

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :: 04.02.2021	PRONOUNCED ON :: 30.04.2021
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A.Nos.8474 of 2018 and A.No.270 of 2019

in
O.P.No.880 of 2015

P.T.ASHA, J.

The claimant/petitioner had moved this Court for termination of the mandate of the Arbitrator who has been arrayed as the second respondent in the above petition O.P.No.880 of 2015. The claimant petitioner has filed the following applications in the said petition which are detailed herein below:

a) A.No.7065 of 2015 has been filed by the applicant to stay all further proceedings pending before the second respondent.

b) A.No.8474 of 2018 is filed for a direction to the third respondent to produce certain details regarding the second respondent.

c) A.No.270 of 2019 is filed for amending the petition in O.P.No.880 of 2015.

2. Though A.No.7065 of 2015 had been filed by the applicant seeking a stay of all further proceedings of the Arbitral Tribunal arguments were not advanced on this and the arguments were addressed only in respect of A.No.8474 of 2018 and A.No.270 of 2019.

3. The facts in brief necessary for disposing these applications are hereinbelow narrated:

3.1. The first respondent had issued a Tender Enquiry for Lumpsum Turnkey Contract (LSTK-2) Sea Water RO Desalination Plant for 5.8 MGD sea water desalination project for the first respondent at North Chennai. The scope of work was engineering, supply, erection, construction, Commissioning and performance testing of seawater RO desalination Plant for the 5.8. MGD sea water desalination project. The applicant had participated in the tender and, the first respondent satisfied with the qualifications of the petitioner had accepted the bid submitted by the petitioner. The first respondent had accepted the bid vide their fax dated 31.08.2005 which was followed by a letter of acceptance dated 23.09.2005. The parties thereafter signed an agreement dated 06.12.2005.

3.2. After the completion of the project, disputes arose between the petitioner and the first respondent relating to payments. The petitioner had invoked the arbitration clause, namely, Clause 12 of the General Conditions of Contract of the Tender Document on 05.06.2012 and the disputes were referred to arbitration. As per the Arbitration clause contained in the Contract, appointment of the Arbitrator was to be done by the Standing Conference of Public Enterprises (SCOPE). They had appointed the second respondent as the Sole Arbitrator. When the arbitration was at the stage of conclusion of cross examination of C.W.1, the claimant came forward with this application for terminating the mandate of the Arbitrator. The only ground on which the termination was sought for is on account of the fact that the Arbitrator, namely the second respondent herein, had actively participated in the cross examination of the claimant's witness. The grievance of the claimant is that the Arbitrator not only prompted the counsel cross examining the witness but also the witness to give all answers. They would therefore submit that since the second respondent had lost his neutrality and his mandate has to be terminated.

Application Nos.8474 of 2018 and 270 of 2019:

3.3. Pending this petition, the applicant has come forward with the above applications.

4. A.No.8474 of 2018 has been filed for directing the third respondent namely the Standing Conference of Public Enterprises to provide the following details with reference to the second respondent.

a) The number of arbitration matters in which second respondent was appointed as arbitrator;

b) The dates on which second respondent was appointed as arbitrator in each of these arbitrations.

4.1. The applicant would submit that the second respondent was a retired Executive Director of the Indian Oil Corporation Limited, which is the parent company of the first respondent. The applicant at the time of giving its consent for the appointment of the second respondent was totally unaware about his inexperience as an Arbitrator. The applicant claimant had to choose from the list of arbitrators provided by SCOPE. The applicant had consented for the

appointment of the second respondent in the belief that he was an experienced Arbitrator. It was only on the first day of the Arbitration sitting that the second respondent disclosed that this was his first arbitration and the inexperience of the second respondent became evident from the manner in which he conducted himself during the cross examination of C.W.1.

5. The applicant would submit that they had, through their employee, sent an RTI Application to the third respondent, SCOPE asking them to furnish details about the second respondent's experience as an Arbitrator. This request was turned down by a letter dated 30.06.2018. Therefore, the applicant is left with no other choice except to move this Petition.

6. A.No.270 of 2019 has been filed to amend the Petition in O.P.No.880 of 2015 by including Paragraph Nos. 28A and 28B. The amendment that is sought to be introduced is that the second respondent holds shares in the first respondent and their holding company Indian Oil Corporation Limited 'IOCL'. That apart, the second respondent was currently an office bearer in IOCL's Corporate Social

Responsibility Initiatives and he advises IOCL in this regard. Therefore, the second respondent has become *de jure* unable to perform his functions.

