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

Date of Decision: 19th July, 2021

+ ARB. P. 84/2021

MOHD IQBAL

..... Petitioner

Through: Mr. Kunwar Chandresh &
Ms. Poonam Prasad, Advocate.

versus

UNION OF INDIA

..... Respondent

Through: Ms. Rashmi Malhotra, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. Frustrated with never-ending arbitration proceedings, the Petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, [hereinafter 'the Act'] for the appointment of an independent Sole Arbitrator for adjudication of disputes that arose 16 years ago on account of alleged illegal termination of a contract. The facts noted hereinafter reveal a highly worrying and disappointing situation that makes a mockery of arbitration proceedings.

2. The Competent Authority of Northern Railways (being the Respondent herein) *vide* letter of acceptance dated 15th July, 2003 accepted the Petitioner's bid in respect of its tender for '*Water supply arrangements*

including construction of new underground tank and its connection with existing pump house and other allied works for new washing lines at New Delhi yard (Lahori Gate area)’ [hereinafter ‘Work’]. The said contract incorporates by reference an arbitration agreement contained in Clause 64 of the General Conditions of Contract-1999 issued by Railway Board.

3. The Work was rescinded, and the contract was terminated on 3rd March, 2004. The Petitioner raised claims on the Respondent for loss and damages. On 3rd July, 2004, the Respondent also raised a counter-claim for liquidated damages. The Petitioner invoked arbitration *vide* letter dated 11th August, 2004 and called upon the Respondent to appoint an Arbitrator to adjudicate the disputes. This led to the eventual constitution of the first Arbitral Tribunal consisting of three members, comprising of serving officers of the Respondent (railways).

4. It turns out that the Arbitral Tribunal had to be re-constituted multiple times on account of resignation, retirement or transfer of the officers who were appointed as arbitrators. Thus, the proceedings dragged along and the sixth Arbitral Tribunal came to be constituted on 8th March, 2017. It also emerges that this Arbitral tribunal lost track of the proceedings, and as a result, the situation has reached a complete stalemate.

5. With the intent to complete the long-drawn arbitration proceedings, the Respondent *vide* letter dated 19th July, 2019, called upon the Petitioner to consent to switch over to the provisions of the Arbitration and Conciliation (Amendment) Act, 2015, and for the applicability of Clause 64(3)(a)(i) of GCC-2018 for nomination of a Sole Arbitrator, as the total claim value was

less than Rs. 1 crore. However, the Petitioner did not agree to the amended clause and as a result the proceedings continue to standstill.

6. In its reply to the petition, the Respondent now asserts that they had been requesting the sixth Arbitral Tribunal (*vide* several letters dated 17th December, 2019, 10th June, 2020 and 22nd June, 2020) to expedite the arbitral hearings. Furthermore, during the proceedings held on 25th May 2021 in this petition before the court, Mr. Neeraj Shukla, Executive Engineer of the Respondent, appeared and stated before this Court that the sixth Arbitral Tribunal is still in existence. This was controverted by the Petitioner by relying upon a letter dated 24th February, 2020 issued by the Deputy Chief Manager on behalf of the General Manager, Northern Railways, which suggested that the mandate of the Arbitral Tribunal has been terminated. In this background, Respondent was directed by the Court *vide* order dated 27th May, 2021, to file an affidavit confirming the factual position. The affidavit, duly filed by the Respondent, now confirms that the sixth Arbitral Tribunal has indeed been terminated. Such is the sorry state of affairs.

7. Be that as it may, as on date, there is no Arbitral Tribunal in place. Despite several requests by the Petitioner, the Respondent has not taken steps for constituting a fresh arbitral panel. Communications have been exchanged between parties, but it goes no further.

8. Mr. Kunwar Chandresh, learned counsel for the Petitioner requests for the appointment of a Sole Arbitrator instead of a three-member tribunal, to minimise the arbitration costs, citing the value of the claim amount and

relying upon the decisions of the Supreme Court in *UOI. v. Singh Builders Syndicate*,¹ *Northern Eastern Railways v. Tripple Engineering Works*,² and *UOI. v. Uttar Pradesh State Bridge Corporation Ltd.*,³ to urge that this Court can appoint a Sole Arbitrator instead of a panel of three Arbitrators in terms of clause 64 of GCC-2018.

