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

Date of decision: 19th October, 2022

+ O.M.P. (T) (COMM) 88/2021
PRASAR BHARTI

.....Petitioner

Through: Mr. P.S. Singh & Mr. Ravi Kumar,
Advocates.

versus

NATIONAL BRAIN RESEARCH CENTRE & ANR.

..... Respondents

Through: Mr. Abinash K. Mishra & Mr. Gaurav
Kumar Pandey, Advocates for R-1.
None for R-2.

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(1)(b) of the Arbitration & Conciliation Act, 1996 ('A&C Act' for short) the petitioner/Prasar Bharti seeks termination of the mandate of the learned Sole Arbitrator appointed *vide* order dated 12.02.2020 by a Co-ordinate Bench of this court in Arb. P. No. 799/2019 under section 11(6) of the A&C Act. The learned Arbitrator is stated to be seized of the disputes between the parties arising from an agreement dated 01.06.2010 signed between the petitioner and respondent No. 1, though by reason of pendency of the present petition, at this time no arbitral proceedings between the petitioner and respondent No. 1 are stated to be going-on.

2. Notice on this petition was issued on 08.09.2021; whereupon respondent No. 1 entered appearance and has filed reply dated 23.12.2021 opposing the prayer in the petition.
3. Insofar as respondent No. 2 is concerned, it is the petitioner's submission, that the disputes between the petitioner and respondent No. 2 have been decided and resolved by way of an interim award dated 21.11.2019 made by a different arbitrator; and the learned Arbitrator in the present matter is seized only of the disputes between the petitioner and respondent No. 1.
4. Mr. P.S. Singh, learned counsel appearing for the petitioner has supported his prayer for termination of the mandate of the learned Arbitrator essentially on the following basis:
 - a. That though the learned Arbitrator had been appointed by a Coordinate Bench of this court *vide* order dated 12.02.2020, soon thereafter *vide* Office Memorandum No. 334774/DoLA/AMRD/2019 dated 30.03.2020 (the 'said O.M.') the Ministry of Law & Justice, Department of Legal Affairs of the Government of India has advised as follows:

"Instructions have been issued to Ministries/Departments of the Governments of India, in the past to avoid inter-departmental litigations in any Court of law, including by all CPSEs/Boards/Authorities, etc., under their Administrative control and to resolve the same amicably or through Arbitration.

2. In order to provide for an institutionalized mechanism for resolution of such disputes, Secretary, Department of Legal Affairs has vide DO letter No. 332619/338367/LS/2019 dt. 28th February, 2020 (copy enclosed) advised all Secretaries to the Government of India that the existing Administrative Mechanism for Resolution of Commercial

Disputes (AMRCD), currently applicable to commercial disputes between CPSEs inter se and also between CPSEs and Government Departments/Organisations, shall stand extended for resolution of disputes other than taxation, between Ministries/Departments inter se and between Ministries/Departments and other Government Ministries/Departments/Subordinate/Attached offices/Autonomous and Statutory Bodies under their administrative supervision/control. Details of the new mechanism, namely, Administrative Mechanism for Resolution of Disputes (AMRD), are hereby outlined for guidance.

- b. It is accordingly the submission that the petitioner is now under mandate to adopt and follow the institutionalized mechanism for resolution of disputes as contained in the said O.M. since respondent No. 1 falls within the purview of the entities covered by it.
- c. It is further the petitioner's contention that in view of the said O.M., the petitioner and respondent No. 1 have mutually and amicably agreed, *vide* Memorandum of Settlement dated 10.03.2021 signed between them, to terminate the mandate of the learned Arbitrator and to adopt the administrative mechanism as contained in the O.M. The settlement signed by the petitioner and respondent No. 1 is in the following words:

“AND WHEREAS in view of the above said development arising out of the OM dated 30.3.2020 the First Party and Second Party have finally decided to adopt the said new mechanism, namely Administrative Mechanism for Resolution of Disputes (AMRD), Notified by Govt. of India, Ministry of Law and Justice, Department of Legal Affairs O.M No. 334774/DoLA/AMRD/2019 dated 30.03.2020 in place of arbitration proceedings as ordered by the Hon'ble

High Court of Delhi vide order dated 12.2.2020 subject to the prior approval of the Hon'ble Delhi High Court.

