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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 09th November 2022

+ O.M.P. (T) (COMM.) 63/2020

RAM KRIPAL SINGH CONSTRUCTION PVT. LTD Petitioner

Through: Mr. Amit Pawan, Mr. Hassan Zobair
Waris, Mr. Aakarsh & Ms. Shivangi,
Advocates.

versus

NTPC

..... Respondent

Through: Mr. R. Sudhinder, Advocate with Mr.
Nikhil Kumar Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 14 of the Arbitration & Conciliation Act 1996 ('A&C Act', for short), the petitioner seeks termination of the mandate of the learned Sole Arbitrator appointed by the respondent *vide* communication dated 14.05.2020 in relation to disputes that are stated to have arisen with the respondent from Letter of Award dated 17.12.2010, which related to the setting-up of a township for the respondent's Super Thermal Power Project at Barh, Bihar; the issuance of the letter of award having culminated in the parties signing a Contract Agreement dated 01.02.2011 ('contract'). For completeness, it is necessary to mention that prior to appointing the arbitrator whose termination has been sought by way of the present petition, the

respondent had also appointed an arbitrator earlier, who had terminated the proceedings for the reasons as detailed below.

2. Notice on the termination petition was issued on 23.10.2020; whereupon the respondent filed a reply dated 11.12.2020; which was followed by the petitioner's rejoinder dated 26.03.2021.

3. In support of the plea for termination, Mr. Amit Pawan, learned counsel for the petitioner submits as follows :

3.1 That the petitioner first invoked arbitration *vide* notice dated 27.01.2014; whereupon the respondent appointed the Joint General Manager, NTPC Ltd. Barh as the sole arbitrator ('1st Arbitrator'). However, the 1st Arbitrator terminated the proceedings under section 25(a) of the A&C Act on 22.06.2016 for want of the petitioner filing a statement of claim before him. Thereafter, on 11.02.2020, the petitioner filed an application for recall of order dated 22.06.2016; whereupon the Chairman & Managing Director ('CMD'), NTPC appointed Mr. Asit Kumar Mukherjee as the arbitrator ('2nd Arbitrator') to decide the recall application;

3.2 On 16.09.2020 the petitioner wrote a letter to the respondent's CMD objecting to the appointment of the 2nd Arbitrator, since the said person was the Regional Executive Director of the respondent, apart from being the Project Head of the project in relation to which disputes had arisen. The petitioner's contention was that the disclosures made by the 2nd Arbitrator so appointed under section 12 of the A&C Act, showed that his appointment was not in conformity with the extant position of law post the

coming into force of the Arbitration & Conciliation (Amendment) Act, 2015 (Act No. 3 of 2016) ('Amendment Act-2015'); and hence the petitioner sought appointment of another arbitrator;

- 3.3 It is stated on behalf of the petitioner however, that the respondent forwarded the petitioner's objection to the 2nd Arbitrator himself; who, on 21.09.2020, held that the Amendment Act-2015 would not apply to the proceedings, which had been *invoked* prior to the coming into force of the amendment; and that therefore, it was within his remit to deal with the disputes. Thereafter, on 05.10.2020, the petitioner requested the 2nd Arbitrator to keep the arbitral proceedings pending, since the petitioner was initiating legal proceedings, which request was denied by the 2nd Arbitrator on the same day;
- 3.4 On 15.10.2020 the petitioner filed the present petition, seeking termination of the 2nd Arbitrator's mandate; but soon thereafter, on 21.10.2020, during the pendency of the termination petition, the 2nd Arbitrator passed an order rejecting the petitioner's application for recall of order dated 22.06.2016;
- 3.5 It is the petitioner's contention that after the first round of arbitral proceedings was terminated by the 1st Arbitrator, on the ground that the petitioner had failed to file its statement of claim, when the CMD, NTPC proceeded to appoint the 2nd Arbitrator, section 12(5) had already been inserted in the A&C Act, which amendment was therefore already in force; and since the person appointed was admittedly the Regional Executive Director of the respondent and the Project Head of the project in relation to which

the disputes had arisen, such person was *de-facto* and *de-jure* ineligible to be appointed as arbitrator; and his mandate must therefore be terminated.

