

\$~23

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

+ O.M.P. (T) (COMM.) 122/2018 & IA 15732/2018

Date of Decision : 19th February, 2019

VISHAL INFRASTRUCTURE LIMITED Petitioner

Through: Mr.Amit Sibal, Sr. Adv. with
Mr.Sonal K. Singh, Mr.Ritesh
Sharma and Mr.Suraj
R.Kesherwani, Advs.

versus

UNION OF INDIA Respondent

Through: Mr.Ripu Daman Bhardwaj,
CGSC with Mr.T.P.Singh, Adv.
alongwith Mr.I.P. Singh,
Dy.Dir(C) and Mr.Satish
Kumar, Dy. Dir(C).

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking termination of the mandate of the Arbitrator appointed by the respondent and for appointment of a Substitute Arbitrator for adjudicating the disputes

that have arisen between the parties in relation to the Contract Agreement dated 28.01.2011 awarding the contract for “construction of dwelling units including allied services for officers, JCO, OR’s at Kirkee (Army)” to the petitioner.

2. The disputes arose between the parties with the termination of the contract by the respondent vide its letter dated 23.09.2013.

3. The petitioner by its letter dated 08.10.2013 requested the respondent to appoint a Sole Arbitrator under Clause 60 of the General Conditions of Contract. The respondent, however, by its letter dated 09.10.2013 refused to appoint an Arbitrator till alternative arrangements to get the work completed through any other contractor /contractors is made by it.

4. The petitioner again made a request to the respondent for appointment of an Arbitrator vide letter dated 05.05.2014, which was again rejected by the respondent vide its letter dated 20.05.2014.

5. The petitioner yet again made a request for appointment of an Arbitrator vide its letter dated 19.07.2014. It is only on 14.03.2016, that is, after coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the ‘Amended Act’) that the respondent finally wrote to the Engineer In-Chief making a reference to the petitioner’s letter dated 19.07.2014 and its letter dated 22.01.2016 (copy of which has not been placed on record by either party) giving particulars of appointment of an Arbitrator.

6. The Engineer In-Chief by its letter dated 29.04.2016 appointed Mr.S.K. Gupta, ADG (Arbitration) as an Arbitrator for adjudicating the disputes that had arisen between the parties. I may note that though Mr.Gupta was also a serving employee of the respondent, however, the petitioner did not raise any objection to such appointment and instead participated in the arbitration proceedings.

7. Learned counsel for the petitioner submits that the petitioner did not raise any objection to such appointment as the respondent had appointed an Arbitrator only after three years of rigorous request by the petitioner and the petitioner did not wish to delay the proceedings any further.

8. Certain proceedings took place before the Arbitrator with the petitioner filing its Statement of Claim, respondent filing its Statement of Defence and the petitioner filing its rejoinder thereto. The respondent further made repeated requests to the Arbitrator to change the venue of the arbitration from Chandimandir (Haryana) to Delhi.

9. The Arbitrator finally by his letter dated 22.06.2018 tendered his resignation, *inter-alia* observing as under:

“2. I have not been able to finalize the case as Union of India represented by DG MAP New Delhi is not co-operating/not interested to get the case adjudicated from undersigned.”

10. The petitioner by its letter dated 01.08.2018 requested the Engineer In-Chief to persuade Mr.Gupta to continue as a Sole Arbitrator on the ground that he had dealt with the entire matter and would be aware of the case.

11. However, the Engineer In-Chief by its letter dated 19.07.2018 appointed the present Arbitrator, Mr.N.K. Singh, Chief Engineer (QS & C) as a Sole Arbitrator. The petitioner states that this letter was received by the petitioner only on 27.09.2018, though it had earlier received a communication from the Arbitrator himself on 07.08.2018 informing about his appointment.

12. It is not denied that no formal sitting of the Arbitrator took place, though, the Arbitrator by a communication dated 10.10.2018 allowed the respondent to revise its Statement of Claim and by the further communication dated 08.11.2018 granted further time to the respondent to file the same.

13. Learned counsel for the petitioner submits that the above directions were passed by the Arbitrator without giving any opportunity to the petitioner or holding any formal sitting of the arbitration.

14. Learned counsel for the petitioner submits that the Sole Arbitrator being a serving employee of the respondent is ineligible to be appointed as an Arbitrator under Section 12(5) read with Entry 1 of the Seventh Schedule to the Act. On the other hand, learned counsel for the respondent submits that the arbitration proceedings having

commenced prior to the coming into force of the Amended Act, the provisions of the Seventh Schedule of the Amended Act would not be applicable to the facts of the present case and in any case, the remedy of the petitioner, if any, is in form of filing an application under Section 13 of the Act before the Arbitrator.

15. I am unable to agree with the submissions made by the learned counsel for the respondent. Admittedly, the request of the petitioner by its letter dated 08.10.2013 to appoint an Arbitrator had been rejected by the respondent by its letter dated 09.10.2013. The subsequent request made by the petitioner on 05.05.2014 was again rejected by the respondent on 20.05.2014. Even the request dated 19.07.2014 was not proceeded with, almost for a period of two years and finally on 14.03.2016, the respondent gave the particulars for appointment of Arbitrator to the Engineer In-Chief. The Arbitrator was finally appointed only on 29.04.2016, that is, after the coming into force of the Amended Act.

16. In any case, even if the Amended Act is not to apply to the present proceedings, this Court in its judgment in ***Omaxe Infrastructure and Construction Ltd. v. Union of India & Anr.***, 2018 SCC OnLine Del 8914, has held that the ineligibility of an Arbitrator has to be considered on the date of his appointment. In the present case, the substitute Arbitrator has been appointed by the letter dated 19.07.2018, that is, much after coming into force of the Amended Act. In that view, the ineligibility of the Arbitrator has to be decided at the anvil of Section 12(5) read with the Seventh Schedule of the Act.

17. In *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited*, (2018) 12 SCC 471 and *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377, the Supreme Court has clarified that where the objections against the Arbitrator are of his ineligibility under Section 12(5) of the Act, the party cannot be relegated to the remedy under Section 13 of the Act.

18. In view of the above, I have no hesitation in holding that Mr.N.K. Singh is ineligible to act as an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Agreement. I, therefore, terminate his mandate as an Arbitrator.

19. I further appoint **Mr.H.L.Bajaj**, (Retired Chairman, Central Electricity Authority, R/o N-37, Panchsheel Park, New Delhi-110017, Tel. No.011-41708366, e-mail ID: bajajhl@gmail.com) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Agreement. The Arbitrator shall file disclosure under Section 12 of the Act before proceeding with the reference.

20. The substitute Arbitrator shall continue the proceedings from the stage they were before Mr.S.K.Gupta, the first Arbitrator. The parties may collect the record from the earlier Arbitrator and file the same before the substitute Arbitrator. In case of any difficulty, the parties are free to file copies of their respective pleadings and documents before the Substitute Arbitrator.

21. The petition is disposed of in the above terms, with no order as to cost.

Dasti.

NAVIN CHAWLA, J

FEBRUARY 19, 2019/Arya

