

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
04~03~2020	11~03~2020

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.801 of 2019
and A.No.514 of 2020

M/s. Progressive – Aliens (JV),
Rep.by Authorised Signatory Mr.D.N.Ravi,
7th Floor, Raghava North Block,
Raghava Ratna Towers,
Chirag Ali Lane, Abids,
Hyderabad 500001.

Now at:

M/s.Progressive -Aliens (JV)
C/o. Aliens Developers Pvt. Ltd.,
Sy.No.385 & 385, Tellapur Village,
RC Puram Mandal, Sangareddy District
Telangana State – 502 032

.. Petitioner

.Vs.

1. The General Manager
Southern Railway, Park Town,
Chennai 6500003.
2. The Chief Administrative Officer,
Construction, Southern Railway,

Periyar E.V.R.High Road,
Egmore, Chennai 600008.

3. The Chief Engineer/MTP(R)/MS,
Metropolitan Transport Project (Railways)
Periyar E.V.R.High Road,
Egmore, Chennai 600008.

4. Shri. Prafulla Varma (The Presiding Arbitration)
Chief Engineer/North/CN,
Southern Railway
Periyar E.V.R.High Road,
Egmore, Chennai 600008.

Now Designated as:

Shri.Prafulla Varma
The Chief Planning and Development Engineer,
Southern Railway, Headquarters Office,
Park Town, Chennai 600003.

5. Smt.S. Selvalakshmi,(The Arbitrator)
Dy. FA & CAO,
Southern Railway, Headquarters Office,
Park Town, Chennai 600003

6. Shri. V. Selvam (The Arbitrator)
GM Rites
Regional Inspection Office,
No.758, Mount Chambers,
Anna Salai, Chennai 600002

.. Respondents

Prayer: Petition filed under Section 14 & 15 r/w 11 of the Arbitration to terminate the mandate of the present Arbitral Tribunal (Comprising of the Respondents 4 to 6 and appoint an Independent Arbitrator to arbitrate all the disputes and claims

arising out of the Agreement No.MTP/CIVIL/470/11 dated 11.03.2011 and direct the respondents to pay the cost of the Petition.

For Petitioner : M/s. Jeremiah Gregong John

For Respondents : Mr. P.T. Ramkumar
R1 to R3 Standing Counsel for Railways

ORDER

This Petition has been filed to terminate the mandate of the Arbitral Tribunal and appoint an Independent Arbitrator to arbitrate all the disputes arising out of the Agreement No.MTP/CIVIL/470/11 dated 11.03.2011.

2. It is the case of the Petitioner that the Petitioner has participated tender and awarded a contract for the value of Rs.25,63,63,494.23 on 30/31.08.2010 and entered into an Agreement with the Respondent Railways on 11.3.2011. As there was a dispute arose between the parties, the Petitioner invoked Arbitration containing Twenty one (21) claims. The 1st Respondent constituted an Arbitral Tribunal by letter dated 14.06.2012. Thereafter, two of the Members were transferred to some other stations another Arbitral Tribunal was constituted on 14.12.2012 with the following members:

- i) Shri.Prafulla Verma, Chief Engineer/Construction/North
- **Presiding Officer**
- ii) Shri.A. Selvam, Chief Works Manager/Locoworks/Perambur
- **Arbitrator**
- iii) Shri.S. Balasubramanian, DY.FA & CAO - **Arbitrator**

Again, the 1st Respondent on 05.08.2014 re-constituted fresh Arbitral Tribunal by relieving Shri. S. Balasubramanian and appointed Smt.S.Selva Lakshmi, DY.FA & CAO/C.

3. It is the contention of the Petitioner that though the proceedings were concluded on 20.07.2016, the Award has not yet passed for more than three years. Therefore, the Tribunal has become de-jure and de-facto to perform its functions and fails to act without undue delay. It is the further contention of the Petitioner that Clause 64(7) of the Agreement makes it clear that any statutory modifications thereof shall apply to the arbitration proceedings under this clause. Further it is his contention that the Arbitrators are also governed by the Railway Circulars. Hence, prayed for termination of the present Arbitral Tribunal and appoint an independent Arbitrator.

4. In the counter affidavit Respondents 1 to 3 are admitting the the constituion and re-constitution of Arbitral Tribunal. It is the contention of the Respondents 1 to 3 that the hearings have taken place before 23.10.2015 i.e., before the Amendment of the Arbitration and Conciliation Act 2015. Hence it is their contention that the Arbitration is governed as per Section 21 of the Act, prior to the Amended Act 2015. Hence it is his contention that mere neglect of an Arbitrator to act or delay in passing the award by itself cannot be a ground to appoint another Arbitrator in deviation from the terms agreed by the parties. Hence, prayed for dismissal.

