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

Date of Decision : 29.05.2019

+ O.M.P. (T) (COMM.) 54/2019 & IAs 8116-8117/2019

G.S. DEVELOPERS & CONTRACTORS PVT.LTD.

..... Petitioner

Through: Mr.Mohit Chaudhary, Mr.Kunal Sachdeva, Advs.

versus

ALPHA CORP DEVELOPMENT PRIVATE LIMITED & ANR.

..... Respondents

Through: Mr.Ayush Agrawal, Mr.Vikrant Singh, Mr.S.N.Samith, Mr.Debesh Panda, Mr.Mangesh, Mr.V.K.Verma, Advs. along with Mr.Praveen, AR.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed by the petitioner under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for termination of the mandate of the Sole Arbitrator and for appointment of a Substitute Arbitrator in his place.

2. The arbitration proceedings between the parties were earlier being conducted by the Arbitrator appointed by the respondent. The respondents unilaterally declared the mandate

of the Arbitrator as terminated and thereafter proceeded to appoint another Arbitrator. This was challenged by the petitioner by way of a petition under Section 14 read with Section 29A of the Act, being OMP(T)(Comm.) No.24/2017.

3. This Court by an order dated 22.03.2017, with the consent of the parties, appointed the present Arbitrator.

4. The Arbitrator entered upon reference and issued a notice of preliminary hearing on 31.03.2017.

5. Admittedly, the arbitration proceedings are today at the stage of final arguments with the pleadings having been completed by both the parties and the witnesses having been examined.

6. The challenge of the petitioner in the present petition is basically confined to the fixation of fee by the Arbitrator. The Arbitrator had raised fee memos on particular fees charged per session to which the petitioner claims to have protested against and had requested for reduction of the fee.

7. It is the case of the petitioner that the Arbitrator agreed to charge his fee in accordance with the ceiling mentioned in the Fourth Schedule of the Act. The petitioner claims that this decision was taken by the Arbitrator in the proceedings held on 16.04.2018.

8. Counsel for the petitioner submits that in accordance with this understanding, the petitioner had addressed e-mails dated 24.04.2018 and 25.04.2018 to which the office of the Arbitrator replied vide e-mail dated 01.05.2018, clearly showing that this understanding of the petitioner had been duly accepted by the Arbitrator.

9. The counsel submits that the Arbitrator, however, on 15.01.2019 again raised an issue of re-determination of the fee stating that as the number of hearings has far exceeded the desired number, he was entitled to charge an additional fee. Though this was protested by the petitioner, the Arbitrator raised fresh memo of fee on 17.01.2019, reverting back to the fee charged per session.

10. By an order dated 15.02.2019, the Arbitrator called upon the respondents to pay this additional fee failing which action shall be taken under Sections 32 and 38 of the Act. The Arbitrator, further on 01.03.2019 closed the right of the petitioner to agitate its counter claims on account of non-payment of the additional fee. On 18.03.2019, the Arbitrator during the course of hearing even refused to look at the documents that had been annexed by the petitioner along with its counter claims.

11. The petitioner thereafter filed an application under Section 14 read with Section 15 of the Act, being OMP(T)(Comm.) No.33/2019. The same was, however,

withdrawn, without prejudice to the rights and contentions of the petitioner and with liberty to first approach the Arbitrator seeking clarification as also making the request for reconsideration of the fee and for allowing the petitioner to agitate its counter claims.

12. The petitioner thereafter filed a fresh application on the same terms before the Arbitrator. However, in the submission of the petitioner, the Arbitrator was agitated on receiving this application and made certain derogatory verbal comments against the petitioner. Faced with this, the petitioner filed an application under Section 13(2) of the Act, before the Arbitrator vide letter dated 01.04.2019.

13. These applications have been disposed of by way of an order dated 18.04.2019, circulated by the Arbitrator to the parties on 15.05.2019.

