



IN THE HIGH COURT OF KARNATAKA AT BENGALURU
DATED THIS THE 14TH DAY OF AUGUST, 2024
BEFORE
THE HON'BLE MR. JUSTICE M.G.S. KAMAL
WRIT PETITION NO.16676 OF 2022 (GM-RES)

BETWEEN:

M/S. MADHAVA HYTECH ENGINEERS
PRIVATE LIMITED
PROJECT OFFICE NO.19, 8TH CROSS
PAMPA LAYOUT EXTENSION
KEMPAPURA, HEBBAL
BANGALORE-560024
REPRESENTED BY SHRI. KILARU PRADEEP
AUTHORISED SIGNATORY
MANAGING DIRECTOR.

Digitally signed
by RUPA V
Location: HIGH
COURT OF
KARNATAKA

...PETITIONER

(BY SRI. PRASHANTH CHANDRA S.N. ADV.,)

AND:

1. SOUTH WESTERN RAILWAY
GADAG ROAD
HUBLI 580023.
REP. BY ITS GENERAL MANAGER.
2. SOUTH WESTERN RAILWAY
NO.18, MILLERS ROAD
BANGALORE-560046.
REP. BY ITS CHIEF ADMINISTRATIVE OFFICER
(CONSTRUCTION).
3. SOUTH WESTERN RAILWAY
NO.18, MILLER'S ROAD
BANGALORE-560046
REP. BY ITS CHIEF ENGINEER
(CONSTURCTION).



4. SOUTH WESTERN RAILWAY
NO.18, MILLER'S ROAD
BANGALORE-560046
REP. BY ITS DEPUTY CHIEF ENGINEER, (WORKS).
5. VIJAY AGARWAL
PRINCIPAL CHIEF ENGINEER
AND PRESIDING ARBITRATOR
SOUTH WESTERN RAILWAYS
HUBBALLI-580023.

...RESPONDENTS

(BY SRI. D. BASAVARAJA, CGC)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE ORDER PASSED BY THE R-5 i.e. THE PRINCIPAL CHIEF ENGINEER/PRESIDING ARBITRATOR VIDE ANNEX-A DTD. 08.06.2020 IN THE DISPUTE RAISED BY THE PETITIONER VIDE AGREEMENT NO.261/CAO/C/SC/95 AS BEING ILLEGAL AND BAD. APPOINT A NEW SOLE ARBITRATOR AS THE SUBSTITUTE ARBITRATOR AND TRANSFER THE PENDING ARBITRAL DISPUTE RAISED BY THE PETITIONER BY ITS REPRESENTATION DTD. 04.06.2012 VIDE AGREEMENT NO.261/CAO/C/SC/95 OF 27.1.1995 FROM THE R-5 FOR CONTINUATION BEFORE THE ARBITRATION AND CONCILIATION CENTRE, KARNATAKA, AT BANGALORE TO ADJUDICATE UPON THE DISPUTE IN ACCORDANCE WITH THE PROVISIONS OF THE ARBITRATION AND CONCILIATION ACT 1996 AND RULES OF THE ARBITRATION AND CONCILIATION CENTRE RULES, 2016 KARNATAKA.

THIS PETITION, COMING ON FOR ORDERS, THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE M.G.S. KAMAL



ORAL ORDER

Present petition gives rise to twin issues for consideration, firstly as to the effect of amendment to Section 12 of the Arbitration and Conciliation Act, 1996, (for short, '**the Act**') , which was brought in by the Act 3 of 2016, by inserting sub-section (5) effective from 23.10.2015 and, secondly as to the status of the arbitration proceedings in the event of an Arbitrator considering himself unable to continue with the proceedings.

2. Facts in brief are that the petitioner, being a contractor having been entrusted with work for conversion of track from MG to BG between Kulem-Nandga on-Vasco Section, had sought for resolution of certain dispute, which had arouse with the respondents, for recovery of money. An Arbitral Tribunal comprising of three Railway Officers namely Sri.D.K.Garg, CGE/SWR/UBL (Presiding Arbitrator), Smt.Reena Ranjan, FA & CAO/WST/UBL and Sri.G.P.Kosta, CBE/SWR/UBL (Co-Arbitrators) was



constituted to resolve the dispute in terms of clauses 63 and 64 of the General Conditions of the Contract.

3. It appears no effective proceedings were conducted by the said Arbitral Tribunal. By a communication dated 12.06.2012 produced at Annexure-C, the said Arbitral Tribunal was reconstituted as two of the earlier members had expressed their inability to continue as Arbitrators, as such a new Tribunal consisting of Sri.D.K.Garg, CE/TP/SWR/UBL (Presiding Arbitrator), Sri.A.Selvaraj, FA & CAO/G/SR/MS (Co-Arbitrator) and Sri.Vijay Agarwal (Co-Arbitrator) was reconstituted. Even after the reconstitution, it appears no substantial progress has taken place in the proceedings. In the meanwhile, an amendment was effected to the Act by inserting subsection (5) to Section 12, which made certain person ineligible to be appointed as the Arbitrator, as enumerated in schedule VII to the Act. In view of that, a communication dated 02.06.2017 produced at Annexure-D came to be issued by the respondents calling upon the



petitioner herein to submit its consent in a prescribed format agreeing for a substituted arbitrator. The said communication further stated that if the petitioner did not submit such consent, the arbitration would continue under the un-amended provisions of the Act.

