



\$~1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 578/2018, I.A. 10614/2018 (Stay)****A2Z CONSTRUCTIONS**

..... Petitioner

Through: Mr. Gaurav Bahl, Advocate
(Ph. 98111328, e-mail:
bahlg77@gmail.com)

versus

INDIAN STATISTICAL INSTITUTE

..... Respondent

Through: Mr. Neeraj Chaudhari and
Mr. Ravjyot Singh, Advocates
(Ph. 9999187343, e-mail:
office@neerajchaudhari.com).**CORAM:****HON'BLE MS. JUSTICE MINI PUSHKARNA****JUDGEMENT****06.09.2022**

%

1. There are directions from the Hon'ble Supreme Court as contained in order dated 19.05.2022 in S.L.P. (C) No. 5306/2022, which read as follows:

“In that view of the matter, we request all the Chief Justices of the respective High Courts to ensure that all pending applications under Sections 11(5) and 11(6) of the Arbitration Act and/or any other applications either for substitution of arbitrator and/or change of arbitrator, which are pending for more than one year from the date of filing, must be decided within six months from today. The Registrar General(s) of the respective High Courts are directed to submit the compliance report on completion of six months from today. All endeavour shall be made by the respective High Courts to decide and dispose of the



applications under Sections 11(5) and 11(6) of the Arbitration Act and/or any other like application at the earliest and preferably within a period of six months from the date of filing of the applications.”

2. In view of the categorical mandate by Hon’ble Supreme Court, the present petition is taken up for hearing.

3. It is submitted on behalf of learned counsel for the petitioner that in the present case an Arbitrator was appointed by the respondent in terms of Clause 36 of the Agreement dated 14.02.2011 between the parties, which reads as under:

“36. ARBITRATION

Except where otherwise provide in the contract, all questions and disputes relating to the interpretation of the specifications, design ns, drawings and instructions herein before mentioned, and as to tile quality or workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, specifications, estimates, instructions, orders on these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the sole arbitration of the person appointed by the Head -Indian Statistical Institute. The arbitrator to whom the matter is originally referred, being unwilling or unable to act for any reason, Head – Indian Statistical Institute , Delhi Centre shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predec.es.sor. The arbitrator shall give a speaking award. The award of the Arbitrator shall be final and binding on the parties. The cost of the Arbitrator shall be borne equally by both the parties.



It is also a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute. It is also a term of the contract that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the Employer that the final bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the Employer shall be discharged and released of all liabilities under the contract in respect of these claims.

The Arbitrator may from time to time with consent of parties enlarge the time for making publishing the award. Subject as aforesaid the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration reference under this clause.”

4. The petitioner herein appeared before the said Arbitrator appointed by the respondent and moved an application under Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) challenging the competence of the Arbitral Tribunal. The said application under Section 16 the Act was allowed by the Arbitrator vide order dated 06.04.2015.

5. Against the aforesaid order dated 06.04.2015 passed by the learned Arbitrator, the respondent herein filed an appeal before this Court being ARB. A. 38/2015. The said appeal came to be disposed of by this Court vide order dated 09.04.2018. By way of said order dated 09.04.2018, this Court allowed the arbitration appeal filed on behalf of the respondent herein. The order dated 09.04.2018 passed in ARB. A.



38/2015 held as follows:

“20. Further, the findings recorded by the learned Arbitrator to allow the application of the respondent under section 16 of the Act are misplaced. The learned Arbitrator holds that where there is an allegation of collusion, it would require interrogation of the suspects. Similarly, he holds that there are accusing fingers being pointed out at some unidentified members of the staff. He further holds that to identify these members would require interrogation and the learned Arbitrator does not have such power to summon and interrogate anyone. This finding is entirely misplaced and misconceived. The interrogation is to be done by the police at the time of investigation of the FIR. The learned Arbitrator is not investigating the facts stated in the FIR. The simple case before the learned Arbitrator was as to whether the respondent is liable to refund excess payment and also pay the other dues of the appellant. The question of the learned Arbitrator interrogating any suspect would not and does not arise.