5. The learned counsel appearing for the Petitioner submitted that though the Tribunal has been constituted in the year 2012 and it has been re-constituted in several times, despite they concluding the proceedings before the Arbitral Tribunal, Award has not yet been passed. Hence, it is his contention that the mandate of the Tribunal has to be terminated and new Arbitrators has to be appointed as per the Amended Act 2015. It is his further contention that Clause 64(7) of the Agreement makes it clear that any statutory modification thereof shall apply to the arbitration proceedings. Hence it is his contention that the Arbitrators

to be appointed fresh. In support of his contention he relied upon the following judgments:

1. Ashiana Infrahomes Pvt. Ltd., & ors. vs. Adani Power Ltd. [2018 SCC online Del 9110]

2. APR Constructions Ltd., vs. Union of India and Ors. [MANU/KA/3682/2018]

6. Learned counsel appearing for the Respondents submitted that though there is a delay on the part of the Tribunal in passing the Award, even this court come to the conclusion that the Arbitral Tribunal has to be terminated, the provision of the Amended Act 2015 will not apply to the Arbitral Proceedings, since proceedings already commenced in accordance with the provision of Section 21 of the Principal Act. Clause 64 of the General Conditions of the contract cannot be taken to be agreement between the parties so as to apply the provisions of the Amended Act. Hence it is his contention that when the mandate of the Arbitrator terminated substitute Arbitrator shall be appointed as per the provision applicable to appointment of the Arbitrator. Hence he prayed for dismissal of the Petition. In support of his contention he placed reliance of the following judgments:

1. *Yashwith Constructions (P) Ltd., vs. Simplex Concrete Piles India Ltd., and Another (2006) 6 SCC 207*
2. *RPN Engineers Chennai Private Ltd., vs. The Union of India 1Order in O.A.No.766 of 2018 of High Court, Masdras dated 19.3.2019]*
3. *Aravali Power Company Pvt. Ltd., vs. Era Infra Engineering Ltd. [(2017) 15 SCC 32]*
4. *Union of India vs. Parmar Construction Company [2019 SCC Online 442]*
5. *Rajasthan Small Industries Corpn. Ltd., vs. Ganesh Containers Movers Syndicate [(2019) 3 SCC 282]*
6. *Government of Haryana PWD Haryana (B and R) Branch vs. G.F.Toll Road Private Limited and others [(2019) 3 SCC 505]*
7. *S.P.Singla Constructions Private Limited vs State of Himachal Pradesh and Another*

[(2019) 2 SCC 488]

7. It is undisputed fact that the Arbitral Proceedings was initiated as per the Principal Act much before the Amended Act of 2015. Though the Tribunal was constituted in the year 2012, it was re-constituted consequent transfer of two Arbitrators. Again, re-constitution was done on 14.12.2012. Again on transfer of one of the Arbitrators another Arbitrator was substituted on 5.8.2014. Now it appears that the proceedings have concluded before the Arbitral Tribunal on 20.07.2016. However, Award has not been passed so far. It is to be noted that when the Arbitrators concluded hearings and they have not passed any Award all these years, this Court is of the view that the Arbitrators were in fact unable to perform their duty properly. After conclusion of the hearings, the Award should be passed within a reasonable time. The long delay in delivering the Awards having been deprecated several time by the Courts. When the gap between the hearings and the award is too long, certainly it could be inferred that such award has not passed on proper appreciation of materials. Hence, this Court is of the view that the mandate of the Arbitral Tribunal has to be terminated and the new Arbitrators to be substituted.

8. It is the contention of the learned counsel for the applicant that there is a clause in the agreement also makes the Amendment Act 2015 applicable. Therefore, Arbitration is governed by the provisions of Amended Act 2015. Whereas it is the contention the learned respondent counsel that the provisions of Principal Act alone to be applied since the proceedings were commenced much prior to the amendment.

9. It is not disputed that orinally the Arbitral Proceedings were commenced prior to the Amendment Act 2015 and prayers were not disputed by both sides and the proceedings were completed. Only the Award has to be passed and there was a delay in delivering the Award for more than three years. A Judgment of the Apex Court in ***S.P.Singla Contrsuctions Private Ltd., v.s State of Hichal Pradesh and Another [(2019) 2 Supreme Court Cases 488]*** it is held that Clause 65 of the general condition of the Contract cannot be taken to be the agreement between parties so as to apply the provisions of the Amended Act. Hence, held that the provisions of the amended Act cannot be invoked.

10. Similarly in ***Rajasthan Small Industries Corporation Limited v. Ganesh Containers Movers Syndicate [(2019) 3 Supreme Court Cases 282]*** the Apex Court took the similar view. The Honourable Supreme Court has held that the parties having participated in the proceedings before the Arbitral Tribunal for quite some time and also having expressed faith in the sole Arbitrator, was not justified in challenging the appointment of Managing Director of the appellant Corporation as the sole Arbitrator.

11. In ***Union of India vs. Parmar Construction Company [2019 (3) SCC online SC 442]*** the Apex Court has held as follows:

25. The conjoint reading of [Section 21](#) read with [Section 26](#) leaves no manner of doubt that the provisions of the [Amendment Act, 2015](#) shall not apply to such of the arbitral proceedings which has commenced in terms of the provisions of [Section 21](#) of the Principal Act unless the parties otherwise agree. The effect of [Section 21](#) read with [Section 26](#) of Amendment Act, 2015 has been examined by this Court in *Aravali Power Company Private Limited Vs. Era Infra Engineering Limited (supra)* and taking note of [Section 26](#) of the Amendment Act, 2015 laid down the broad principles as under: “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 subjectmatter of the dispute.

