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

Date of Decision: 13.01.2023

+ O.M.P. (T) (COMM.) 111/2022

PRADEEP VINOD CONSTRUCTION CO. Petitioner

Through: Mr. S.W. Haider and Ms. Pooja
Dua, Advocates.

versus

UNION OF INDIA Respondents

Through: Ms. Archana Surve, GP with
Mr. Karan Sharma and Ms.
Roopali, Advocates.
Mr. Akshay Amritanshu, Mr.
Samyak Jain and Mr. Divyansh
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. By way of this petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks termination of the mandate of the arbitral tribunal, which is adjudicating disputes between the parties under a Contract Agreement dated 16.11.2010 for “*Misc. works such as construction of Duty Huts at L-Xings, water supply arrangements, provision of station name boards, hand pumps, circulating area, lifting barriers, approach roads*”

and other allied works between RE-ROK in c/w Rewari-Rohtak New Line”.

2. The Contract Agreement contains an arbitration clause (Clause 64 of the General Conditions of Contract), which contemplates resolution of disputes by arbitration. It is provided that in claims exceeding ₹10,00,000/-¹, the arbitral tribunal would consist of a sole arbitrator and in other cases, it would consist of three arbitrators. The clause contemplates nomination of one of the members of the tribunal by the contractor from a panel of Gazetted Railway Officers, forwarded to it by the respondent. The other two members of the tribunal are to be nominated by the respondent from the aforesaid panel or otherwise.

3. Upon disputes arising between the parties, the petitioner first approached this Court for appointment of an arbitrator in ARB.P. 168/2015 under Section 11 of the Act. This Court allowed the petition by an order dated 15.05.2015. However, the aforesaid order was set aside by the Supreme Court vide judgment dated 14.11.2019 in Civil Appeal No. 6400/2016, holding as follows:-

“16. In the result, the impugned judgments dated 15.05.2015 and 02.02.2015 of the High Court of Delhi in Arbitration Petition No.168 of 2015 and Arbitration Petition No.531 of 2014 are set aside and these appeals are allowed. The appellant is directed to appoint the arbitrator in terms of Clause 64(3) of the agreement

¹ I am informed that this amount has since been raised to Rs. 1 Crore. However, the present case undisputedly concerns a claim in excess of Rs. 1 Crore.

within a period of one month from today under intimation to the respondent(s)- contractors. As soon as the communication of the appointment of arbitrator is made to the respondent(s), the statement of claim be filed by the respondent(s) within six weeks thereafter and the reply of the appellant to be filed within four weeks thereafter. The arbitrator shall proceed with the matter in accordance with law and decide the claim after affording sufficient opportunity of hearing to both parties expeditiously preferably within a period of four months.”

4. The three-member arbitral tribunal was, thus, constituted by a communication dated 24.06.2020 and then on 15.02.2021, in view of one of the nominated members recusing himself.

5. The grievance of the petitioner is that the arbitral tribunal has held only one hearing on 05.10.2021 and no further hearings have taken place. According to the petitioner, several requests have been made for the hearing to be resumed, but the arbitral tribunal has not done so. It is in these circumstances that the present petition was filed.

6. Notice was issued on 17.11.2022 and the respondent was granted time to file an affidavit within two weeks. The respondent has not filed any affidavit in response.

7. Mr. S.W. Haider, learned counsel for the petitioner, points out that, out of the three-member arbitral tribunal, two members-Mr. S.K. Sharma and Mr. Rakesh Sabharwal have since recused from the proceedings.

8. Mr. Akshay Amritanshu, learned counsel for the respondent, does not contest the position regarding recusal of two members of the arbitral tribunal and the delay in conduct of the proceedings.

9. In view of the fact that no proceedings in the arbitration have been held since 05.10.2021 and two members of the arbitral tribunal have also recused themselves, the mandate of the arbitral tribunal is terminated.

10. As far as appointment of a substitute tribunal is concerned, Mr. Amritanshu submits that a further panel of four names has been forwarded by the respondent to the petitioner from which the petitioner is required to suggest two names, out of which the General Manager, Northern Railways, will appoint one as the contractor's nominee.