4. In support of the aforementioned arguments, counsel for the petitioner relies on the following judicial precedents:

- 4.1 ***SREI Infrastructure Finance Ltd. vs. Tuff Drilling Pvt. Ltd.***¹, on the point that termination of arbitral proceedings under section 25 is different from termination under section 32(2) of the A&C Act;
- 4.2 ***Omaxe Infrastructure and Construction Ltd. vs. Union of India & Anr.***², on the applicability of the Amendment Act-2015 to disputes where arbitration was invoked pre-amendment, but the appointment of the arbitrator was made post-amendment;
- 4.3 ***KKR Infra Projects Pvt. Ltd. vs. Union of India***³, on the applicability of the Amendment Act-2015 to a case where a second arbitrator was appointed in the same arbitral proceedings, however post-amendment;
- 4.4 ***Ellora Paper Mills Ltd. vs. State of Madhya Pradesh***⁴, on the applicability of the Amendment Act-2015 to a case where an arbitral tribunal was appointed pre-amendment, however arbitral proceedings had not commenced until post-amendment.

5. In opposition to the petition, Mr. R. Sudhinder, learned counsel for the respondent has raised several objections, of which the following are material for a decision of the present matter :

¹(2018) 11 SCC 470

² 2018 SCC Online Del 8914

³ 2018 SCC Online Del 12418

⁴ 2022 SCC Online SC 8

- 5.1 Since under section 25 of the A&C Act, an arbitrator is entitled to terminate the proceedings if a claimant defaults in filing its statement of claim within the time granted by the arbitrator, an application seeking recall of such order is also required to be decided by the arbitrator himself. Once an arbitrator dismisses such application for recall, the order so passed becomes an ‘award’ and the arbitral tribunal becomes *functus officio*; and any challenge to such order would only lie under section 34 of the A&C Act as a challenge to an award;
- 5.2 In the present case, the petitioner filed its recall application on 11.02.2020 *i.e.* almost 04 years after the arbitral proceedings had been terminated on 22.06.2016 by the 1st Arbitrator. In these circumstances, the CMD, NTPC appointed a 2nd Arbitrator to consider the recall application, who, after duly considering the application, dismissed it by order dated 21.10.2020 since the petitioner had failed to disclose sufficient cause for recall of the termination order. Such an order was just and fair, and in any case, is amenable to challenge only under section 34 of the A&C Act;
- 5.3 The appointment of the 2nd Arbitrator is valid since it was made in arbitral proceedings that commenced on 27.01.2014 by way of issuance of the invocation notice under section 21, which was issued *prior* to the amendment inserting section 12(5) in the A&C Act with retrospective effect from 23.10.2015. By reason thereof, section 12(5) is not applicable to the arbitral proceedings and the appointment of the 2nd Arbitrator cannot be faulted on that ground;

- 5.4 The appointment of the 2nd Arbitrator was made by the CMD, NTPC as per the procedure agreed to between the parties and was therefore in conformity with the law as it stood prior to the Amendment Act-2015, which came into force after the date of commencement of arbitral proceedings in this case;
- 5.5 Additionally, the arbitration agreement comprised in clause 56 of the GCCs expressly stipulates that if an arbitrator cannot be appointed by the CMD, NTPC in the manner agreed upon, then the disputes would not be referred to arbitration at all. The foundation of arbitration proceedings being the consent of parties, such proceedings cannot be thrust upon the respondent contrary to the terms it had agreed upon. It is the respondent's contention that the procedure for appointment of an arbitrator cannot be severed from clause 56, to selectively give effect only to the agreement to arbitrate, while ignoring the other clauses, especially when the arbitration clause expressly says that if the arbitrator is not appointed in accordance with the procedure agreed upon between the parties, the disputes would not be referred to arbitration at all;
- 5.6 For the foregoing reasons, the challenge to the mandate of the 2nd Arbitrator is misconceived, misplaced and premised on a wrong notion of the law.
6. In support of the above arguments, counsel for the respondent relies on the following judgements:

