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

+ O.M.P. (T) (COMM.) 75/2024, I.A. 35807/2024, I.A. 35808/2024

NATIONAL HIGHWAYS AUTHORITY OF INDIAPetitioner

Through: Mr Ankur Mittal, Mr Abhay Gupta,
Ms Simran Goel and Ms Ikshita
Parihar, Advs.

versus

VIJAY ENGINEERING ENTERPRISESRespondent

Through: Mr Abjijat, Mr Shyam S Sharma, Mr
Sanjeev Kumar Baliyan, Mr Yash
Yadav and Ms Jyoti Garg, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

28.10.2024

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1. This is a petition filed under Section 14 of the Arbitration and Conciliation Act, 1996 seeking termination of the mandate of the Arbitral Tribunal comprising of Sh. Govind Sharan (Presiding Arbitrator), Sh. Ashok Wasson and Sh. Vinod Kumar Tiwari (Co-Arbitrators) and thereafter appointment of a new substitute Arbitral Tribunal.

2. It is the case of the petitioner that the arbitration was invoked by the respondent in the year 2014 and despite more than 8 years have passed, the arbitral proceedings are still going on.

3. Aggrieved of the order dated 19.07.2024 passed by the Arbitral Tribunal, the petitioner has filed the present petition. The Arbitral Tribunal in paras 8 and 12 of the order dated 19.07.2024 *inter alia* held as under:



8. Viewed above, having gone through the pleadings, documents relied upon by the parties as well as inputs received from the arguments advanced by the Ld. Counsels of the parties, the AT require following information and documents as pointed out and referred to in the volumes containing the documents submitted by the parties, the details are as under:

A) The documents and information directed to be submitted by the Claimant-VEE as per details given below:

- i) Please refer CD-4/AR-9/Pg.No.76-78 & CD-4/AR-7/Pg.No.73-74, as regards to the quantity of Slush Removal and backfilling to the extent of 23838.3 Cum. AT desired the information as to how this quantity of 23838.3 Cum. is calculated and arrived at for Slush Removal and backfilling as also the missing information about the unit rates payable for calculated quantity to arrive at the amount of the Claim against this Item.

B) The documents and information directed to be submitted by the Respondent-NHA as per details given below:

- i) Copy of the **IPC-39 & Final Bill**, along with all the enclosures, annexures, charts, statements as submitted by the Contractor-VEE at the time of final bill submission to the engineer based upon which the said IPC-39 & Final Bill was certified by the Engineer-NICE-NHA for releasing the payment based on such recommendation / certification by the Engineer-NICE and acceptance & the payment made by the NHA is directed to be produced by the Respondent-NHA. This is evident from the facts that as per **Letter no. NICE/HW/343/12-13/0013 dated 05.01.2013 (Ref.CD-4/Annex-AR-8/Page 75 as well as RCV-I document no.13 at page no.41 as placed on AT record by the Ld. Counsel for the Respondent-NHA)**, which is a letter from Engineer-NICE to PD-Karur PIU at Karur, all such documents had been submitted by the Engineer-NICE to the PD-Karur PIU at Karur, certifying the said bills for payment.



- ii) The copy of all the MPRs in respect of the said project, submitted by the Engineer-NICE to the PD-Karur PIU at Karur from time to time, which are in the custody of the Respondent-NHAI.
- iii) The copy of other reports as submitted by the Consultant-NICE to NHAI as mentioned in the Agreement by & between NHAI & NICE, copy of the said **Agreement dated 09.08.2001** is on the record of the AT as furnished by the Respondent-NHAI in compliance of the specific orders from the AT. These reports are relevant and necessary and therefore, AT required to peruse, assess and understand the same as the said agreement by & between NHAI & Consultant-NICE revealed that the said agreement contains **Appendix-B** in which relevant reports such as Commencement Report (which ought to have been submitted within 30 days after commencement of services), **Progress Report (Monthly & Quarterly- ought to have been submitted by 10th of every month)**, **Final Report with CD (Within 90 days of completion of services)**, etc. are there which are necessary for the purpose of adjudication and decision in the present case.