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

22.1.3. The Chief Justice or his designate while exercising power under subsection (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 subsection (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.” which has been further considered in *S.P. Singla Constructions Pvt. Ltd. Vs. State of Himachal Pradesh and Others* 2018(15) Scale 421.

“16. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in *Ratna Infrastructure Projects* case; suffice it to note that as per *Section 26* of the Arbitration and Conciliation (Amendment) Act, 2015 the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Principal Act before the commencement of the *Amendment Act* unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so

as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015(w.e.f. 23.10.2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and, therefore, provisions of the Amended Act cannot be invoked.”

The Apex Court in the above Judgment has also held that the Arbitrators to be appointed as agreed between the parties in terms of contract.

12. In ***RPN Engineers Chennai Private Ltd., vs. The Union of India*** [O.P.No.766 of 2018 order dated 19.03.2019], this Court after considering various judgments of the Honourable Supreme Court held that independent Arbitrator cannot be appointed by terminating the mandate of the Arbitral Tribunal in view of the terms of the agreement between parties and a direction was given for substitution of Arbitrator by way of re-constitution of a fresh Arbitral Tribunal and directed the first Respondent i.e., General Manager of the Southern Railway to constitute such an Arbitral Tribunal and also directed to make such exercise within

30 days.

13. In view of the above judgments and the fact that Arbitration was governed by the old Act commenced prior to the amended Act, the parties are certainly governed by the terms of the contract. Since the Award has not passed there is an inordinate delay of more than three years, this Court is of the view that the Tribunal has not acted fairly in delivering the Award. In such a view of the matter the mandate of the Arbitral Tribunal consisting of Respondents 4 to 6 is hereby terminated and the first Respondent is directed to substitute the Arbitral Tribunal by way of re-constitution within one month from the date of receipt of copy of this order. On such re-constitution, the Arbitrators shall hear the oral arguments of both sides and pass an Award within two months from the date of oral submission. It is not the case of applicant that the proceedings were not properly conducted before the Arbitrators. In fact there is no whisper whatsoever made, questioning the proceedings or raising any allegation or bias etc., against the Tribunal. In such view of the matter, this Court is of the view that the newly constituted Tribunal will resume proceedings from the stage left by the previous Tribunal and pass an Award on merits after hearing both sides.

14. With the above directions, this Original Petition is disposed of.
Consequently connected Application is closed. No costs.

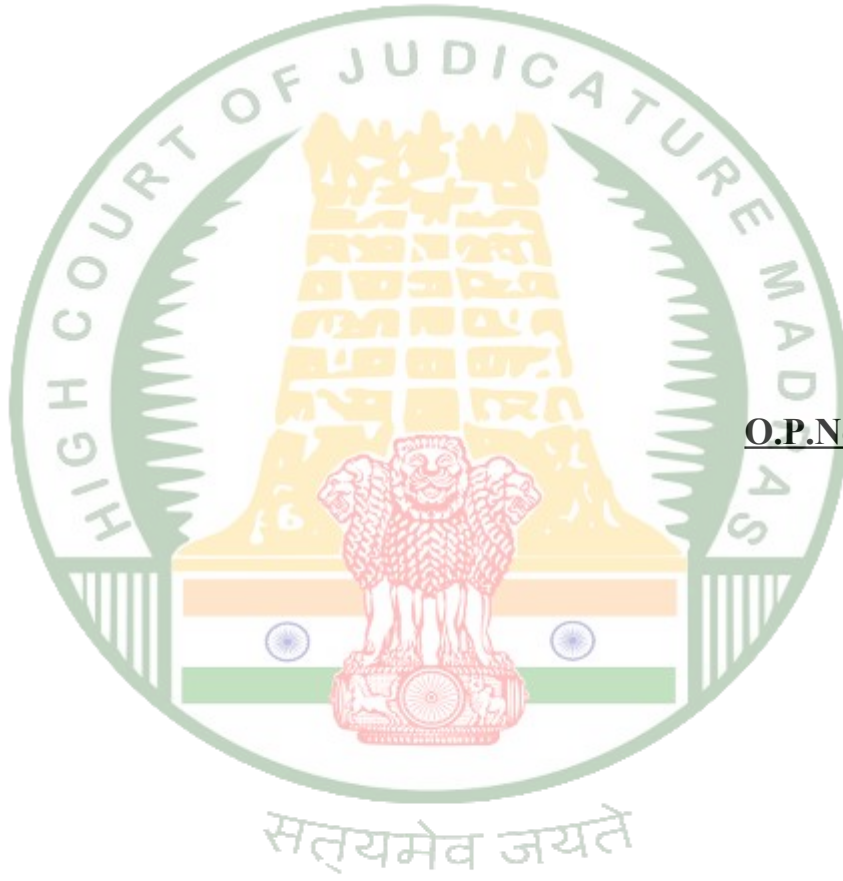
11.03.2020

Index : Yes / No
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N. SATHISH KUMAR, J.
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order in:
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