- 6.1 ***SREI Infrastructure Finance Ltd. vs. Tuff Drilling Pvt. Ltd.***⁵, to urge that termination of arbitral proceedings under section 25 is different from termination under section 32(2) of the A&C Act; and when a tribunal rejects a statement of claim filed late after due application of mind, such order becomes an award, which can only be challenged under section 34 of the A&C Act;
- 6.2 ***Angelique International Ltd. vs. SSJV Projects Pvt Ltd.***⁶, on the proposition that a challenge to an arbitral tribunal's order dismissing arbitral proceedings for want of statement of claim, must be by way of a petition under section 34 of the A&C Act, and not under section 14 and 15 of the A&C Act;
- 6.3 ***ATV Projects India Ltd. vs. Indian Oil Corporation Ltd. & Anr.***⁷, ***Awasthi Construction vs. GNCTD & Anr.***⁸ and ***M.L. Lakhanpal vs. Darshan Lal & Anr.***⁹, on the proposition that dismissal of proceedings under section 25(a) of the A&C Act is deemed to be an 'award' and hence must be challenged under section 34 of the A&C Act;
- 6.4 ***Union of India vs. Pradeep Vinod Construction Company***¹⁰, on the proposition that the Amendment Act-2015 is not applicable to arbitrations where notice for arbitration was issued prior to Amendment Act-2015 coming into force; and that therefore

⁵(2018) 11 SCC 470

⁶2018 SCC Online Del 8287

⁷2013 SCC Online Del 1669

⁸ 2022 SCC Online Del 5443

⁹2018 SCC Online Del 6833

¹⁰(2020) 2 SCC 464

appointment of the arbitrator should be as per the agreed procedure in the arbitration clause;

- 6.5 ***Union of India vs. Parmar Constructions***¹¹, on the applicability of the Amendment Act-2015 to proceedings that have commenced under section 21 of the A&C Act prior to the amendment coming into effect;
- 6.6 ***S.P Singla Constructions Pvt. Ltd. vs. State of Himachal Pradesh &Anr.***¹², for the proposition that a challenge to the appointment of an arbitrator is to be considered in light of the terms of the agreement between the parties;
- 6.7 ***Veekay General Industries vs. Union of India***¹³, on the proposition that arbitration cannot be thrust upon parties, if one of the parties (the Railways in that case) cannot appoint an arbitrator as stipulated in the arbitration clause;
- 6.8 ***Indian Oil Corporation Ltd. &Ors vs. Raja Transport Pvt. Ltd.***¹⁴, on the point that the appointment of an employee of one of the parties as an arbitrator, in the pre-amendment time, cannot *per-se* be a bar to his acting as an arbitrator.

7. Although the respondent has also made submissions as to how the apprehension of bias and partiality against the 2nd Arbitrator is misplaced, in the opinion of this court, those submissions are not material for deciding the present petition, since the issue here must be decided as a matter of law.

¹¹(2019) 15 SCC 482

¹²(2019) 2 SCC 488

¹³2017 SCC Online Cal 5835

¹⁴(2009) 8 SCC 520

Discussions & Conclusions

8. Although a plethora of judgements have been cited in support and in opposition of the termination petition, and several grounds have been taken, in the opinion of this court, the decision of the present matter turns on one short point, and that is :

Whether the appointment of the 2nd Arbitrator by the CMD, NTPC on 14.05.2020, in arbitral proceedings which had commenced vide invocation notice dated 27.01.2014, is required to comply with the mandate of section 12(5) of the A&C Act inserted vide the Amendment Act-2015 with retrospective effect from 23.10.2015 ?

The nuance here being, that though arbitral proceedings commenced prior to the coming into force of section 12(5), the appointment of 2nd Arbitrator was made after section 12(5) was already in force. To be clear, the decision of the 2nd Arbitrator to reject the recall application and to hold that arbitral proceedings were validly terminated by the 1st Arbitrator, *can only be valid if* the appointment of the 2nd Arbitrator was itself valid in law.

9. In the opinion of this court, the answer to the foregoing query is found in a meaningful reading of section 12(5) of the A&C Act, inserted by the Amendment Act-2015 with retrospective effect from 23.10.2015 and the judicial view taken thereon.

10. Section 12(5) reads as under:

“Section 12. Grounds for challenge-

- (1) ***When a person is approached*** in connection with ***his possible appointment*** as an arbitrator, he shall disclose in writing any circumstances :
- (a)...
- (b)...

- (2) *An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.*
- (3) ...
- (4) *A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.*
- (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.”

