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

\+ O.M.P.(MISC.)(COMM.) 215/2023

TRANSSTROY DINDIGUL-THENI-KUMAIL-TOLLWAYS PVT LTD ..... Petitioner

Through: Ms. Bina Gupta, Ms. Sheena Taqui, Ms. Akansha Saini, Mr. S. Gupta, Advocates.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA ..... Respondent

Through: Ms. Geeta Luthra, Sr. Adv. alongwith, Mr. Suvir Sharma, Ms. Kamakshi Gupta and Mr. Manas Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

<u>O R D E R</u>

% **19.03.2024**

1. The petitioner has filed the present petition under Section 29A of the Arbitration and Conciliation Act, 1996 ["the Act"], for extension of the mandate of an Arbitral Tribunal which is in *seisin* of disputes between the parties under a Concession Agreement dated 12.07.2010.

2. The arbitration clause was invoked by the petitioner *vide* letter dated 26.11.2019 and its mandate, under Section 29A of the Act, expired on 09.06.2023. Although the petitioner consented to extension of the mandate for the period of six months as provided under Section 29A of

the Act, the respondent – National Highways Authority of India ["NHAI"] did not consent. This has led to the institution of the present petition.

3. I am informed that the proceedings before the Arbitral Tribunal are at the stage of examination of witnesses.

4. The two objections urged by Ms. Geeta Luthra, learned Senior Counsel for NHAI, as recorded in the order dated 25.01.2024 are as follows:

> *"a. That the petition was filed after the mandate of the learned arbitral tribunal had already been lapsed and;*
>
> *b. That the petition is unsupported by an authorisation on behalf of the petitioner-company."*

5. With regard to the first objection, it has been clarified in the order dated 15.03.2024, based upon a report received from the Registry, that the present petition was, in fact, filed on 03.06.2023 and defects were cured on 20.07.2023. The mandate of the Arbitral Tribunal admittedly lapsed on 09.06.2023. The first objection, therefore, does not survive.

6. As far as the second objection is concerned, the objection is based upon the fact that the petition has been filed on the strength of a Board Resolution of a company by the name of Transstroy (India) Ltd. ["TIL"] in favour of Mr. Ananth Vummidi, who had affirmed the Statement of Truth in support of the petition. Ms. Luthra pointed out that the petitioner in the present petition is not TIL but a subsidiary of TIL, by the name of Transstroy Dindigul-Theni-Kumail-Tollways Pvt. Ltd ["TDTKTPL"].

7. Ms. Bina Gupta, learned counsel for the petitioner, was given an opportunity to file a further affidavit and documents in this regard. The first affidavit filed thereafter was found to be unsatisfactory, as recorded

in the order dated 15.02.2024. Upon payment of costs, the petitioner was given a further opportunity to rectify the position and show the authorisation for filing of the present petition by the petitioner - company itself, supported by a resolution of its Board of Directors.

8. The petitioner has since filed an affidavit of one Mr. Rajagopalan Ayyengar in support of the petition. It has also filed two resolutions, one of an Extraordinary General Meeting ["EGM"] of the petitioner - company held on 17.02.2024, and the second of the Board of Directors of the petitioner - company held on 20.02.2024.

9. By a resolution taken by the members of the petitioner - company at the EGM on 17.02.2024, they have appointed two directors, namely Mr. Rajagopalan Ayyengar and Mr. Jesubalan Peter. The meeting of the Board of Directors on 20.02.2024 authorises Mr. Rajagopalan Ayyengar *inter alia* to sign affidavits on behalf of the petitioner - company and to represent the petitioner - company in arbitration and legal proceedings.

10. I am informed that a similar objection with regard to the authority of the person who has filed the Statement of Claim before the Arbitral Tribunal has been raised by NHAI in the arbitral proceedings. Issue No. (i) framed by the Arbitral Tribunal in its order dated 30.07.2023 is as to whether the Statement of Claim has been presented by an authorised person and, if not, the effect thereof.

11. The question before the Court at this stage is whether the proceedings under Section 29A of the Act ought to be rejected on the basis that they were not properly instituted, even after the filing of the documents summarised above.

12. In this connection, Ms. Luthra submits that the name of Mr.

Rajagopalan Ayyengar is still not reflected in the Master Data of the petitioner - company as available on the website of the Ministry of Corporate Affairs, Government of India. She submits that a document pertaining to be Form DIR-12 was handed over by Ms. Gupta to her on the last date of hearing i.e. 15.03.2024, which purported to show Mr. Rajagopalan Ayyengar's appointment as a Director of the petitioner - company on 29.01.2024, whereas the EGM resolution was passed only on 17.02.2024. She submits that, by an order of the National Company Law Tribunal, TIL has been sold on a "going concern" basis to one Hruday Infra and Resources Solutions Private Limited ["Hruday"]. A copy of the sale certificate dated 31.10.2022 has been placed on record, alongwith the reply filed by NHAI. Ms. Luthra submits that the effect of this sale is that the assets of TIL, including the shares in TDTKTPL, have been sold in liquidation, contrary to Section 36 of the Insolvency and Bankruptcy Code, 2016.

13. Relying upon the judgment of this Court in *Nibro Ltd. vs. National Insurance Co. Ltd.* [1990 SCC OnLine Del 65] and of the Patna High Court in *BOC India Ltd. vs. Zinc Products and Co. Pvt. Ltd.* [1996 SCC OnLine Pat 563], Ms. Luthra further submits that the irregularity in the original filing cannot be cured in the manner sought to be done by the petitioner.