4. In response thereof, the petitioner herein issued a reply dated 30.06.2017 as per Annexure-E vehemently opposing the proposition put-forth by the respondents and contended that it would prefer to file an application under Section 15 of the Act seeking appointment of neutral 3rd party arbitrator. The Said communication was followed by a notice issued by the petitioner through its counsel dated 11.09.2017 in which the petitioner had suggested name of an Arbitrator to be the sole arbitrator and had called upon the respondents to communicate their consent, if any, within 30 days thereof. Since there was no favourable response, petitioner preferred a Civil Miscellaneous Petition in



CMP.No.326/2017 before this Court seeking appointment of an Arbitrator in terms of Section 15 of the Act.

5. During the pendency of the said proceedings, the impugned order at Annexure-A dated 08.06.2020 came to be passed by the substituted Arbitrators, opining that the matter was pending for 14 years and it was impossible to proceed with the arbitration proceedings, as such, the proceedings were terminated. Since the arbitration proceedings were terminated, the Civil Miscellaneous Petition in CMP No.326/2017 which was filed by the petitioner seeking appointment of substituted arbitrator was disposed of reserving liberty to the petitioner to revive the said petition upon adjudication of the impugned order in this petition. Hence, the petitioner is before this Court.

6. Sri.Prashanth Chandra, learned counsel appearing for the petitioner taking this Court through the documents enclosed with the petition and also provisions of Sections 12, 15, 25 and 32 of the Act and relying upon



the judgement of the Apex Court in the case of ***Ellora Paper Mills Limited vs. State of Madhya Pradesh*** reported in **(2022) 3 SCC 1** and in the case of ***Dani Wooltex Corporation and Others vs. Sheil Properties Pvt. Ltd. And Another*** reported in **2024 SCC OnLine SC 970** submits that the impugned order is unsustainable and is contrary to the provisions of sub-section (5) of Section 12 of the Act. He also submits that on and from the date of the amendment to the Act, it was incumbent upon the respondents to have agreed for an appointment/substitution of new Arbitrators, as the earlier Arbitrators were the employees of respondent No.2 being ineligible could not have imposed the condition as sought to be done by their communication dated 02.06.2017. That despite the petitioner objecting for such proposition and despite petitioner having initiated proceedings under Section 15 of the Act by filing Civil Miscellaneous Petition seeking substitution of the Arbitrator, to the knowledge of the respondents, the Arbitral Tribunal which was constituted prior to amendment to the Act, passed the



impugned order. He further submits termination of mandate has two facets, *one*, the termination may itself put an end to the arbitration proceedings and the *second*, it may not have an effect of putting an end to the arbitration proceedings, but the office of the Arbitrator may fall vacant. It is the latter which is the case at hand and the Arbitrators could not have terminated/closed the proceedings. Options under the statute was to seek substitution of an Arbitrator. Thus, he submits that the entire process adopted by the respondents is illegal and unsustainable, hence seeks for allowing the petition.

7. Learned counsel for the respondents, on the other hand, justifying the order passed by the Arbitral Tribunal submits that the petitioner herein was indeed given an option by communication dated 02.06.2017 to give its consent for substitution of arbitrator and since the petitioner did not opt for the same and also did not participate in the pending arbitration, in exercise of power under Section 32(2)(c) of the Act, the Arbitral Tribunal has



terminated the proceedings which is very much within the framework of the Act and as such the same cannot be found fault with.

8. Heard. Perused the records.

9. There is no dispute of the fact that the Arbitral Tribunal was constituted at the instance of the petitioner herein for resolution of dispute as far back as in the year 2006 consisting of three Arbitrators named above who were the employees of the respondent-Railway. There is also no dispute that the said Arbitral Tribunal continued until it was reconstituted with different Arbitrators as found in the communication dated 12.06.2012, in view of the earlier Arbitrators having expressed their inability to continue with it. The said reconstituted Arbitrators continued till passing of the impugned order.

10. The intervening factor which statutorily necessitated appointment of neutral arbitrator is in view of



amendment that was brought to Section 12 of the Act by inserting sub-Section (5), which reads as under:

"12. Grounds for challenge.

(1) xxx

(2) xxx

(3) xxx

(4) xxx

(5) *Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

11. As per the list of Arbitrators in the seventh schedule who are ineligible to be appointed includes the Arbitrator who is an employee, consultant, advisor or has any other post or present relationship with the party.

12. Apex Court in the case of ***Ellora Paper Mills Limited vs. State of Madhya Pradesh*** dealing with the identical fact situation of the matter wherein the Apex Court holding the order of rejection of an application



seeking appointment of an Arbitrator in view of amendment to be unsustainable, at paragraph No.20 has held as under:

"20. *In view of the above and for the reasons stated hereinabove, the impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court is contrary to the law laid down by this Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] and the recent decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] . It is held that the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and : (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate by operation of law in view of Section 12(5) read with Seventh Schedule and a fresh arbitrator has to be appointed under the provisions of the Arbitration Act, 1996. The impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court*



is therefore unsustainable and deserves to be quashed and set aside."