9. The court has heard the counsel for the parties. The jarring fact remains that it's now over 16 years since the commencement of arbitral proceedings, but the disputes have not yet been resolved. The Respondent has not constituted the Arbitral Tribunal in terms of the clause that governs the parties. Apparently, it claims, that for years it has followed up with the Arbitral Tribunal, but to no avail; whereas, the arbitrators of the tribunal were its own serving officers (of the Respondent). Now in its reply to the present petition, Respondent would like to blame the Petitioner for not agreeing to switch over to the amended clause; and for not suggesting the names for formation of a new panel. This is not acceptable. The option to switch over was given four years after the amendment. No explanation is forthcoming for the delay. Then, after giving such option to the Petitioner to make a nomination for reconstituting the tribunal, vide letter dated 24th February 2020, Respondent has slept over the matter without taking any steps, and is now trying to hold the Petitioner responsible for the delay.

10. There is a total deadlock, as a result of which, there is no arbitral tribunal in place today.

¹ (2009) 4 SCC 523.

² (2014) 9 SCC 288.

³ (2015) 2 SCC 52.

11. The intent and purpose of expeditious dispute resolution through ADR mechanisms has already been frustrated by the Respondent's conduct. The delay in completing the arbitration is inordinate and inexcusable. This delay has occurred entirely on account frequent transfer, retirement or resignation of the members of the Arbitral Tribunal consisting of serving employees of the Respondent, or due to failure on the part of the Respondent to reconstitute the Tribunal. In light of such conduct, it would be unfair to the Petitioner if the Respondent was permitted to form the Arbitral Tribunal once again from its panel of officers. In fact, the Respondent has forfeited its right to constitute the Arbitral tribunal, having not acted as per the procedure despite Petitioner's requests for constitution of the Tribunal. It is, moreover, settled position in law that once a petition under Section 11 of the Act is filed, the power of the defaulting party to appoint an arbitrator in terms of the arbitration clause of the agreement, ceases. [See: *Datar Switchgear Ltd. v. Tata Finance Ltd.*,⁴ and *Deep Trading Company v. Indian Oil Corporation*.⁵]

12. In *Singh Builders Syndicate* (*supra*), in a somewhat similar situation, the Supreme Court had expressed its anguish at the manner in which the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. In the present case as well, a total of six Arbitral Tribunals have been constituted in a span of thirteen years, and as on date, there is no Arbitral Tribunal in place. Petitioner is still struggling for an avenue for adjudication of its disputes. Respondent, who is also a counter-claimant, is more interested in asserting its right to form the

⁴ (2000) 8 SCC 151.

⁵ (2013) 4 SCC 35).

Arbitral Tribunal, rather than in the conclusion of the arbitral proceedings. Further, as held in *Tripple Engineering Works* (*supra*), in exceptional circumstances, it is indeed permissible for the court to depart from the agreed terms regarding the appointment of an Arbitral Tribunal.

13. Respondent is also keen to have a sole arbitrator as is evident from their communication dated 19th July 2019 wherein, while requesting the Petitioner to switch over to procedure under the amended Act, consent was also sought for nomination of sole arbitrator under Clause 64(3)(a)(i) of GCC-2018.

14. As noted already, more than 16 years have lapsed since the Petitioner has raised the claims for alleged wrongful termination of contract. In such a scenario, the effort of this Court has to be to ensure that the Arbitral Tribunal is constituted promptly, and the arbitration does not drag on for years and decades. Having regard to the facts of the case, the court agrees with the Petitioner that no fruitful purpose would be served by once again reconstituting a three-member Arbitral Tribunal in accordance with Clause 64. Thus, the court unhesitatingly departs from the agreed procedure and appoints a sole arbitrator for adjudication of disputes between the parties.

15. In view of the above, the present petition is allowed. Accordingly, Mr. Kuldip Singh, Retired ADJ, Delhi [Contact No.: 9868237722], is appointed as the Sole Arbitrator to adjudicate the disputes between the parties arising under the letter of acceptance dated 15th July, 2003.

16. The parties are directed to appear before the learned Sole Arbitrator as and when notified. This is subject to the Arbitrator making the necessary

disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

17. The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the Act.

18. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the learned Arbitrator in accordance with law.

19. The petition stands disposed of in the above terms.

JULY 19, 2021

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(corrected and released on 24th July, 2021)

SANJEEV NARULA, J