14. Ms. Luthra also submits that, in terms of a clarification dated 03.03.2015 of the Ministry of Corporate Affairs, reconstitution of the Board of Directors of the petitioner - company could not have been done without deactivation of the Director Identification Number of the petitioner's erstwhile director. She submits that the name of the erstwhile

director continues to be shown on the website of the Ministry of Corporate Affairs, Government of India.

15. Having considered these submissions, I am of the view that these objections ought not to come in the way of the present petition under Section 29A of the Act. What the respondent urges the Court to do is to go into the question of whether the resolutions passed at the EGM and by the Board of Directors of the petitioner - company have been validly passed. That is beyond the scope of the present petition, at least without any compelling evidence of such irregularity having been placed by the respondent - NHAI. When faced with the resolution of the EGM appointing Mr. Rajagopalan Ayyengar, the resolution of the Board of Directors authorising him to represent the petitioner - company in legal matters and the affidavit filed by him in support of the contents of the petitioner, I am satisfied that the petitioner - company has taken responsibility for the filing of the present petition, even if, the original petition was filed by TIL, which is its holding company to the extent of 99.97%. As far as the Form DIR-12 handed over to the respondent is concerned, Ms. Gupta submits that this was based upon an earlier attempt to appoint Mr. Ayyengar, which was unsuccessful. The procedure to be followed for uploading of the information on the database of the Ministry of Corporate Affairs may take some time, but Ms. Luthra did not suggest that appointment of a director is dependent upon this.

16. Ms. Luthra's suggestion regarding the sale of TIL in the course of insolvency proceedings to Hruday also does not, in my view, affect the present proceedings. The question raised is as to ownership of the shares of TIL; Ms. Luthra's entire objection to the present filing is correctly

based upon the fact that TDTKTPL and TIL are different legal entities. TDTKTPL is the claimant in the arbitration proceedings, and the petitioner before this Court. The resolutions in question recorded above have been passed by its General Body and Board of Directors, and the Court is not called upon at this stage to go into the validity of any sale at the level of TIL.

17. The final submission was that these documents cannot ratify the irregular filing of the original petition. The following paragraphs of the judgment of this Court in *Nibro* [Supra], were relied upon by Ms. Luthra:

> "*25. Chapter IV of the Delhi High Court (Original Side) Rules deal with the question of presentation of suits.* ***Under this Rule, suit can be presented by a duly authorised agent or by an advocate duly appointed by him for the purpose. This authorization, in my view, in the case of a company can be given only after a decision to institute a suit is taken by the Board of Directors of the company. The Board of Directors may in turn authorise a particular director, principal officer or the secretary to institute a suit.***
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> *26.* ***The plaintiff has not placed on record any resolution passed by the company authorising Shri G. Jhajharia to institute the suit****. Shri G. Jhajharia did not come forward to make a statement that he was in a position to depose to the facts of the case. In the plaint signed by him, he claims to be a principal officer and director, but there is no evidence on record to indicate that he had the authority to institute the suit. The Memorandum and Articles of Association of the plaintiff company are also not placed on record.* ***Even after the suit was instituted by Shri G. Jhajharia, no resolution was passed by the company ratifying this action. No such decision of the Board of Directors is placed on record in the present case.*** *The plaintiff has examined Shri Ashok Kumar Jhajharia. He has placed on record Ext. PW 2/1 which is the resolution of the Board of Directors re-appointing Shri G. Jhajharia as the Director but this resolution does not empower Shri G. Jhajharia as a Director to institute the present suit. Shri Ashok Kumar Jhajharia has stated that he was handling day-to-day management of the plaintiff company including the insurance part of it. He however, does not state that Mr. G. Jhajharia was handling day-to-day management or was incharge of the insurance claim.*

27. Thus, there is no evidence to prove that Shri G. Jhajharia had the authority to institute the present suit."

[Emphasis supplied.]

18. It is clear from the above that this judgment was rendered in the context of authority to file a suit, relying upon the provisions of the Original Side Rules of this Court. Even in this judgment, the Court noticed that the plaintiff - company had not filed a resolution ratifying the action of filing of the suit. I am of the view that the present case is distinguishable. One of the primary purposes, at least in proceedings of the nature with which we are concerned, is for the petitioner - company to take responsibility for the action instituted. As noted above, I am satisfied that the documents belatedly placed on record demonstrate such responsibility.

19. As far as the judgment of the Patna High Court in *BOC India Ltd.* [Supra] is concerned, Ms. Luthra submits that, relying upon *Nibro Ltd.* [Supra], the Patna High Court found that a petition for winding up was not maintainable and was required to be summarily rejected. There is an observation of the judgment of the Patna High Court that this Court has held in *Nibro Ltd.* [Supra] that even a subsequent authorisation/ratification by the Board of Directors cannot cure the defect. However, Ms. Luthra is unable to point me to any such observation in the judgment of this Court in *Nibro Ltd.* [Supra].

20. For the aforesaid reasons, I am of the view that the objections to the present petition are insubstantial, and liable to be rejected. The petition is, therefore, allowed and the mandate of the learned Arbitral Tribunal is extended for a period of 18 months with effect from

09.06.2023.

21. It goes without saying that the parties are free to raise their respective contentions before the learned Arbitral Tribunal with regard to the issues framed by it.

PRATEEK JALAN, J

MARCH 19, 2024
"Bhupi"/