14. Counsel for the petitioner submits that a reading of the order itself would show that the Arbitrator has an inherent bias against the petitioner for having agitated the issue of fee before him. Relying upon the judgment of the Court of Appeal in *K/S Norjarl A/S vs. Hyundai Heavy Industries Co. Ltd.* 1991 1 QB 863, he submits that the fee having been determined by the Arbitrator, incase the Arbitrator thereafter enters upon communication with the parties for increase in such fee, this itself amounts to misconduct, giving rise to a ground for removal of the Arbitrator. Further relying upon the judgment

of the Supreme Court in *State of West Bengal & Ors. vs. Shivananda Pathak & Ors.* (1998) 5 SCC 513 and *Union of India vs. Sanjay Jethi & Ors.*, (2013) 16 SCC 116, he submits that bias has many forms. It may be pecuniary bias, personal bias as also bias on account of judicial obstinacy. He submits that the issues of bias are to be examined on the touchstone of doctrine of prejudice and the test is whether a reasonable independent person fully apprised of the circumstances, would fall in a series of apprehension of bias. He submits that the order dated 18.04.2019 passed by the Arbitrator clearly gives rise to such an apprehension in the mind of the petitioner.

15. I am unable to agree with the submissions of the counsel for the petitioner. Admittedly, there is no record of any arbitral proceedings especially one on 16.04.2018, recording the concession of the Arbitrator on charging the fee in accordance with the ceiling mentioned in the Fourth Schedule to the Act. It is important to note here that this Court while appointing the present Arbitrator on 22.03.2017 did not mandate that the Arbitrator would charge his fee only in accordance with the Fourth Schedule to the Act. The Fourth Schedule to the Act being merely a guiding model, is not binding on the Arbitrator specially because the same has not been so far been adopted by this Court in its Rules. The Arbitrator was, therefore, free to determine his own fee.

16. The e-mail of the Arbitrator being relied upon by the petitioner, does not even remotely suggest that the Arbitrator had given his consent to a ceiling on the fee. The petitioner sought a confirmation from the office of the Arbitrator that it had received an amount of Rs.25 lakh out of Rs.30 lakh as fee. This was duly acknowledged by the office of the Arbitrator. The e-mail said nothing further.

17. In spite of this position, the petitioner has persisted with the Arbitrator even causing the Arbitrator to change his order at a later stage. The Arbitrator had no option but to deal with these allegations in his order dated 18.04.2019. Merely because the Arbitrator has chosen to deal with these allegations, it cannot be said that the Arbitrator has expressed a bias against the petitioner. Infact, the Arbitrator has proceeded to stem the controversy by agreeing to charge lower fee.

18. By the above order, the Arbitrator has recorded the entire sequence of events and the way in which the proceedings have been held before the Arbitrator specially with regard to fixation of fee. While rejecting the application under Section 13(2) of the Act filed by the petitioner, the Arbitrator in paragraph 58 of the said order has passed the following directions as far as the fee is concerned:

“58. Although the Respondent does not press upon the prayer (a) of the Application dated 28th March 2019, in the interest of justice, the Tribunal now amends the fee

structure of the matter as laid in Order dated 12th May 2017 to Fourth Schedule of the Act. The Tribunal shall now charge Rs.37.50 Lakh for the Claim as well Rs. 37.50 Lakh for the Counterclaims, to be shared equally between the Parties. The Respondent may make the payments as per Fourth Schedule for the Claims as well as the Counterclaims within 10 days of the receipt of the Order. In case, the Respondent fails to make payment of the its share of fees for the Claims and Counterclaims, then the Claimants may make payment of the Respondent's share of fee for the Claim as well as Counterclaim within 10 days thereafter. The Tribunal is mindful of the fact that the Claimant had refused to pay the Respondent's share of the fee for the Counterclaim, but that was so in the background of the fee structure laid in the Order dated 12th May 2017. In the event, the Claimants do not make such payments then the matter will proceed for the arguments of the Respondent on the Claims as well as Counterclaims and Rejoinder arguments thereafter, and the aspect of arbitral arrears shall be dealt at the stage of making of the Award, as per law. The Fee Memos elated 18th December 2017 and 17th January 2019 issued by the Tribunal are withdrawn.”

19. Be that as it may, if the allegation of bias is raised under Section 13 of the Act, the remedy of the petitioner is only to await the Award and thereafter challenge the same if so, advised, along with its challenge to the Final Award. The petitioner cannot file an application under Section 14 of the Act.

20. The present petition is therefore, not maintainable.

21. In view of the above, I find no merit in the present petition. The same is dismissed with cost quantified at Rs.25,000/- to be paid to the Delhi High Court Advocates Welfare Fund.

NAVIN CHAWLA, J

MAY 29, 2019
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