21. The impugned order is erroneous and is liable to be set aside. The said order wrongly holds that the disputes are not capable of being adjudicated through Arbitration. I accordingly quash the impugned order dated 6.4.2015. The matter is remanded back to the arbitral tribunal for fresh adjudication, as per law. It may be noted that anything said herein would not in any manner influence the investigation of the FIR filed by the appellants.”

6. After passing of aforesaid order dated 09.04.2018 by this Court in ARB. A. 38/2015, the parties approached the learned Sole Arbitrator. However, the learned Arbitrator by order dated 04.05.2018 terminated his mandate on the ground of his pre-occupation.

7. Subsequently, the respondent appointed a retired ADJ to act as the Sole Arbitrator. Against the aforesaid appointment of a fresh



Arbitrator by the respondent, the petitioner herein has filed the present petition under Section 12(5) and 14 of the Act, for termination of the mandate of the Sole Arbitrator by declaration that appointment of the new Arbitrator appointed vide letter dated 18.05.2018, is null and void.

8. The present petition has been filed on behalf of the petitioner on the ground that by virtue of Section 12(5) of the Act, as amended, the Head of the respondent, ceases to have any authority to appoint an arbitrator in the matter both in law and in fact. Learned counsel for the petitioner has submitted that the present petition has been filed mainly on the ground that Hon'ble Supreme Court as well as this Court has held that by virtue of the Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an Arbitrator. Thus, it is submitted on behalf of the petitioner that from the language employed in the Seventh Schedule, Head of the respondent has become ineligible by operation of law and fact. Thus, it is the case of the petitioner that once the Head of the respondent becomes ineligible to be appointed as an Arbitrator, he ceases to have any authority to appoint any arbitrator.

9. Thus, in view of the aforesaid submissions, it is the case of the petitioner that once the arbitrator has become ineligible by operation of law, he cannot nominate another person as an arbitrator. The Arbitrator has become ineligible as per prescription contained in Section 12(5) of the Act. It is further the case of the petitioner that once the identity of the head of the respondent as the sole arbitrator is



lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the appointment of the learned Sole Arbitrator by the Head of the respondent, is wrong and illegal.

10. The petitioner relies upon the judgment of Hon'ble Supreme Court in TRF Limited v. Energo Engineering Projects Ltd., (2017) 8 SCC 377.

11. Notice in the present case was issued by order dated 09.08.2018. By order dated 09.08.2018, this Court had held that the arbitration proceedings be carried out subject to final outcome of the present petition. Against the order dated 09.08.2018 passed by this Court, the petitioner herein filed Special Leave to Appeal (C) No. 24667/2018 before Hon'ble Supreme Court. By order dated 13.09.2018, Hon'ble Supreme Court passed the following order:

“Application for exemption from filing c/c of the impugned judgment is allowed.

Issue notice.

Status quo, as it exists today, shall be maintained by the parties, in the meantime.

Tag with SLP(Civi) Nos. 7161-7162 of 2018.”

12. By virtue of order dated 13.09.2018 passed by Hon'ble Supreme Court in Special Leave to Appeal (C) No. 24667/2018, arbitration proceedings have not proceeded thereafter. Status quo with respect to the arbitration proceedings is still continuing, as the said appeal before the Hon'ble Supreme Court is stated to be still pending.

13. Learned counsel for the petitioner has shown the status of the case from the Supreme Court website printed out today morning,



which shows that the case was last listed on 30.03.2022.

14. In view of the pendency of the appeal before Hon'ble Supreme Court, the present matter has been adjourned time and again at the request of the parties to await for the outcome of the appeal before Hon'ble Supreme Court.

15. Learned appearing counsel for the petitioner submits that the present petition may be kept pending and ought to be adjourned in view of the status quo order passed by Hon'ble Supreme Court.

