The main question falling for consideration is whether the High Court was right in terminating the mandate of the arbitrator appointed as per the agreement and appointing a substitute arbitrator in the application filed under Section 11(6) and Section 15 of the Arbitration Act. As pointed out earlier, the proceedings before the Arbitral Tribunal

proceeded till 17.08.2011 and thereafter, no progress was made. The respondent issued legal notice on 07.02.2013 calling upon the appellant to pay Rs.3.90,81,602/- alleging that the said amount was settled during the course of proceedings before the Arbitral Tribunal. Reiterating the demand, the respondent has again sent the legal notice on 07.03.2013. However, no award came to be passed. The respondent filed application under Sections 11 and 15 of the Act of 1996 on 13.05.2015 seeking appointment of an independent arbitrator for adjudication of the disputes and differences between the appellant and the respondent."

38. In that case, since the Arbitrator failed to complete the arbitration proceedings even after four years, on that ground, the High Court in that case appointed a substitute Arbitrator departing from the Arbitration clause in the agreement between the parties. However dealing with the said situation, their Lordship's has held as follows :

"31. Mere neglect of an arbitrator to act or delay in passing the award by itself cannot be the ground to appoint another arbitrator in deviation from the terms agreed to by the

parties. We may usefully refer to RUSSELL ON ARBITRATION, 20th Edition which reads as under:-

"Mere neglect of an arbitrator to act, as distinct from refusal or incapacity, does not of itself give the court power to appoint another arbitrator in his place. It does, however, give the court power to remove him, whereupon there is a power to replace him."*

*[RUSSELL ON ARBITRATION, 20th Edition, Pg. 136 quoted in Law relating to Arbitration and Conciliation, 9th Edition, by Dr. P.C. Markanda at Pg. 620]

32. Section 15 deals with termination of the mandate and substitution of an arbitrator. Sub-section (1) of Section 15 states that in addition to the circumstances referred to in Sections 13 and 14 of the Act, the mandate of an arbitrator shall terminate where he withdraws from office for any reason or by pursuant to the agreement of the parties. In terms of sub-section (2), after termination of arbitrator's mandate, the appointment of the substitute arbitrator shall be in accordance with the rules applicable to the appointment of an arbitrator who is being replaced."

39. The Hon'ble Supreme Court has further held at para 34, where the relevant portion reads thus :

"34...As held in Yashwith Constructions, Section 11(6) of the Act would come into play only when there was failure on the part of the party concerned to appoint an arbitrator in terms of the arbitration agreement. In the case in hand, the High Court, in our view, was not right in appointing an independent arbitrator without keeping in view the terms of the agreement between the parties and therefore, the impugned order appointing an independent arbitrator/retired District Judge is not sustainable."

40. Ultimately the Judgment of the High Court in that case, has got reversed and the following directive was issued by the Hon'ble Apex Court :

"39. In the result, the impugned order of the High Court dated 22.04.2016 is set aside and this appeal is allowed. The present Managing Director of the appellant-Rajasthan Small Industries Corporation Limited shall be the sole arbitrator and the Managing Director is directed to take up the matter and continue the proceedings and afford sufficient opportunity to both the parties to adduce further evidence and

to make oral submissions and pass the final award within a period of four months. It is made clear that the arbitrator may not be influenced by any of the views expressed by the High Court."

41. In this context, the learned counsel appearing for the Railways also relied upon an earlier Judgment of the Supreme Court in **Aravali Power Co., (P) Ltd., v. Era Infra Engg. Ltd.**, reported in **(2017) 15 SCC 32**, where the following principles have been made out, which reads thus :

"22. The principles which emerge from the decisions referred to above are:-

22.1. In cases governed by 1996 Act as it stood before the Amendment Act came into force:-

22.1.1. 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. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

22.1.2. Unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

22.1.3. 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.

22.1.4. While exercising such power under sub section (6) of Section 11, 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.

22.2. In cases governed by 1996 Act after the Amendment Act has come into force: If the arbitration clause finds foul with the amended provisions, the appointment of the Arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the Court would be within its

powers to appoint such arbitrator(s) as may be permissible.

23. The observations of the High Court in paragraphs 37-38 as quoted above show that the exercise was undertaken by the High Court, "in order to make neutrality or to avoid doubt in the mind of the petitioner" and ensure that justice must not only be done and must also be seen to be done. In effect, the High Court applied principles of neutrality and impartiality which have been expanded by way of Amendment Act, even when no cause of action for exercise of power under Section 11(6) had arisen. The procedure as laid down in unamended Section 12 mandated disclosure of circumstances likely to give rise to justifiable doubts as to independence and impartiality of the arbitrator. It is not the case of the Respondent that the provisions of Section 12 in unamended form stood violated on any count. In any case the provision contemplated clear and precise procedure under which the arbitrator could be challenged and the objections in that behalf under Section 13 could be raised within prescribed time and in accordance 32 with the procedure detailed therein. The record shows that no such challenge was raised within the time and in

terms of the procedure prescribed. As a matter of fact, the Respondent had participated in the arbitration and by its communication dated 04.12.2015, had sought extension of time to file its statement of claim.