12. In view of above, AT issued following directions to the parties :

DIRECTIONS:

- a. Both the parties are hereby directed to submit the copy of above relevant documents and missing information as specified in para 8 above, within a time period of 15 days from this order by 04.08.2024.
- b. If desired by the parties, the AT may grant an opportunity of hearing to the parties strictly to the extent of these documents and information so submitted by the parties in order to throw light on the relevant facts.
- c. The parties are hereby advised/ directed not to seek any adjournments, unless it is required for extra ordinary compulsory reasons.

All are hereby directed to take note of the above to comply accordingly.



4. Thereafter, on 06.08.2024 the Arbitral Tribunal recalled their order dated 19.07.2024 and reserved the Arbitral Award.

5. Hence the present petition.

6. Mr Mittal, learned counsel for the petitioner has relied upon the order dated 13.08.2018 passed by the Hon'ble Supreme Court in Civil Appeal No. 8242 of 2018 (Arising out of SLP (Civil) No. 16965 of 2018) titled '**Punj Lloyd Limited v. West Bengal Medical Services Corporation Limited**'. The operative portion of the same reads as under:

“As stated in the said order, the matter came up again after one month before a different Bench, who then in a volte face from the earlier position taken, stated that the appellant can move an application under Sections 12 or 13, and nothing else would survive. Having heard learned counsel for the parties, we are of the view that the impugned order has moved in the opposite direction from the two orders dated 18.12.2017 and 10.05.2018 and has forgotten that it was hearing on application under Section 14 of the Arbitration Act. In the peculiar circumstances of this case, we, therefore, feel that it would be in the fitness of things that a retired Judge continue with arbitral proceedings.”

7. He further relies on the judgment passed by High Court of Judicature of Bombay, Aurangabad Bench in Writ Petition No. 7502 of 2006 titled '**Kishore v. Preeti**' and more particularly para 8 which reads as under:

“8. Normally, when this Court is ceased of the matter, it is expected of the subordinate courts to stay their hands away. It is difficult to understand as to what was an alarming urgency to proceed further and dismiss the petition when the learned Judge of the Family Court



was very well aware that the order dated 15th September, 2006 was challenged before this Court by the present petitioner. No doubt, that the learned Family Court is right in observing that there was no stay by this Court. But as a matter of propriety and when the learned Judge was very much aware about pendency of the petition before this Court, the learned Judge ought to have stayed his hands away and waited till further orders to be passed by this Court. In that view of the matter, I am inclined to allow the petition.”

8. Reliance is also placed upon the judgment passed by Hon’ble High Court of Andhra Pradesh in ***Rashtriya Ispat Nigam Ltd. v. Space Tech Equipments and Structural Private Limited and Others*** 2020 SCC OnLine AP 147. The relevant paras of the said judgement read as under:

“45. Keeping in view the above, it is to be seen whether petitioners were right in making application under Section 14 of the Act when the arbitral tribunal failed to pass an order on merits on an application filed under Section 12(3) read with Section 13(2) of the Act. The reading of the material on record show that the petitioner herein made an application under Section 12(3) read with Section 13(2) of the Act before the Arbitral Tribunal seeking termination of the mandate of the arbitrator as contemplated under the provisions of the Act. By a majority of 2 : 1, the tribunal held that it cannot go into the said issue and the power to terminate a co-arbitrator is not vested with them. As the matter was not decided on merits, the petitioner made an application before the competent court under Section 14 of the Act, raising the plea of bias. Referring to the judgments of High Court and the Hon'ble Apex Court, the Principal District Judge rejected the application stating that such a plea can be raised only in the appeal to be filed under Section 34 of the Act i.e., after passing of the award.

46. The objection now raised is, whether it is permissible for the petitioner to make an application under section 14 of the Act, having failed to succeed before the arbitral tribunal. At the outset, it is to be noted that no order on merits came to be passed in the application filed



under Section 12(3)(2) read with Section 13(2) of the 1996 Act. Left with no option, an application came to be filed under Section 14(2) urging the Court that R4 is de jure unable to perform his function.