(emphasis supplied)

11. Emphasizing the need for independence and impartiality of arbitrators, based on the recommendations made in the 246th Law Commission Report, with the aim and intent of ensuring ‘neutrality’ of arbitrators, in its recent decision in *Ellora Paper Mills Limited* (supra), in a somewhat similar fact situation, the Supreme Court has held as follows:

“11.3 The learned counsel appearing on behalf of the respondent has also submitted that in the facts and circumstances of the case, the decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh [(2021) 17 SCC 248] is not applicable. It is submitted that in the said case, the arbitrator was appointed after amendment of the Arbitration Act, 2015. However, in the present case, the arbitrator was appointed approximately 20 years prior thereto and thereafter the arbitration proceedings commenced and even the appellant also participated. It is therefore contended that the amended Section 12(5) of the Arbitration Act which is brought in the statute by way of amendment in 2015 shall

not be applicable retrospectively. It is submitted that Section 12(5) of the Arbitration Act shall have to be made applicable prospectively.

* * * * *

“16. In such an eventuality i.e. when the arbitration clause is found to be foul with the amended provision, the appointment of the arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such an arbitrator as may be permissible. That would be the effect of the non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement.

“17. It cannot be disputed that in the present case, the Stationery Purchase Committee – Arbitral Tribunal comprising of officers of the respondent State are all **ineligible to become and/or to continue as arbitrators** in view of the mandate of sub-section (5) of Section 12 read with Seventh Schedule. Therefore, by operation of law and by amending Section 12 and bringing on statute sub-section (5) of Section 12 read with Seventh Schedule, 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 and such an Arbitral Tribunal cannot be permitted to continue and therefore a fresh arbitrator has to be appointed as per the Arbitration Act, 1996.**

“18. ... **There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties’ apparent agreement.** A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed.”

(emphasis supplied)

12. It is also beneficial at this point to refer briefly to the judgment of the Supreme Court in ***Voestalpine Schienen GMBH vs. Delhi Metro Rail***

Corpn. Ltd ¹⁵, which discusses the need for independence and impartiality in an arbitrator in the broader perspective, quoting from the authoritative text of “O.P. Malhotra, *The Law and Practice of Arbitration and Conciliation*” (3rd Ed.), revised by Ms. Indu Malhotra (subsequently Hon’ble Judge, Supreme Court of India) in the following words:

“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator’s appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial.”

(emphasis supplied)

13. Though there is no cavil that the prevailing view as taken by the Supreme Court *inter-alia* in *Parmar Constructions and Pradeep Vinod Construction Company* (supra) is that the amendments brought in by way of Amendment Act-2015 apply to arbitration proceedings that *commence* - within the meaning of section 21- *after* the Amendment

¹⁵ (2017) 4 SCC 665

Act-2015 came into force on 23.10.2015, those decisions do not deal with a fact situation that obtains in the present case. In the present matter, an arbitrator is to be appointed *at the present time when the amendments are already in force* though in proceedings that *commenced before the amendments came into force*.

14. In the opinion of this court, the verdict of the Supreme Court in its most recent decision in *Ellora Paper Mills Limited* (supra), is therefore more germane to the present fact situation.
15. Now, in light of the judicial precedents referred to above, section 12 may be parsed in the following way:
 - 15.1 In Sections 12(1) and 12(2) set-out the disclosures required of an arbitrator affecting his independence or impartiality *when he is approached in connection with his possible appointment as an arbitrator*. Section 12(1) refers to the disclosures required at the stage when a person is approached for their possible appointment; and section 12(2) casts an obligation on an arbitrator *throughout the arbitral proceedings* to disclose any circumstances (unless already informed to the parties) that may give rise to justifiable doubts as to their independence or impartiality.
 - 15.2 Sections 12(3) and 12(4) set-out grounds relating to independence, impartiality and qualifications, on which an arbitrator may be challenged; specifically permitting a party to challenge an arbitrator *even if* the party has appointed or participated in their appointment, for reasons which the party may have become aware of *after* the appointment has been made.

- 15.3 Section 12(5), on the other hand, sets-out the criteria or grounds that would make a person ‘ineligible’, that is to say *per-se* disqualified, for appointment as an arbitrator as a matter of statutory presumption, setting-out the categories of relationships which would attract such disqualification in the Seventh Schedule to the A&C Act.
16. Needless to say that *ineligibility for appointment must necessarily be tested at the threshold*, when the appointment is to be made; and therefore, for it to be meaningful and not otiose, section 12(5) must apply *regardless* of whether the arbitration proceedings themselves commenced *before* or *after* coming into force of the Amendment Act-2015, *provided* the appointment of the arbitrator is being considered on a date when section 12(5) is in force.
17. Furthermore, looking at the overall scheme and purpose of section 12, independence and impartiality of an arbitrator is a *continuing requirement* since it goes to the very root of the credibility of the arbitral proceedings; and a person who is ineligible cannot be appointed as an arbitrator on the facetious plea that since arbitral proceedings had commenced prior to the coming into force of section 12(5), parties would have to suffer an ineligible person being appointed or continuing as their arbitrator. Any other interpretation of section 12(5) would defeat the legislative intent that informed the amendment.
18. Keeping in mind the purpose and intendment of the Legislature in inserting section 12(5), in the opinion of this court, only one inference arises, *viz.* that if an arbitrator is appointed *after* section 12(5) has come into force, the arbitrator would be ineligible if he does not pass muster