7. The next amendment that is sought for is on the ground that the Arbitration Agreement mandates the Arbitrator to render the Award within six months of the commencement of the arbitration proceedings, and the same may be enlarged by consent of the parties. This enlargement has been made periodically and the last of such extension expired on 03.12.2015. The applicant would submit that the matter was being adjourned to arrive at an amicable settlement and since an amicable settlement is not possible the applicant is not willing to grant further extension of time. Consequently the second respondent can no longer function as an arbitrator. Therefore, the applicant would seek to have the mandate terminated.

8. A counter statement has been filed by the first respondent in response to A.No.270 of 2019. It is the contention of the first respondent that the very O.P. namely O.P.No.880 of 2015 is not maintainable as the applicant/petitioner has not made out any case for

terminating the mandate as contemplated under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"). The only ground on which the applicant had moved this Court to terminate the mandate of the Arbitrator/second respondent herein was that he was actively participating during the cross examination of C.W.1. The first respondent would submit that the applicant was aware even at the time of the appointment of the second respondent as an Arbitrator that he was an Executive Director of IOCL, prior to his retirement. Therefore, the allegations that they were unaware about the same is absolutely false.

9. The first respondent would further submit that this application is highly belated, since the petition for terminating the mandate has been filed as early as in the month of October, 2015 and this application has been taken out four years thereafter. The only attempt on the part of the petitioner was to protract the proceedings. The reason why the second respondent Arbitrator was unable to pass the Award within the time stipulated was on account of the frequent adjournments taken by the applicant/petitioner and the applicant cannot take advantage of their own wrong.

10. The first respondent would submit that the petitioner has sought for extension of time for submission of its statement of claims from February, 2015, till September 2015, the petitioner had been taking time for the cross examination of his witness. In fact, in the hearing on 30.09.2015, it was agreed that the cross examination of C.W.1 would be concluded by 16.10.2015 and the re-examination if any, would also be concluded on the same day. However, the applicant has rushed to this Court by filing the present Petition. The present application is yet another attempt to protract the proceedings and therefore the application deserves to be dismissed.

11. With reference to A.No.8474 of 2018, the first respondent has submitted oral and written arguments.

Submissions:

12. Mr. V. Ramakrishnan, learned Senior Counsel appearing on behalf of the counsel for the applicant, even at the outset would fairly concede, that they have absolutely no grievance about the integrity and honesty of the Arbitrator/second respondent.

13. The learned Senior Counsel would submit that the reason for seeking to amend O.P.No.880 of 2015 was on account of the fact that the second respondent has been sitting alongside the first respondent's counsel and suggesting questions for cross examination, modification to questions and modification to the witness' answers. The second respondent had given out that he wanted to get to the bottom of the issue and find out the truth. It is the contention of the learned Senior Counsel that the second respondent was conducting the enquiry like a departmental fact-finding mission. Further the second respondent hold shares in the first respondent and its holding to the Indian Oil Corporation Ltd. and is an office bearer in IOCL's Corporate Social Responsibility. Therefore, the necessity for seeking the amendment to declare the second respondent de jure incapable of continuing as an Arbitrator.

14. The amendment sought to be introduced as Paragraph 28 B would narrate that the Arbitration Clause provided for completion of Arbitral proceedings within six month's time, with a condition that the period could be extended if consent is given by both parties.

Accordingly, the period was extended from time to time on consent from both sides. The extension by consent had expired on 03.12.2015. Therefore, the mandate of the second respondent had terminated. The issue therefore was whether the mandate had terminated on account of efflux of time. If the mandate is not terminated then the applicant would have to file another application under Section 14 based on the subsequent development which would lead to multifarious proceedings. The amendment which is sought to be introduced as paragraph No.28 A is that the second respondent in his counter has stated that he does not own any share in the first respondent company. However, he has accepted the fact that he holds 20,000 shares in Indian Oil Corporation which is the holding company of the first respondent company. The second respondent has stated that he is no longer the office bearer of IOLC's Corporation Social Responsibility Initiative. The applicant is however not able to accept the statement or deny the same at present.

15. The learned Senior Counsel would contend that Section 12 of the Act prior to the 2015 amendment required the Arbitrator to make proper disclosure prior to his appointment which has not been done by

the second respondent. The second respondent ought to have declared his holding of the above shares in IOLC since the share holding is a significant one. Therefore, the applicant wanted to introduce the defense that the second respondent had *de jure* become unable to perform his functions as Arbitrator.