16. Perusal of the order dated 13.09.2018 as passed by Hon'ble Supreme Court shows that Hon'ble Supreme Court has directed maintenance of status quo, as it existed that day, by the parties. Since the appeal pending before Hon'ble Supreme Court is against the order dated 09.08.2018 passed by this Court wherein there were directions that the arbitration proceedings may continue before the learned Arbitrator subject to outcome of the petition pending in the High Court, it is clear that the status quo order, as directed by Hon'ble Supreme Court, pertains to the arbitration proceedings pending between the parties. Thus, by way of order dated 13.09.2018, the Hon'ble Supreme Court has directed status quo with respect to the arbitration proceedings pending between the parties. Thus, in view of the aforesaid order dated 13.09.2018 passed by Hon'ble Supreme Court, the arbitration proceedings have remained in limbo and have not proceeded any further. Thus, both the parties are still complying with the directions of Hon'ble Supreme Court passed vide order dated 13.09.2018 and status quo as regards the arbitration proceedings is being maintained by the parties.



17. As regards the pendency of the present petition, it is seen that the present matter was being adjourned time and again for a long time at the request of the parties due to pendency of the aforesaid appeal before Hon'ble Supreme Court. However, in view of the clear mandate of Hon'ble Supreme Court vide order dated 19.05.2022 in S.L.P. (C) No. 5306/2022, the present matter has been heard in order to comply with the clear and categorical directions of Hon'ble Supreme Court.

18. The issue which has been raised by the petitioner in the present case as regards the authority of the respondent to appoint a Sole Arbitrator in view of the judgment of Hon'ble Supreme Court in the case of TRF Limited (Supra), is now pending before Hon'ble Supreme Court in the appeal filed by the petitioner herein. Perusal of order dated 13.09.2018 passed by Hon'ble Supreme Court, in fact shows that the appeal filed on behalf of the petitioner herein has been tagged along with SLP (Civil) Nos.7161-7162/2018. As per learned counsel for the petitioner, the said petitions also raise the same issue as regards the power of any party to appoint an Arbitrator in view of the clear embargo under Section 12(5) of the Act and in view of the law declared by Hon'ble Supreme Court in the case of TRF Limited (Supra).

19. Thus, the issue which has been raised in the present petition is now pending consideration before Hon'ble Supreme Court. The arbitration proceedings between the parties herein would now be dependent on the outcome of the petitions pending before the Hon'ble Supreme Court.



20. Thus, if the appeal filed on behalf of the petitioner herein before Hon'ble Supreme Court was to be allowed by Hon'ble Supreme Court, then the effect of such order would be that the mandate of the Arbitrator appointed by the respondent would stand terminated. In that eventuality, the present petition would in any way not survive. Similarly, if the appeal on behalf of the petitioner herein pending before Hon'ble Supreme Court was to be dismissed by Hon'ble Supreme Court, then the consequence would be that the Sole Arbitrator as appointed by the respondent shall continue and arbitration proceedings will carry on between the parties. In either way, whether the appeal filed on behalf of the petitioner before Hon'ble Supreme Court is allowed or dismissed, the issue as regards the continuation of the Arbitrator appointed by the respondent herein, shall be decided finally by Hon'ble Supreme Court itself.

21. Learned counsel appearing for the respondent submits that the order passed by the respondent appointing Sole Arbitrator is absolutely correct and as per law. He further submits that the respondent herein is being represented before the Hon'ble Supreme Court in the appeal filed on behalf of the present petitioner and that they are defending their actions before Hon'ble Supreme Court.

22. In view of the aforesaid discussion, no useful purpose will be served in keeping the present petition pending, and the same is sought to be disposed of by this order.

23. It is clarified that the disposal of the present petition will not come in the way of the petitioner herein to pursue his appeal i.e. Special Leave to Appeal (C) No. 24667/2018 before Hon'ble Supreme



Court. It is also clarified that since the present petition is being disposed of after hearing both the parties in view of the clear mandate passed by Hon'ble Supreme Court for disposal of the petitions which are pending for more than one year pertaining to appointment of an Arbitrator or substitution/ change of Arbitrator, it is directed that the respondent herein shall not raise any objection with respect to the disposal of the present petition at the time when the appeal filed by the petitioner herein is taken up for hearing by Hon'ble Supreme Court.

24. The present petition is disposed of in the aforesaid terms. Pending application also stands disposed of accordingly. The petitioner is, however, given liberty to revive the present petition in case any cause of action still subsists.

MINI PUSHKARNA, J

SEPTEMBER 6, 2022

PB

न्यायमेव जयते