47. Section 14 of the Act, 1996 postulates failure or impossibility to act--, the mandate of an arbitrator shall be terminated and he shall be substituted by another arbitrator, if--(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay. The meaning of the word de jure was explained by the Division Bench of the High Court of judicate at Hyderabad for the State of Telangana and for the State of Andhra Pradesh in “Gurcharan Singh Sahney v. Harpreet Singh Chabbra”¹⁷ as under:

“The Court does not terminate the mandate of an arbitrator. It stands terminated on the happening of anyone of the events referred to in Section 14(1), and the Court only declares it. (Ram Chandra Rungta v. Ram Swarup Rungta). Use of the word “or” between the kinds of eventualities in Section 14(1)(a) show that they are disjunctive. The mandate of the arbitrator would terminate by the occurrence of anyone of the events prescribed in sub-clause (a) which is either (i) his becoming de jure or de facto unable to perform his functions or, (ii) for other reasons, he fails to act without delay. (Priknit Retails²³). While deciding a petition under Section 14(2) of the Act, all that the Court does is to declare whether termination of the mandate of the arbitrator ipso jure has taken place or not. To that extent, the order of the Court under Section 14(2) of the Act is merely declaratory, and is not in the nature of a mandatory or perpetual injunction restraining a person from acting as an arbitrator. A declaration that the mandate of the arbitrator stands terminated does not amount to his removal by the Court. (Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.)”

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49. Though the meaning of the word de jure was restricted to the incapacity or disability, but, this incapacity or disability should occur to the arbitrator himself so that he becomes, as a matter of law or fact, unable to perform his functions. (Priknit Retails Ltd.²³). The Division Bench of the High Court observed that the de jure impossibility, referred to in Section 14(1)(a), is the impossibility which occurs due to factors personal to the arbitrator, and de facto inability occurs due to factors beyond the control of the Arbitrator. At the same time, the



judgment also refers to the de jure incapacities of the Arbitrator or legal incapacities to perform under law. Illustrations of such nature were mentioned therein.

50. It is now to be seen whether the element of bias can be made the basis to terminate the mandate of the arbitrator under Section 14 of the Act. Bias as observed by various Judgments of the Apex Court is, one of the main ingredients of principles of natural justice. Any action taken or any act done in violation of the principles of natural justice would be bad in law. The word de jure as stated by us would mean compliance with all the requirements of law, which also includes the principles of natural justice and also element of bias as a whole. Therefore, Section 14 gets attracted only when the arbitrator becomes incapable either in law or in fact of performing his function.

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52. In “State of West Bengal v. Shivananda Pathak¹⁸” it has been observed that, justice should not only be done but should manifestly be seen to be done. In other words, principles of natural justice are to be observed strictly in letter and spirit and one of the requirements of natural justice is that the hearing should be done by a judge with an unbiased mind.

53. In para no. 23 of the said judgment, it was held that All judicial functionaries have necessarily to have an unflinching character to decide a case with an unbiased mind. Judicial proceedings are held in open court to ensure transparency. Access to judicial record by way of inspection by the litigant or his lawyer and the facility of providing certified copies of that record are factors which not only ensure transparency but also instil and inspire confidence in the impartiality of the court proceedings.

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56. Facts in the said case are identical to the case on hand. In the instant case, application under Sections 12 and 13 of the Act was moved, but the issue raised was not decided on merits holding that Tribunal cannot go into the said issue. Thereafter, an application was moved before the Court under Section 14 of the Act. The de jure impossibility in our view, and as held in the judgments referred to above would be “impossibility in law” or “incapable either in law or



on facts". The word de jure as defined in Black's Law Dictionary is descriptive of a condition in which there has been total compliance with all the requirements of law. It is also well established that bias vitiates the entire proceedings including arbitral proceedings making it nugatory. The objective of the judicial or quasi judicial proceedings is to render justice or decide a case with an unbiased mind and be impartial. This principal of one getting disqualified if he is biased or suffers from prejudices, applies to all adjudicating authorities and arbitrators are no exception. Therefore, our view that if the arbitrator acts in a biased manner, he is de jure incapacitated/unable to perform his function under Section 14 of Act gets support from the view expressed in National Highways Authority of India's case. We are also aware that such a power is to be exercised sparingly and with caution. As the material on record amply establish that the fourth respondent acted in a biased manner, we feel that in the facts of the case the petitioners were justified in invoking Section 14 of the Act seeking termination of the Arbitrator.