13. Thus, the facts of the present case is squarely covered by the said judgement of the Apex Court. The arbitrators being employees of respondent-Railways were ineligible to hold and continue the arbitration proceedings.

14. The other aspect of the matter, as noted above, is with regard to the status of the Arbitral Tribunal proceedings. In the circumstances of this nature, whether the said arbitrator could have terminated the proceedings for the purported reason of long pendency of the matter. Even the said aspect is also covered by the judgment of Apex Court in the case of ***Dani Wooltex Corporation and Others vs. Sheil Properties Pvt. Ltd. And Another*** wherein the Apex Court dealing with the situation of default of the party in proceedings in the matter, at paragraph Nos.11 & 13 held as under:

"11. The Arbitration Act has two provisions for terminating an Arbitrator's mandate. Sections 14 and 15 are the relevant sections. The Arbitrator is empowered to withdraw from his office, which



terminates his mandate. However, the arbitral proceedings continue by the arbitrator's substitution.

13. *On a conjoint reading of Sections 14 and 15, it is apparent that an Arbitrator always has the option to withdraw for any reason. Therefore, he can withdraw because of the parties' non-cooperation in the proceedings. But in such a case, his mandate will be terminated, not the arbitral proceedings."*

15. At paragraph No.21, Apex Court has laid down the following guidelines to be followed by the Arbitral Tribunal in the situation as that of the one at hand:

21. *To conclude,*

a. The power under clause (c) of sub-section (2) of Section 32 of the Arbitration Act can be exercised only if, for some reason, the continuation of proceedings has become unnecessary or impossible. Unless the Arbitral Tribunal records its satisfaction based on the material on record that proceedings have become unnecessary or impossible, the power under clause (c) of sub-section (2) of Section 32 cannot be exercised. If the said power is exercised casually, it will defeat the very object of enacting the Arbitration Act;

b. It is the Arbitral Tribunal's duty to fix a meeting for hearing even if parties to the proceedings do not make such a request. It is the duty of the Arbitral Tribunal to adjudicate upon the dispute referred to it. If, on a date fixed



for a meeting/hearing, the parties remain absent without any reasonable cause, the Arbitral Tribunal can always take recourse to the relevant provisions of the Arbitration Act, such as Section 25;

c. The failure of the claimant to request the Arbitral Tribunal to fix a date for hearing, per se, is no ground to conclude that the proceedings have become unnecessary; and

d. The abandonment of the claim by a claimant can be a ground to invoke clause (c) of sub-section (2) of Section 32. The abandonment of the claim can be either express or implied. The abandonment cannot be readily inferred. There is an implied abandonment when admitted or proved facts are so clinching that the only inference which can be drawn is of the abandonment. Only if the established conduct of a claimant is such that it leads only to one conclusion that the claimant has given up his/her claim can an inference of abandonment be drawn. Even if it is to be implied, there must be convincing circumstances on record which lead to an inevitable inference about the abandonment. Only because a claimant, after filing his statement of claim, does not move the Arbitral Tribunal to fix a date for the hearing, the failure of the claimant, per se, will not amount to the abandonment of the claim."

16. In the light of the aforesaid enunciation of law by the Apex Court and facts and circumstances of the case, it was incumbent upon the respondents to have



sought for substitution of arbitrators instead of insisting the petitioner to agree upon the arbitrator of their choice. Petitioner, in the considered view of this Court, was justified in refusing to accept the proposition and preferring a petition before this Court seeking substitution of Arbitrator. The respondents, despite being notified and having participated in the said Civil Miscellaneous Petition, could not have passed the impugned order under the purported exercise of power under Section 32(2)(c) of the Act. Such a course was not available for the Arbitrators as it is not the case of there being any impossibility or impracticality for continuation of arbitration proceedings. Merely because the arbitration proceedings were pending for 14 years, albeit the same being a mockery of object and reasons for promulgation of Arbitration Act, it was not open for the Arbitrators to have closed the arbitration proceedings. The very fact that by virtue of the amendment brought-in, by inserting sub-section (5) to Section 12 of the Act by legal fiction, the seat of



arbitrators has become vacant and had to be filled in only in the manner known to law.

17. For the aforesaid reasons and analysis, the impugned order dated 08.06.2020 passed by respondent No.5 is unsustainable, the same is therefore, set aside. The writ petition is accordingly ***allowed***.

18. Necessary also to note that the order dated 20.10.2022 passed by this Court in CMP.No.326/2017 wherein taking note of the pendency of this present petition, the said Civil Miscellaneous Petition filed by the petitioner was disposed of with liberty to the petitioner to revive the same subject to outcome of the petition. In view of this writ petition having been allowed setting aside the order as above, petitioner is at liberty to seek revival of the said petition.

Sd/-
(M.G.S. KAMAL)
JUDGE

BSR