on the anvil of the Seventh Schedule read in context of section 12(5) of the A&C Act. This position would obtain *regardless* of whether the arbitral proceedings themselves commenced *prior to, or post*, coming into force of the Amendment Act-2015, *provided the arbitrator is being, or has been, appointed after the amendment took effect*.

19. In the present case, the 1st Arbitrator terminated the arbitral proceedings by order dated 22.06.2016, whereafter he is stated to have superannuated. Subsequently therefore, when the petitioner filed the recall application, the CMD, NTPC thought it appropriate to appoint the 2nd Arbitrator who is the Regional Executive Director of the respondent, and, *if* the petitioner is correct, was also the Project Head of the project from which the disputes have arisen. Whether or not the 2nd Arbitrator was Project Head is irrelevant for purposes of the present petition, since *admittedly* he is the Regional Executive Director of the respondent.
20. What the CMD, NTPC conducted was doubtlessly a *fresh exercise for appointment of an arbitrator*, which culminated in the appointment of the 2nd Arbitrator on 14.05.2020 at a point in time when section 12(5) had already come on the statute book, having been brought into effect from 23.10.2015. If therefore the 2nd Arbitrator was *per-se* ineligible for appointment in view of the Seventh Schedule to the A&C Act, he could not have been appointed as a matter of law.
21. Regrettably, based on the admitted facts obtaining in the present case, the 2nd Arbitrator does not pass muster in that regard; since he is concededly the Regional Executive Director of the respondent and therefore attracts the disqualification of being “... *a manager, director or part of the management in one of the parties*” as listed at Serial

No. 12 of the Seventh Schedule. The 2nd Arbitrator is therefore *de-facto* and *de-jure* ineligible and could never have been appointed as arbitrator in the matter. It may be observed that there is also no assertion that subsequent to the disputes having arisen, the petitioner has in any way waived the applicability of section 12(5) by any express agreement in writing.

22. Consequently, the decision of the 2nd Arbitrator rejecting the recall application, upholding the termination of the arbitral proceedings by the 1st Arbitrator, also cannot be sustained but only because the 2nd Arbitrator had no jurisdiction to make that decision.
23. This court would however, hasten to add, that this is not an expression of opinion on the merits of termination order dated 22.06.2016 passed by the 1st Arbitrator; and any challenge to that termination may be decided by a validly appointed arbitrator, on its own merits, in accordance with law.
24. At this point, the question also arises as to what the *sequitur* to terminating the mandate of the 2nd Arbitrator would be? The answer to this is contained in section 14 of the A&C Act itself, which contemplates not only termination of the mandate of an arbitrator but also the substitution of the arbitrator by another.
25. Accordingly, in view of the above discussion, the present petition is allowed; the mandate of Mr. Asit Kumar Mukherjee, the learned Sole Arbitrator appointed by the respondent is terminated; order dated 21.10.2020 upholding the termination of arbitral proceedings, is also set-aside; and Hon'ble Mr. Justice Aftab Alam, former Judge, Supreme Court of India (Cellphone No.: +91 9868219005) is appointed as the

learned Sole Arbitrator to adjudicate upon the disputes between the parties.

26. The learned Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
27. The learned Arbitrator shall be entitled to fee in accordance with the Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Arbitrator.
28. Parties shall share the arbitrator's fee and arbitral costs, equally.
29. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.
30. For completeness it may be recorded, that though the learned Arbitrator appointed in the present case is the same as the learned Arbitrator appointed in the connected dispute *vide* Arb. P. No. 582/2020; the present reference will be treated as a separate reference though before the same learned Arbitrator.
31. Parties are directed to approach the learned Arbitrator appointed within 10 days.
32. The petition stands disposed-of in the above terms.
33. Other pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

NOVEMBER 09, 2022/Ne/uj/ds