HIGH COURT OF MADHYA PRADESH : JABALPUR

BEFORE HON'BLE SHRI JUSTICE SANJAY YADAV

Arbitration Case No.48/2014

M/s Pragat Akshay Urja Limited Company
versus
State of M.P. & others

Arbitration Case No.53/2014

M/s Pragat Akshay Urja Limited Company
versus
State of M.P. & others

and

Arbitration Case No.54/2014

M/s Pragat Akshay Urja Limited Company
versus
State of M.P. & others

Shri Amit Singh, learned counsel for petitioners.

Shri A.P. Singh, learned counsel for State of M.P.

Smt. Shobha Menon, learned Senior Counsel with Shri Rahul Choubey, learned counsel for respondents No.3 to 4.

Reserved on : **13.06.2016**

Date of decision : **30.06.2016**

O R D E R

This common order shall govern final disposal of Arbitration Cases No.48/2014, 53/2014 and 54/2014.

1. These applications under Section 11(6) of Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act') at the instance of Contractor, are for appointment of sole arbitrator.

2. Three agreements were entered into between the applicant and respondent No.3-Madhya Pradesh Urja Vikas Nigam Limited -

1. Agreement No.RFP No.MPUVN/RFP-Notices/SPVPP-1Kwp-100Kwp/2013-14/2072 dated 2.8.2013.
2. Agreement No.RFP No.MPUVN/REF-Notices/SPVPP-1Kwp-9Kwp/2012-13/3230 dated 10.10.2012.
3. Agreement dated 23.7.2013 in reference to NIT No.MPUVN/Solar Cookers/2013-14/213 dated 15.4.2013.

3. On the allegations that the Contractor has failed to timely perform the contractual obligations, these contracts were terminated by communication dated 26.6.2014, 26/27.6.2014 and 27.6.2014 by the order of Managing Director. Pursuant to cancellation of contract, Applicant through its Counsel forwarded a notice dated 1.9.2014 and 27.6.2014 seeking invocation of Arbitration as per

Clause 43 of the Agreement and sought appointment of an independent Arbitrator, apprehending that the named Arbitrator being the Managing Director on whose order the contract are terminated, applicant will not get justice.

4. The request having not been acceded to has led the applicant file present applications seeking appointment of sole arbitrator.

5. It is contended on behalf of applicant that though the agreement nowhere mention about the deep pervasive control of Managing Director who also happens to be Secretary, Department of New and Renewable Energy, Govt. of M.P.; therefore, the applicant had agreed in case if a dispute arising from the said contract, to refer to the sole Arbitrator i.e Managing Director/Secretary. It is urged that after the termination of contracts, which is by the order of Managing Director, applicant has come to know about the fact that the Managing Director is having pervasive control over the functioning of Madhya Pradesh Urja Vikas Nigam and there is likelihood of bias in case the dispute in question is arbitered by him, as he would then be a judge of his own cause and applicant will be deprived of fair hearing. It is further contended that even statutory provision aims at for appointment of an independent and impartial Arbitrator.

6. To bring home his submissions, applicant has placed

reliance on the decisions in **Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd. 2003 (7) SCC 418; Bharat Sanchar Nigam Limited v. Motorola India Private Limited (2009) 2 SCC 337; Indian Oil Corporation Limited v. Raja Transport Private Limited (2009) 8 SCC 520** and **Danel (Proprietary) Limited vs. Bharat Electronics Limited (2010) 6 SCC 394**.

7. The respondents, on their turn, have contradicted the stand. While not disputing that the contracts in question are terminated by the order of the Managing Director, the respondent, however, deny that the reference to named Arbitrator and the dispute being arbitered by him will cause any prejudice to the applicant merely because the named Arbitrator happened to terminate the contracts. While contradicting that the Managing Director have a pervasive control over day-to-day activities of the Corporation, it is urged that he has overall supervisory control over working of the Corporation as would give rise to an occasion of any likelihood of bias if he discharges as an Arbitrator. It is further contended that the applicant having agreed over the terms and conditions of contract agreement now cannot resile from the same. It is also submitted that on applicant raising the dispute, the matter has been referred to Arbitrator and a communication to that effect was entered into on

18.9.2014 (Annexure A/22 in A.C. No.48/2014. However, such indulgence is not shown in respect of demand made for referring the dispute qua termination of contract which is subject matter of A.C. No.53/2014 and A.C. No.54/2014). While denying the contention that the Managing Director of the Corporation and the Secretary, Department of New and Renewable Energy, Govt. of M.P. are one and same, it is urged that if the petitioner has any grievance against the Managing Director, Secretary, Department of New and Renewable Energy, Govt. of Madhya Pradesh, who is also a named Arbitrator can resolve the dispute. It is further urged that the applicant even before entering into adjudication has prejudged that there is likelihood of bias, if the Managing Director or for that even Secretary, Department of New and Renewal Energy acts an an Arbitrator. But, without any cogent material on record as would lead to an irreversible conclusion that the Arbitrator is biased, the application for appointment of independent arbitrator is liable to be rejected. Reliance in placed on the decisions in **Indian Oil Corporation Limited v. Raja Transport Private Limited (2009) 8 SCC 520**, **State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli (1987) 2 SCC 160** and **Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35**, to bring home the submission that bias cannot be presumed, that having agreed for a named Arbitrator,

the applicant cannot resile and that applicant is bound by the terms of agreement.