24. In the circumstances, the High Court was clearly in error in exercising jurisdiction in the present case and it ought not to have interfered with the process and progress of arbitration. We therefore accept the challenge raised by the Appellant and reject that raised by the Respondent. Consequently, appeals arising out of Special Leave Petition (Civil) Nos.25206-25207 of 2016 are allowed while those arising from Special Leave Petition (Civil) Nos.503-504 of 2017 stand dismissed. The arbitration, in pursuance of the appointment of the Arbitrator on 19.08.2015, shall proceed in accordance with law.

25. The appeals are disposed of in aforesaid terms, without any order as to costs."

42. In view of the latest law as has been envisaged in the two said Judgments of the Hon'ble Supreme Court referred to above, it become crystal clear that, since the 2015 Act would not be made applicable to the cases, where the Arbitration Proceedings commenced prior to the Act came into force, i.e., from 23.10.2015 and in those

cases even if the Court finds that, the present Arbitrator or Arbitral Tribunal's mandate is to be terminated, it shall be replaced with a new set of Arbitrator or Arbitral Tribunal strictly in accordance with Section 15(2) of the Act, which mandate that, a substitute Arbitrator shall be appointed according to the Rules that were applicable to the appointment of the Arbitrator being replaced.

43. In view of Section 15(2) of the Act, the substitution to be made only as per the rule, which were applicable at the time of commencement of the Arbitration.

44. When that being so, in the present case, since the Arbitration Proceedings was commenced on 02.07.2015, i.e., well before the amended Act came into force, i.e., on 23.10.2015, therefore if this Court comes to the conclusion that, the mandate of the present Tribunal to be terminated, the reconstitution by way of substitution has to be done only in accordance with the sub-section (2) of Section 15 alone, not otherwise.

45. Taking into account the factual matrix of this case, where there had been considerable delay on the part of the Arbitral Tribunal, which are inexplicable in nature, as absolutely no reason or rhyme to have such a delay of months together and more than a year to have a sitting by the Tribunal and also at least prima facie there had been some communication directly from the Tribunal to the first respondent, where the petitioner seems to have been kept in dark, the two grounds primarily urged by the petitioner to terminate the mandate of the present Arbitral Tribunal is, in the opinion of this Court, well founded.

46. Accordingly, this Court is inclined to terminate the mandate of the present Arbitral Tribunal in this matter consisting of the respondents 3 to 5 forthwith.

47. At the same time, in view of the legal position, as has been referred to above, especially in the context of the two decision including the very recent decision referred to above, dated 23.01.2019, this Court cannot show its indulgence to appoint an independent Arbitrator by way of substitution to the present Arbitral Tribunal. Therefore, in view of the aforesaid facts and circumstances and the conclusion arrived at by this Court, the following orders are passed :

"(1) The mandate of the Arbitral Tribunal consisting of respondents 3 to 5 is hereby terminated.

(2) In view of such termination, the substitute to be made by way of reconstitution of a fresh Arbitral Tribunal, which shall be done in accordance with the agreement between the parties, which means, the first respondent, i.e., the General Manager of the Southern Railway shall constitute such an Arbitral Tribunal.

(3) While constituting such a Tribunal, the first respondent can make appointment of either existing officials of the Railway or retired officials or with both.

(4) The aforesaid exercise of constituting the Tribunal shall be undertaken by the first respondent within a period of 30 days from the date of receipt of a copy of this order.

(5) On such constitution, the newly constituted Tribunal shall take every effort to complete the adjudication of the reference including any additional reference from either side within a period of six months from the date of enter upon to the reference by the Tribunal and pass the final Award.

(6) The Time frame mentioned herein above shall be strictly adhered to by the parties concerned."