16. As regards A.No.8474 of 2018, the learned Senior Counsel would submit that since the second respondent had failed to disclose the details at the time of his appointment, the applicant was left with no other option except to seek these details from the third respondent. Therefore, he would seek to have the two applications ordered as prayed for.

17. Per contra, Mr. Arjun Suresh, learned counsel for the first respondent has made oral arguments and submitted his written submissions. Learned counsel would contend that A.No.8414 of 2018 deserves to be dismissed on the ground that it is highly belated and there has been no request made earlier by the applicant to the third respondent seeking the details about the second respondent prior to their giving consent for his appointment. After having participated in

the proceedings till the stage of cross examination of claimants witness such an application is nothing but an abuse of the process of Court.

18. The counsel would briefly take this Court through the sequence of events after the arbitration clause had been invoked on 05.06.2012 in order to show the conduct of the applicant.

<i>Date</i>	<i>Event</i>
15.10.2012	Claim statement filed before the third respondent and requested for prospective arbitrator.
13.12.2012	A list of 140 arbitrators given to the parties
16.01.2013	Applicant gives letter proposing the names of three arbitrators including the name of second respondent herein.
28.01.2013	The first respondent had suggested the names of five arbitrators including the name of second respondent herein.
08.02.2013	Applicant requested the third respondent to appoint the second respondent as the sole arbitrator and the second respondent was common nomination of both, the applicant as well as the first respondent.
12.08.2013	The first arbitral hearing held then subsequent hearing relating to submission of pleadings, proof affidavit, arguments, etc., commenced on September, 2015.
15.10.2015	O.P.No.880 of 2015 filed.

19. Therefore, it is the contention of the learned counsel for the applicant that this application is belated and the applicant had waived their right to question the appointment of the second respondent at this late stage.

20. As regards A.No.270 of 2019, the learned counsel would submit that nearly four years after the filing of the petition in O.P.No.880 of 2015, the applicant seeks to carry out an amendment to Original Petition that too, after the O.P. had been extensively argued on the earlier occasion. Knowing fully well that their petition to terminate the mandate of the second respondent is baseless this attempt by the applicant to introduce some reason to sustain the petition.

21. The learned counsel would submit that the contention of the applicant that the mandate of the second respondent/arbitrator had ceased since the arbitration clause provided that the Award should be passed within a period of six months from the commencement of the Arbitral proceedings is totally baseless. As soon as the evidence taking had commenced the O.P to terminate the mandate has been filed.

22. The learned counsel presses into service Section 4 of the Arbitration and Conciliation Act to state that the applicant had waived his right to raise any objection at his belated stage. The matter was posted on 03.12.2015 only for completion of oral evidence. The applicant has participated fully in the proceedings and only a small portion of the cross examination of C.W.1 is pending. The attempt of the applicant is to somehow take away the admission that the first respondent had obtained throughout the proceedings, through these amendment petitions. The contention that the arbitration clause had expired is to say the least is, absurd.

23. Discussion:

23.1. Before proceeding to consider the applications in question, it is necessary to briefly set out the grounds on which the main petition under Section 14 of the Act has been filed.

23.2. The applicant/petitioner has filed O.P.No.880 of 2015 on the following grounds:

a) The second respondent is not acting in a neutral manner:

i) that the second was seated next to the counsel for the first respondent and was suggesting questions for cross examination, modification to the questions asked and also suggesting modifications to the witness's answer.

ii) frequent prompting by the second respondent that if there are contradictions between the witness's evidence and the pleadings, it would be fatal to the case of the petitioner.

iii) second respondent expresses lack of faith in the report of the consultant of the first respondent and that the second respondent wanted to get to the bottom of the case and discover the truth.

b) by ceasing to be neutral the second respondent had de jure and de facto become incapable to perform his duties.

23.3. From the tabular statement that was submitted by the first respondent and which has been extracted in paragraph No.18 supra and from the counter and submission made by the counsel for the first respondent, it is seen that the proceedings had commenced on 12.08.2013 and ultimately the matter was posted on 03.12.2015 for the conclusion of the oral evidence of C.W.1, the claimant's witness.

In fact, it was only a small portion of the cross examination that was pending. It is at this stage that the present application has been filed invoking the provisions of Sections 14 and 15 of the Act.

23.4. Although this Court is not considering the main O.P however since an amendment is sought to be introduced to the main O.P. by the petitioner nearly four years after the filing of the O.P. and six years after the first arbitral hearing, it is necessary to elaborate the amendment that is now sought to be introduced is twofold.

a) to declare the second respondent de jure incapable of continuing as arbitrator since he holds shares in the first respondent and its holding company Indian Oil Corporation Limited and as the office bearer in IOCL's Corporate Social Responsibility Initiatives.

b) The Arbitration clause provides for conclusion of the arbitration proceedings within a period of six months subject to the same being extended by consent and since this consent had expired on 03.12.2015.