8. Considered rival submissions and perused material pleadings and decisions cited at bar.

9. Present are the applications under Section 11(6) of 1996 Act which makes a provision for appointment of an Arbitrator in three circumstances, viz. (**i**) party fails to act as required under the agreed procedure; or (**ii**) the parties or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (**iii**) a person including an institution, fails to perform any function entrusted to him or it under that procedure. If one of the three conditions is satisfied, the Chief Justice or the person or institution designated by him to take necessary measure, may exercise the jurisdiction and appoint an Arbitrator.

10. That, sub-section (8) of Section 11 of 1996 Act as it was prior to its substitution vide Arbitration and Conciliation (Amendment) Act, 2015 w.e.f. 23.10.2015, provided that the Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects viz. (a) any qualification required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator. In

Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited (2008) 10 SCC 240, while dwelling on the scope of sub-section (8) of Section 11 of 1996 Act, it was observed -

> "11. The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures" (underlined for emphasis). This expression has to read alongwith requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
>
> 12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

13. The expression `due regard' means that proper attention to several circumstances have been focussed. The expression `necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

14. In all these cases at hand the High Court does not appear to have focussed on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above."

11. This view has been reiterated in **Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35,** wherein their Lordships were pleased to observe that -

"18. .. Insofar as Section 11(8) is concerned,

> this Court stated that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements mentioned therein have to be kept in view."

12. That, sub-section (8) of Section 11 of 1996 Act has now been substituted vide Amendment Act, 2015 in the following terms -

> "(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—
>
> (a) any qualifications required for the arbitrator by the agreement of the parties; and
>
> (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.";

13. Sub-section (1) of Section 12 of Amendment Act, 2015 provides for -

> "(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, -
>
> (a) such as the existence either direct or indirect, of any past or present relationship

with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months."

14. As per newly inserted fifth schedule the grounds which give rise to justifiable doubts as to the independence or impartiality of arbitrators are exhaustively delineated under following head :

(1) Arbitrator's relationship with the parties or counsel

(2) Relationship of the arbitrator to the dispute

(3) Arbitrator's direct or indirect interest in the dispute

(4) Previous services for one of the parties
(5) or other involvement in the case

(6) Relationship between an arbitrator and another arbitrator or counsel

(7) Other circumstances

15. Furthermore, sub-section (5) of Section 12 of the Amendment Act, 2015 envisages that -

"(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."

16. Sub-section (5) of Section 12 read with Clause 12 of the Seventh Schedule of Amendment Act, 2015 mandates a person ineligible to act as an arbitrator if he "is a manager, director or part of the management, or has a similar controlling influence in one of the parties".

17. That, Section 26 of the Amendment Act, 2015 excludes the application of the Amendment Act, 2015 to pending arbitral proceedings. It stipulates :

> "26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

18. Section 21 of 1996 Act mandates :-

> "**21**. **Commencement of arbitral proceedings**.- Unless otherwise agreed by the

parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

19. In **State of Goa v. Praveen Enterprises (2012) 12 SCC 581,** it has been held -

18. …. As Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of `institution' for arbitration proceedings. Section 21 of the Act supplies the omission. But for Section 21, there would be considerable confusion as to what would be the date of `institution' in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under Section 11 of the Act. In view of Section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on

> the date on which "the request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore the purpose of Section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not."

20. These applications under Sections 11(6) of 1996 Act were filed before the commencement of Amendment Act, 2015. And, the arbitral proceedings having commenced, provisions of Amendment Act, 2015 are not attracted by virtue of Section 26 of the Amendment Act, 2015. Thus, the applicants are not benefited from the newly inserted sub-section (8) of Section 11, sub-section (1) and (5) of Section 12 and Schedule V and VII of Amendment Act, 2015. This answers the submissions on behalf of the applicants which were tendered after the matter was closed for orders.

21. Coming back to the case at hand, the Arbitration Clause 43 is in the following terms -

> "43. **Arbitration –** That, in the event of any dispute or difference whatsoever arising under the Contract/Work order placed by MPUVN, the same shall be referred to Arbitration which shall be as per the provisions of Indian Arbitration Act, 1996 and the Rules applicable thereto/under. All the Proceedings of

> Arbitration will take place in Bhopal. The award in such arbitration shall be final and binding on both the parties i.e. MPUVN and Participant. In this case, the arbitrator shall be Secretary, Department of New and Renewable Energy, Govt. of Madhya Pradesh/Managing Director, M.P. Urja Vikas Nigam Ltd. Bhopal. That, any dispute between Participant and M.P. Urga Vikas Nigam Ltd. Bhopal shall be subjected to Bhopal jurisdiction."