57. Hence, as held by us earlier, this application under Section 14 can be entertained, as the arbitrator is incapable of adjudicating the dispute since he has already made up his mind, which is evident from the 33 pages note prepared by him."

9. *Per contra*, Mr Abjijat, learned counsel for the respondent states that in the present case the delay has only been attributable to the petitioner.

10. I have heard learned counsel for the parties.

11. I am of the view that 8 years is an inordinate delay in concluding the arbitral proceedings but the fact today remains that the Arbitral Tribunal has reserved the Award *vide* order dated 06.08.2024.

12. At this stage, if another Arbitral Tribunal is constituted, the parties will have to again argue their claims, evidence and documents which will further delay the arbitration proceedings.

13. In "**Rohan Builders (India) (P) Ltd. v. Berger Paints India Limited**" 2024 SCC OnLine SC 2494 the Hon'ble Supreme Court *inter alia* held as



under:

“In the event of substitution of arbitrator(s), the arbitral proceedings will commence from the stage already reached. Evidence or material already on record is deemed to be received by the newly constituted tribunal. The aforesaid deeming provisions underscore the legislative intent to effectuate efficiency and expediency in the arbitral process.”

14. To my mind, the objective of the Arbitration and Conciliation Act, 1996 is to effectuate the process of arbitration efficiently and expediently. At this stage, the substitution of the Arbitral Tribunal would be counter productive to the above two objectives.

15. The judgments relied upon by Mr Mittal, learned counsel for the petitioner are also distinguishable.

16. In ***Punj Lloyd Limited (supra)***, the Hon’ble Supreme Court was pleased to substitute the appointed Arbitrator as the Arbitral Tribunal did not heed to the order of the Hon’ble High Court requiring it to complete the arbitral proceedings in a time bound manner.

17. The judgment of ***Kishore (supra)*** is not a judgement passed under the Arbitration and Conciliation Act but is on the issue of judicial propriety.

18. In the judgment of ***Rashtriya Ispat Nigam Ltd. (supra)*** there was already a 33 page note available on the file which showed that perhaps the Arbitral Tribunal had already prejudged the matter before the stage of final arguments.

19. For the aforesaid reasons, even though there is an inordinate delay, at this stage, I am not inclined to substitute the Arbitral Tribunal as the matter is pending for pronouncement of the Arbitral Award.

20. At this stage, Mr Mittal, learned counsel for the petitioner states that



he shall be filing an application under Section 12 of the Arbitration and Conciliation Act, 1996 indicating the bias of the Arbitral Tribunal.

21. The following directions are issued:

- i. The application under Section 12 of the Arbitration and Conciliation Act, 1996 shall be filed within a period of one week from the date of release of this order.
- ii. Without there being a hearing, the respondent shall file its reply on receipt of the application through e-mail within one week thereafter.
- iii. The Arbitral Tribunal will give one date for hearing the arguments in the application filed under Section 12 of the Arbitration and Conciliation Act, 1996 and thereupon will pass the order on the application within one week thereafter.
- iv. The entire process shall be completed within one month from the date of release of this order.
- v. In case the order is against the petitioner, then without conducting any fresh hearing, the Arbitral Tribunal shall pass an Award within four weeks thereafter.
- vi. The timelines indicated above shall be strictly adhered to failing which the petitioner will be at liberty to revive the present petition.

22. With these directions, the petition is disposed of.

JASMEET SINGH, J

OCTOBER 28, 2024

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Click here to check corrigendum, if any