11. Mr. Haider objects to this procedure, relying upon a judgment of the Supreme Court in *Ellora Paper Mills Limited vs. The State of Madhya Pradesh*². He submits that the judgment of the Supreme Court in Civil Appeal No. 6400 of 2016, was considered by the Court in the said decision and the Court, nevertheless, came to the conclusion that the unilateral appointment of an arbitral tribunal composed of officers of the government was contrary to the judgments of the Court.

12. The judgment of the Supreme Court in *Ellora*³ emphasised the objective of Section 12(5) of the Act to provide for neutrality of arbitrators and objectivity of the arbitral tribunal. The Court, *inter alia*

² (2022) 3 SCC 1.

³ Ibid.

cited its decision in *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited vs. Ajay Sales & Suppliers*⁴, which in turn referred to several earlier judgments of the Court, including *Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited*⁵, *TRF Limited vs. Energo Engineering Projects Limited*⁶, and *Bharat Broadband Network Limited vs. United Telecoms Limited*⁷. The Supreme Court, in *Ellora*⁸, set aside the impugned judgment of the High Court and appointed a former judge of the Supreme Court to act as an arbitrator to resolve the disputes between the parties.

13. In *Voestalpine*⁹, the Supreme Court permitted appointment of an arbitrator from a broadbased panel to be suggested by one of the parties. The judgment of the Supreme Court in *Central Organisation For Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*¹⁰, on the other hand, suggests that the appointment of an arbitrator from a panel submitted by one of the parties is by itself a valid procedure.

14. This Court, in two recent judgments, has had occasion to consider the present legal position on this aspect. The judgment in *Gangotri Enterprises Ltd. vs. General Manager, Northern Railways*¹¹, deals with a clause very similar to the one with which we are concerned. Northern Railways, which is the respondent in the present

⁴ 2021 SCC OnLine SC 730.

⁵ (2017) 4 SCC 665.

⁶ (2017) 8 SCC 377.

⁷ (2019) 5 SCC 755.

⁸ Supra (note 2).

⁹ Supra (note 5).

¹⁰ (2020) 14 SCC 712.

¹¹ 2022 SCC Online Del 3556.

case, was also the respondent in the said case. The Court held that the nomination of a four-member panel by Northern Railways could not be held to be a broadbased panel in terms of the judgment in *Voestalpine*¹² and also rejected the argument of Northern Railways, based on the judgment in *Central Organisation*¹³. In *L&T Hydrocarbon Engineering Limited vs. Indian Oil Corporation Limited*¹⁴, also, this Court has come to a similar conclusion, relying upon *Voestalpine*¹⁵. In that case, both *Voestalpine*¹⁶ and *Central Organisation*¹⁷ were considered and it has been held that the respondent therein was not entitled to insist upon the nomination of an arbitrator from a panel of five names.

15. Having regard to the aforesaid judgments, I am of the view that the Union of India's insistence on appointment of the petitioner's nominee arbitrator from the panel of four names suggested by it, is impermissible.

16. Learned counsel for the parties were asked to take instructions as to whether the matter be referred to an arbitral tribunal of three members or whether they would be agreeable to reference to a sole arbitrator. Mr. Amritanshu submits that he has no instructions to consent to appointment of a sole arbitrator.

¹² Supra (note 5).

¹³ Supra (note 10).

¹⁴ 2022 SCC Online Del 3587.

¹⁵ Supra (note 5).

¹⁶ Ibid.

¹⁷ Supra (note 10).

17. In view of the above, keeping in mind that the contractual stipulation in the present case is for appointment of a three-member tribunal, the petition is disposed of with a direction that the parties may nominate one member each of their choice to the arbitral tribunal within a period of two weeks from today. The two members so appointed will be at liberty to appoint the presiding arbitrator, whereupon the arbitral tribunal will stand constituted.

18. I am informed that pleadings have been completed before the erstwhile arbitral tribunal. Learned counsel for the parties agree that the arbitral tribunal constituted in terms of this order may take up the proceedings from the position at which they were before the erstwhile arbitral tribunal. Parties will file copies of the pleadings, which were filed before the erstwhile arbitral tribunal, before the newly appointed arbitral tribunal, which may take up the proceedings from that stage.

PRATEEK JALAN, J

JANUARY 13, 2023

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