22. It is not in dispute that the contract agreements were terminated by the order of Managing Director. That, on an information sought from the Government Advocate, it was informed that presently, Managing Director of M.P. Urja Vikas Nigam Ltd. and Secretary, Department of new and Renewable Energy, Govt. of M.P. are one and the same. This belies the contention on behalf of respondents that Managing Director of the Corporation and Secretary, Department of new and Renewable Energy, Govt. of M.P. are not the same. It is also not in dispute that Madhya Pradesh Urja Vikas Nigam Limited is a body incorporate and as per Article 70 of Article of Association, it shall have minimum two directors, maximum nine directors including the Chairman and Managing Director. The Managing Director is appointed by the Governor under Article 77:XII of Article of Association for "the conduct or management of the business of the company subject to

the control and direction, supervision of the Board of Directors". This Article further provides that "The Managing Director so appointed may be authorized by the Board to exercise such of the powers and discretion in relation to the affairs of the company as are specifically delegated to him by the Board and are not required to be done by the Board of Directors of the company at the general meeting under the Act".

23. Taking into consideration these provisions, it cannot be said that the Managing Director has no say in the conduct or management of the Company. It is because of the powers so conferred, the Managing Director terminated the contracts.

24. This takes us to the main contention that Managing Director, the named Arbitrator being the Authority having terminated the contract agreement, can act as an Arbitrator.

25. Plethora of decisions were cited at bar noted supra. However, recently in **North Eastern Railway v. Tripple Engg. Works, (2014) 9 SCC 288**, it has been held by their Lordships -

> "6. The "classical notion" that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in Ace Pipeline Contracts (P) Ltd. v. Bharat

Petroleum Corporation Ltd. wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India v. Bharat Battery Manufacturing Co. (P) Ltd. wherein following a three-Judge Bench decision in Punj Lloyd Ltd. v. Petronet MHB Ltd. it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in ACE Pipeline and Bharat Battery Mfg. Co. (P) Ltd. was reconciled by a three-Judge Bench of this Court in Northern Railway Admn. v. Patel Engg. Co. Ltd. wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasized by taking into account the expression "to take the necessary measure" appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read alongwith the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corporation Limited and Ors. V .Raja Transport Pvt. Ltd. Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) herein

below.

> *"48. (vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.*
>
> *(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."*

8. The above discussion will not be complete without reference to the view of this Court expressed in Union of India v. Singh Builders Syndicate wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not been concluded for over a decade, making a mockery of the process. In fact, in para 25 of the Report in Singh Builders Syndicate this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in Deep Trading Co. v. Indian Oil Corporation and Ors. followed the legal position laid down in Punj Lloyd Ltd. which in turn had followed a two-Judge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. The theory of

> forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction Under Section 11(6) of the Act."

26. Keeping in view the law as now stand and the fact that the Managing Director of respondent-Company is also the Secretary, Department of New and Renewal Energy, Govt. of M.P. and the law as adverted to in **Bihar State Mineral Development Corporation v. Encon Builders** (supra) wherein it is observed :-

> "17. There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well- settled principle of law that a person cannot be a judge of his own cause. It is further well-settled that justice should not only be done but manifestly seen to be done.
>
> 18. Actual bias would lead to an automatic disqualification where the decision maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality

> or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.
>
> 19. The case at hand not only satisfies the test of real bias but also satisfies the real danger as well as suspicion of bias. (See. Kumaon Mandal Vikas Nigam Ltd. vs Girja Shankar Pant (2001) 1 SCC 182)."

27. In **Secretary to Government, Transport Deptt. Madras v. Manuswamy Mudaliar 1988 (Supp) SCC 651,** the Supreme Court while examining the issue as in the present case as to removal of named arbitrator being a Govt. Servant in a dispute wherein one of the party is the State, laid down following parameters to adjudge reasonable apprehension of bias. Their Lordships were pleased to observe -

> "12. Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, Commercial Arbitration, 1982 Edition, page 214. Halsbury's Laws of England, Fourth Edition, Volume 2, para 551, page 282 describe that the test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias."

28. When these tests are applied to the facts of present case, it leaves no iota of doubt that the Managing Director/Secretary, Department of New and Renewal Energy cannot be allowed to judge his own cause.

29. It would, therefore, be in the interest of both the parties that an Arbitrator other than Secretary, Department of New and Renewable Energy, Govt. of Madhya Pradesh/Managing Director, M.P. Urja Vikas Nigam Ltd. Bhopal, requires to be appointed to settle the dispute.

30. For these reasons, applications are **allowed**. Hon'ble Shri Justice K.K. Trivedi, Former Judge of M.P. High Court, R/o Block No.3, Vasundhara Vihar, Near St. Thomas School, South Civil Lines, Jabalpur is appointed as an Arbitrator to settle the dispute arisen between the applicant and respondents.

31. The Arbitrator will be at liberty to fix the remuneration and other terms and conditions with regard to holding of the arbitration proceedings.

(SANJAY YADAV)
JUDGE

vinod