

Ncc Ltd vs.union of India Through: Director General, Married Accommodation Project & Anr.

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Court : Delhi

Decided On : Nov-26-2018

Appellant : Ncc Ltd

Respondent : Union of India Through: Director General, Married Accommodation Project & Anr.

Judgement :

\$-18 * + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

26. h November, 2018 O.M.P.(MISC.)(COMM.) 313/2018 NCC LTD

... Petitioner

Through: Ms.Priya Kumar, Mr.Adhish Srivastava, Mr.Tejas Chhabra, Mr.Anand Chichra and Mr.Sujit Kr.Singh, Advs. versus UNION OF INDIA THROUGH: DIRECTOR GENERAL, MARRIED ACCOMMODATION PROJECT & ANR.

... RESPONDENTS

Through: Mr.Ruchir Mishra, Mr.Sanjiv Kr.Saxena, Mr.Mukesh Kr.Tiwari, Mr.Ramneek Mishra and Mr.Abhishek Rana, Advs. CORAM: HON'BLE MR. JUSTICE NAVIN CHAWLA NAVIN CHAWLA, J.

(Oral) 1. This petition has been filed under Section 29A of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking extension of time

for making of the Arbitral Award by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Contract No.DGMAP/ PHASE -II/ PKG.-.18/ ARMY/19 of 2009-2010.

2. The Arbitration Agreement between the parties is contained in Clause 60 of the General Conditions of the Contract and requires a O.M.P. (MISC)(COMM) 313/2018 Page 1 serving officer having a degree in Engineering to be appointed as an Arbitrator. As the said condition would be violative of Section 12(5) of the Act, the parties entered into a Supplementary Agreement dated 10.07.2017 whereby the consent of the petitioner was recorded for the named Arbitrator to be appointed.

3. The formal letter of appointment of Arbitrator was issued by the respondents on 16.08.2017 and the Arbitrator entered upon reference on 01.09.2017 by issuing a Procedural Order.

4. By a subsequent notice dated 14.03.2018, the Arbitrator fixed 17th to 19th April, 2018 as the date of hearing. He advised the parties to file before him all the books, papers, accounts, bills etc which may be required during the hearing. He further called upon the parties to hand over non-judicial stamp paper for the purpose of the Award.

5. It is at this stage that the respondent started putting spokes in the arbitration proceedings by filing applications one after another. They were all intended to derail the arbitration proceedings. The first of such applications was filed on 03.04.2018 requesting the Arbitrator to fix the hearing after 10.07.2018 as also to change the venue of the arbitration. Having failed to get relief in this application, another application was filed by the respondent on 16.04.2018, again seeking adjournment of the arbitration proceedings and a change of venue. In this application further relief was sought for allowing the parties to produce witnesses and conduct the admission and denial of the documents. The said application was also rejected by the Arbitrator vide his order dated 18.04.2018. O.M.P. (MISC)(COMM) 313/2018 Page 2 6. Aggrieved by the same, the respondent filed an application seeking recusal of the Arbitrator from the proceedings. Certain other applications were also filed before the Arbitrator, as noted above, all intended

merely to derail the arbitration proceedings.

7. The mandate of the Arbitrator terminated in terms of Section 29A(4) of the Act on 31.08.2018. The Arbitrator vide two separate letters both dated 06.09.2018 expressed his disinclination to continue as an Arbitrator. In the first letter he clearly records that this was due to non cooperation of the respondents. While in the second, he stated that he was about to superannuate and is unable to give an Award during his tenure of service.

8. At this stage, I may only note that the petitioner has produced a letter dated 23.10.2018 from the Arbitrator giving his consent to continue as an Arbitrator in the event this Court extends the time for making of the Award. In any case, as the resignation letters are addressed post termination of the mandate of the Arbitrator, the same can have no effect.