23.5. As regards the first amendment that is sought to be introduced, the second respondent was selected by the applicant from out of the five names suggested by the first respondent. The selection had taken place as early as on 08.02.2013. The applicant had not objected to the appointment of the second respondent as Arbitrator despite knowing the fact that he had functioned as the Chief Executive Officer of the Indian Oil Corporation. The shares are said to have been allotted to the second respondent during his tenure as an employee and the same has increased through bonus shares and from purchase in the open market. This is a ground that squarely falls within the provisions of Sections 12 (1) and 12 (2) of the Act.

23.6. It is not the contention of the applicant/petitioner that the second respondent is incapable to act as an Arbitrator. They would contend that by reason of his holding shares in the first respondent company and its parent company justifiable doubts arise as to his independence. This squarely falls within the Fifth Schedule of the Act where the procedure for challenge is only under Section 13 of the Act. The Hon'ble Supreme Court in the judgment reported in "[**2018 12 SCC 471, HRD Corporation (Marcus Oil and Chemical Division)**]

vs Gail (India) Limited, had discussed in detail about the persons becoming incapable to be appointed as Arbitrators and the persons about whom justifiable doubts exist as to their independence.

23.7. The learned Judges had held as follows:

12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a),

he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under [Section 13](#). Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under [Section 14\(2\)](#) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator’s independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal

under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items

contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

The ratio laid down in the above judgment will apply on all fours to the instant case.

23.8. The procedure for challenge is provided under Section 13 of the Act. Section 13 (2) squarely provides that a challenge to the Arbitrator should be made within a period of 15 days from the date of the party becoming aware about the constitution of Arbitral Tribunal or on becoming aware about the circumstances specified in Sub Section (3) of Section 12. Such a challenge can be made only before the Arbitral Tribunal. Further as per Section 12 (3) of the Act, the appointment of the Arbitrator can be challenged only if

a) circumstances exist that give rise to a justifiable doubt regarding his independence or impartiality.

b) he does not possess the qualification agreed to by the parties.

Therefore, the first amendment has to be amended on the basis of the above provisions.

23.9. The learned Senior Advocate who is appearing for the applicant has fairly conceded that they have absolutely no doubt about the honesty and integrity of the second respondent arbitrator.

23.10. In the main petition, the applicant has only contended that the Arbitrator was prompting the counsel for the respondent while he was cross examining and suggesting questions and he was also assisting the witness namely the witness of the applicant/petitioner in giving answers. In fact, it is the respondent who has to be aggrieved by this conduct if the same is true. The petition before this Court is one for terminating the mandate under Section 14 (1) of the Act. The provisions of Sections 12 and 14 operate at different levels. In a judgment reported in "**[2014 2 CTC page 427], Chennai Metro Rail Ltd., vs Lanco Infratech Ltd)**", the learned Judge had in detail considered the scheme of the Act with regard to Sections 12 to 15.

23.11. The learned Judge had observed as follows in paragraph 21 of the Judgment:

" 21. From a careful perusal of Sections 12 to 15, it could be seen that if the appointment of an Arbitrator is challenged on the grounds indicated in sub section (3) of Section 12, a remedy is provided in express terms under Section 13 (2). Similarly, if a party claims that the mandate of an Arbitrator stands terminated in terms of Section 14 (1) (a), a remedy is provided in express terms under Section 14(2). Therefore, to find an answer to the question of maintainability, all that one has to do is to see whether (i) the case on hand i) the case on hand relates to the challenge of an Arbitrator or the termination of a mandate and (ii) the case on hand is relatable to Section 12(3) or to Section 14(1)(a).

If the case on hand is simply a challenge to the very appointment of an Arbitrator and if such a challenge is made on the grounds available under Section 12(3), then the remedy of the petitioner is only under Section 13(2). On the other hand, if the case on hand is for the termination of the mandate and if the ground on which such termination of mandate is sought, could be traced to Section 14(1)(a), then the remedy is only under Section 14(2).

23.12. The learned Judge had drawn a dichotomy between the provisions of Section 12 and the procedure contemplated in Section 13 vis-a-vis Sections 14 and 15 of the Act.

23.13. The contents of the amendment sought for clearly indicates that it is one falling within the contours of Section 12 (3) and therefore, the procedure of challenge is as contemplated under Section

13 and not under Section 14 (1) of the Act. Therefore, this amendment cannot be permitted.