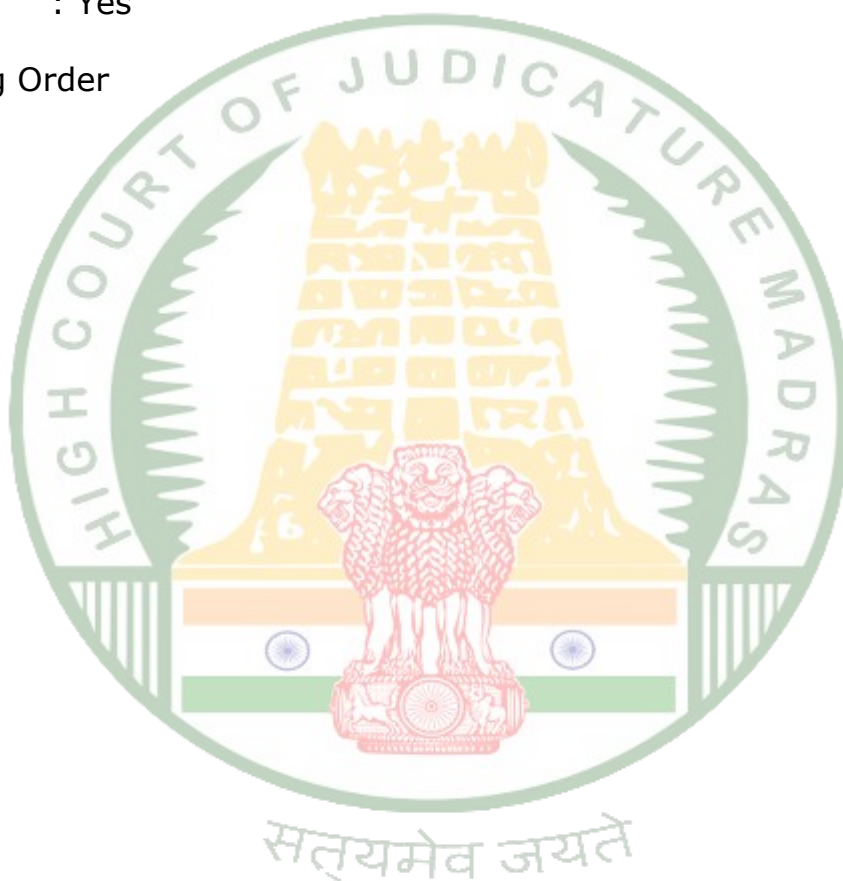
With these directions, this Original Petition is disposed of. No costs.

19.03.2019

Index : Yes

Speaking Order

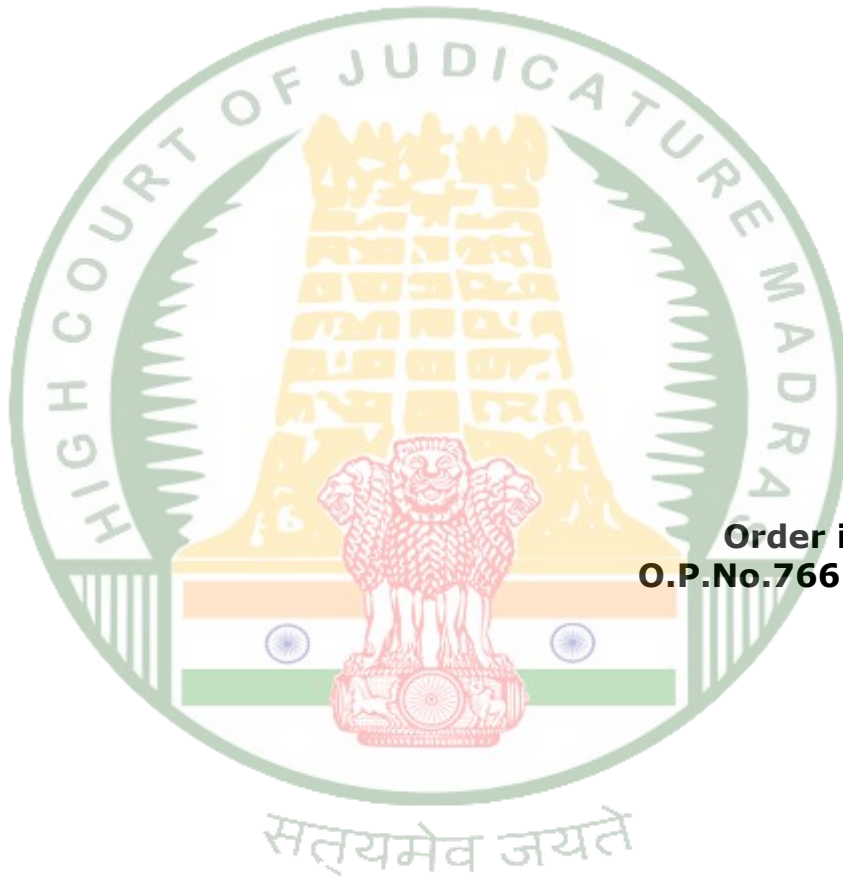
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R.SURESH KUMAR, J.

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**Order in
O.P.No.766 of 2018**

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