9. The learned counsel for the respondents has drawn reference to the minutes of the arbitration proceedings held on 17th and 18th April, 2018. He submits that the Arbitrator did not grant proper opportunity to the respondents to make the submissions. He further submits that the Arbitrator having tendered his resignation, the substitute Arbitrator had to be appointed in accordance with Section 15 of the Act by observing the same procedure as prescribed in the Arbitration Agreement.

10. I have considered the objections raised by the counsel for the respondents, however, find no merit in the same. O.M.P. (MISC)(COMM) 313/2018 Page 3 11. Section 29A of the Act is intended to sensitize the parties as also the Arbitral Tribunal to aim for culmination of the arbitration proceedings expeditiously. It is with this legislative intent, Section 29A was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. This provision is not intended for a party to seek substitution of an Arbitrator only because the party has apprehension about the conduct of the arbitration proceedings by the said Arbitrator. The only ground for removal of the Arbitrator under Section 29A of the Act can be the failure of the Arbitrator to proceed expeditiously in the adjudication process.

12. In the present case, the Arbitrator in the first notice itself, issued on 01.09.2017 had stated that he would like to publish the Award within six months from the date of entering upon the reference. By subsequent notice dated 14.03.2018, he fixed the schedule for hearing and called upon the parties to produce all the documents in support of their respective case. In fact, it is the respondents who were seeking postponement of the hearing by filing applications before the Arbitrator.

13. Surely the respondent cannot now make a complaint against the Arbitrator for him having not concluded the arbitration proceedings within the stipulated period of one year as prescribed under Section 29A of the Act.

14. As far as the grievance of the respondents that the conduct of the arbitration proceedings are biased is concerned, the same cannot be the subject matter of the present proceedings. The respondents have also filed an application under Section 13 of the Act before the Arbitrator, which is pending adjudication. This Court, therefore, refrains from O.M.P. (MISC)(COMM) 313/2018 Page 4 making any observation on the said application. Even otherwise, in term of Section 13(4) of the Act, incase the said application is decided against the respondents, the remedy provided to the respondents would be to challenge the same alongwith the ultimate Award passed by the Arbitrator.

15. As far as the issue of resignation of the Arbitrator is concerned, as noted above, the mandate of the Arbitrator had terminated on 31.08.2018. Faced with the situation, he had addressed two letters tendering his resignation. However, on a query being raised by the petitioner, the Arbitrator had clarified that he will be willing to continue as the Arbitrator if the time for making of the Award is extended by this Court. In my view, as the respondents have contributed to the failure of the Arbitrator in not being able to pass the Award within the stipulated period, purported resignation of the Arbitrator was out of frustration more than free will. In the present case, this Court is only to consider the application seeking the extension of time for the Arbitrator to make the Award. Incase the Arbitrator still considers that for any reason he would not like to continue as an Arbitrator, it would always be open to the Arbitrator to tender his resignation in accordance with the law.

16. The submission of the counsel for the respondent that the Arbitration Agreement between the parties requires only a serving officer of the respondents to be appointed as an Arbitrator and as the Arbitrator has superannuated on 31.10.2018, the substitute Arbitrator is to be appointed, I may only note that the said provision of serving officer being appointed as an Arbitrator is violative of Section 12(5) of the Act and can no longer be enforced except on a specific waiver by O.M.P. (MISC)(COMM) 313/2018 Page 5 the respondent. The said specific waiver, as recorded in the Supplementary Agreement has been given by the petitioner only on the appointment of the present Arbitrator. Therefore, the submission of the counsel for the respondents has no merit.

17. In view of the above, I extend the time for making of the Award by the Arbitrator by a further period of six months with effect from today. However, the Arbitrator shall remain uninfluenced by any observations made by this Court. The observations made in the present order shall also be not read to prejudice the respondent in any other proceedings.

18. The petition is disposed of in the above terms. The respondents shall pay a cost of Rs.25,000/- for the present proceedings to the petitioner. NOVEMBER26 2018/Arya NAVIN CHAWLA, J O.M.P. (MISC)(COMM) 313/2018 Page 6

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