

Via video conferencing

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

+ O.M.P. (T) (COMM.) 36/2020 & I.A. 6947/2020

LARSEN AND TOUBRO LIMITED

..... Petitioner

Through Mr.Dayan Krishnan, Sr. Adv. with
Mr.Kirat Singh Nagra, Mr.Kartik Yadav,
Mr.Parinay T. Vasandani & Mr.Karanvir Singh
Goraya, Advs.

versus

NTPC LTD & ANR.

..... Respondent

Through Ms.Maninder Acharya, Sr. Adv. with
Mr.Tarkeshwar Nath, Mr.Viplav Acharya &
Mr.Harshit Singh, Advs.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

ORDER

19.08.2020

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1. This is a petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') whereby the Claimant before the Arbitral Tribunal is seeking termination of the respondent's nominee Arbitrator on account of his refusal to participate in the arbitral proceedings through video conferencing. In furtherance thereof, the petitioner has also prayed that this Court substitute the respondent's nominee Arbitrator by appointing a suitable arbitrator in his place.

2. Mr Dayan Krishnan, learned senior counsel for the petitioner submits that the petitioner's primary grievance is that even though two members of the three member Arbitral Tribunal were ready and

willing to conduct further hearings through video conferencing and had, in fact, fixed the matter on 17.07.2020 to hear the respondent's remaining submissions, the third nominee Arbitrator, whose termination is being sought, had refused to participate therein. He further submits that in fact the respondent's counsel, without any justification, had also failed to take part in the proceedings held on 17.07.2020.

3. Mr Krishnan submits that once the respondent's nominee Arbitrator refused to conduct hearings through video conferencing, this implied that he was failing to discharge his obligations under the special regime of arbitration which envisages avoiding undue delay in hearings to ensure expeditious resolution of disputes. His refusal also shows that he is no longer interested in continuing to discharge his responsibilities as a co-arbitrator, which makes him unsuitable for the role and warrants termination of his mandate.

4. On the other hand, Ms. Acharya, learned senior counsel who appears on behalf of the respondents on advance notice, submits that no ground for termination of mandate under Section 14 of the Act has been made out by the petitioner in the facts of the present case. She submits that the respondent's nominee Arbitrator is 70 years of age and has expressed his inability to participate in virtual hearings due to lack technological proficiency. She further submits that the concerned officers of the respondents had contacted their nominee Arbitrator and requested him to reconsider his stance on the issue and explore the possibility of participating in the proceedings through video conferencing. However, in response, the learned Arbitrator reiterated

his inability to do so and stated that since he did not find hearings conducted via video conferencing to be very effective, he had reservations in this regard.

5. Ms. Acharya submits that in any event, the respondent's nominee arbitrator has not requested for an inordinately long adjournment, but has only requested for the next date of hearing to be fixed after 22.10.2010 as he hopes for resumption of physical hearings by then. She further submits that considering the pendency of the arbitral proceedings in question for the last seven years, no irreparable prejudice will be caused to the petitioner if the same is deferred by a few more months.

6. At this stage, learned senior counsel for the petitioner submits, on instructions, that even though the petitioner is seriously aggrieved by the decision of the respondent's nominee Arbitrator, compounded by the fact that the refusal to participate has not been substantiated with any cogent reasons, the petitioner would be satisfied if, for the present, this petition is disposed of as not pressed. However, the petitioner prays that this Court may clarify that in case physical hearings in arbitral proceedings are not resumed by the date provided by the respondent's arbitrator, i.e., 23.10.2020, he will at least make an endeavour to familiarize himself with the technological procedures and begin participating in virtual hearings.

7. In my view, the petitioner's suggestion is reasonable and fair. In these difficult times when the whole world is grappling with the pandemic of COVID-19 and the only known deterrent to the disease so far is the practice of social distancing, there can be no gainsaying

that physical hearings of arbitral proceedings are undesirable. Undoubtedly the pandemic has necessitated a shift to virtual hearings which, resultantly, have become a regular feature of holding court in most courts and tribunals, helped transcend the limitation of geographical proximity while participating in legal proceedings and led to an increase in the use of electronic technology. Mr. Krishnan is, therefore, justified in urging that once most courts, including the Apex Court, High Courts and Tribunals, are accommodating an increasing number of matters via virtual hearings, then the process of arbitration, which is meant to ensure speedy resolution of disputes, ought to follow suit and adopt virtual hearings.

8. Even though I am inclined to agree with the general proposition urged by the petitioner that an attempt should be made to embrace virtual hearings in arbitral proceedings, the facts of the present case compel me to hold in favour of the respondent. There is merit in Ms Acharya's submission that refusal of the respondent's nominee arbitrator to participate in the proceedings through video conferencing, at a stage when proceedings have already remained pending for 7 years, is not sufficient on its own to terminate his mandate. Furthermore, due regard ought to be given to the fact that the petitioner's request to conduct hearings over video conferencing was made for the first time only on 08.06.2020, in response where to the nominee arbitrator has merely requested a deferment to any date after 22.10.2020 with the hope that physical hearings will be resumed by then.

9. The petition, along with pending application, is accordingly disposed of as not pressed, with the hope that the nominee arbitrator of the respondent shall try and rise to the occasion by utilising the time until the next date of hearing, to acclimatize himself with the system of video conferencing. It is expected that the learned arbitrator will also appreciate that the true strength of arbitration, as a part of the alternate dispute resolution system, lies in its efficiency which has experienced a setback in the light of the global pandemic. However, that has only ushered in an opportunity to include and expand the use of video conferencing to conduct virtual hearings in arbitration, and could be a transformational tool in innovating arbitration and enhancing its efficiency; the learned nominee Arbitrator of the respondents can, therefore, endeavour to capitalise on these benefits as also the flexibility offered by electronic technology.

10. At this stage, I am also constrained to observe that there appears to be a communication gap between the three members of the Arbitral Tribunal, which is reflected from the e-mails brought on record. It is expected that the learned presiding Arbitrator will examine this aspect and ensure that proper discussions are conducted between the three arbitrators in order to agree upon mutually acceptable, procedural modalities.

REKHA PALLI, J

AUGUST 19, 2020

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