23.14. The next amendment that is sought to be introduced is that the mandate of the Arbitral Tribunal has come to an end by efflux of time. If the sequence of events are analyzed, it is seen that when the matter had been adjourned to 03.02.2015 for continuation of cross examination even before the said date that is on 15.10.2015, the applicant has moved this Court for terminating the mandate. It is needless to state that the Court has the power to extend the period of the Arbitral Tribunal.

23.15. The case in question is a pre 2015 Arbitration and therefore the provisions of Section 29 (A) would not be applicable to the proceedings. Even assuming that provisions are applicable, it is open to the court to extend the mandate of the Arbitrator. Therefore, this amendment also has to fail. Therefore, the applicant/petitioner has not made out any case for amending the petition.

23.16. As regards A.No.8474 of 2018, the same is filed seeking the following details from the third respondent:

- a) The number of arbitration matters in which second respondent was appointed as arbitrator
- b) The dates on which second respondent was appointed as arbitrator in each of these arbitrations
- c) The number of arbitration matters decided by second respondent
- d) The number of arbitration matters pending before second respondent
- e) The date on which second respondent was empaneled with third third respondent and
- f) The second respondent arbitration experience as per third respondent's records.

23.17. A perusal of these details would clearly show that these details ought to have been sought for at the time of appointment of the Arbitrator. Having participated in the proceeding till the stage of cross examination the present application is nothing but an abuse of process of court and an attempt to protract the arbitral proceedings by

filing such applications. The applicant is only trying to delay the speedy disposal as enshrined in the Act and which forms the corner stone of the Act.

23.18. Considering the fact the applicant has clearly stated that they have no doubt about the integrity and honesty of the second respondent/arbitrator, this application also deserves to be dismissed.

In fine A.Nos.8474 of 2018 and 207 of 2019 stand dismissed. No costs.

Internet : Yes/No
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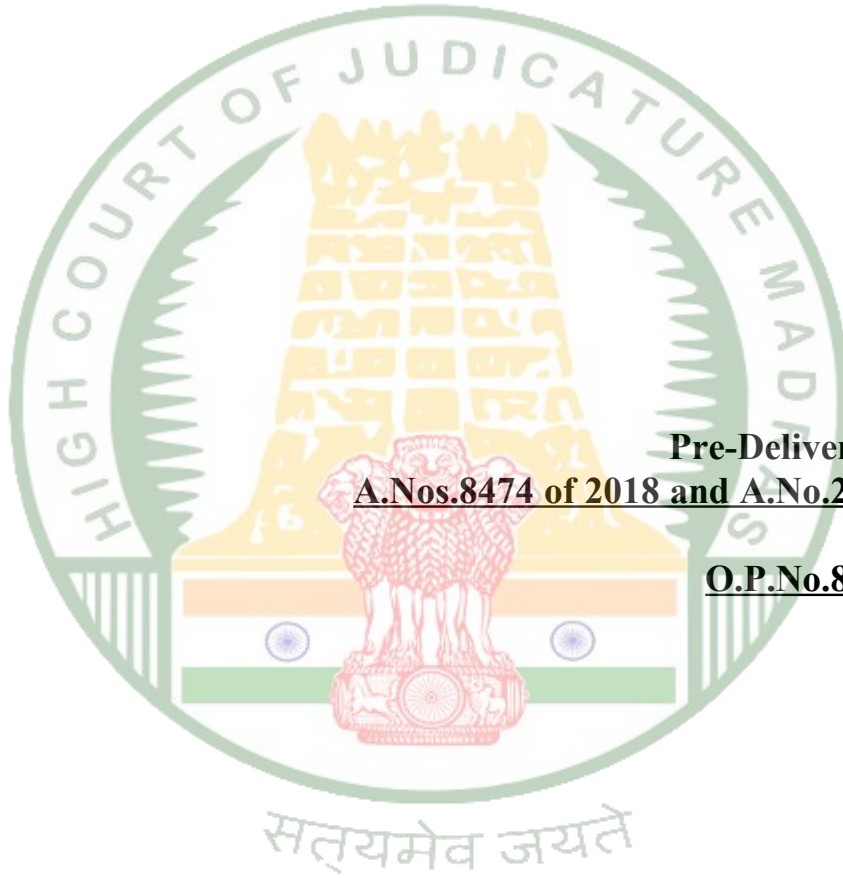
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A.Nos.8474 of 2018 and A.No.270 of 2019
in O.P.No.880 of 2015

P.T. ASHA. J,

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