AND WHEREAS in the interregnum of the above mentioned arbitration proceedings the first party and the second party out of their own free will and according to O.M No. 334774/DoLA/AMRD/2019 dated 30.03.2020 issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs have thus mutually and amicably, without any coercion, undue influence, threat etc. from any corner have agreed to adopt the Administrative Mechanism for Resolution of Disputes(AMRD) in the following terms and conditions and subject to the prior approval of the Hon'ble Delhi High Court:-

TERMS AND CONDITIONS

1. That the First Party and Second Party will jointly move an application before the Hon'ble Delhi High Court for seeking its prior approval for adopting the mechanism provided in OM dated 30.3.2020 instead of arbitration by the Sole Arbitrator, Justice M.R. Agnihotri (Retd.), for the adjudication of the disputes and differences which have arisen between the first party and the second party out of the agreement dated 01.06.2010.

* * * * *

7. That the first and second parties further agree that the outcome of the filing of the application before the Hon'ble Delhi High Court shall be duly informed to the Third Party-M/s Unity Builders also with the same stipulations and liberty as mentioned in the order dated 12.2.2020.

* * * * *

9. That in view of the above, both the parties to this memorandum hereby further agree that they shall not raise any objection in future to the change of the dispute resolution mechanism, subject to the prior approval given by the Hon'ble Delhi High Court, from the arbitration as ordered in terms of the Order dated 12.2.2020 [passed in Arb. Petition No. 799 /2019] to the AMRD as per the OM dated 30.3.2020.

(emphasis supplied)

5. Controverting the petitioner's contentions, as detailed in reply dated 23.12.2021 filed on behalf of respondent No. 1, Mr. Abinash K.

Mishra, learned counsel appearing on behalf of the said respondent has opposed the petition, submitting as follows:

- a. That there is an arbitration clause comprised in clause 4.8 of agreement dated 01.06.2010 executed between the petitioner and respondent No. 1, by which agreement the petitioner had engaged the services of respondent No. 1 as the Project Management Consultant. By way of a separate agreement dated 31.01.2011 signed between the petitioner and respondent No. 2, the petitioner had also engaged the services of respondent No. 2 as the Contractor.
- b. Respondent No. 1 contends that respondent No. 2 had failed to discharge its obligations and to make timely compliance of its obligations towards completion of the project; however, in collusion with respondent No. 2, the petitioner has chosen to over-look the failures on the part of respondent No. 2 and has instead raised disputes with respondent No. 1. It is submitted that it was in this backdrop that arbitration proceedings were initiated by respondent No. 1 against the petitioner *and* respondent No. 2, which culminated in the appointment of the learned Arbitrator by order dated 12.02.2020 by a Co-ordinate Bench of this court.
- c. It is submitted however, that arbitral proceedings could not be commenced due to the then prevailing Covid-19 pandemic; and in the meantime the said O.M. came to be issued by the Government of India;

- d. It is argued that though respondent No. 1 did sign the memorandum of settlement dated 10.03.2021 with the petitioner, it was an express term of the settlement that respondent No. 1 shall not be liable for any claims *until and unless* the disputes between the petitioner and respondent No. 1 were *finally* resolved. Respondent No. 1 contends however, that despite the aforesaid agreed position, the petitioner sent a communication dated 27.08.2021 intimating to respondent No. 1 that an interim award for about Rs. 5.06 crores alongwith interest had been passed *against the petitioner and in favour of respondent No.2*; implying thereby that *respondent No.1* would be liable to reimburse the said sum of Rs. 5.06 crores to the petitioner. This, it is contended, is a breach by the petitioner of the terms of the memorandum of settlement.
- e. It is argued that in this backdrop, respondent No. 1 raised the issue with the petitioner *vide* its letter dated 24.11.2021 and also by a separate letter dated 03.11.2021 sent to the Department of Bio-technology, Government of India (which is the parent department of respondent No. 1); and that in response, respondent No. 1 has since received letter dated 17.12.2021 from that department, which reads as under :

“2. In connection with the above, it is stated that the subject matter was examined in consultation with Legal Cell, DBT and with the approval of Competent Authority, it has been decided that the dispute between NBRC and CCW may be adjudicated through Arbitration in place of adaptation of AMRD.”

- f. In these circumstances, it is argued that respondent No. 1 has decided not to give consent for termination of the mandate of the learned Arbitrator appointed in the matter and is therefore opposing the present petition.
6. In the opinion of this court, the decision of the present case turns upon the following considerations:
- a. Though it cannot be gainsaid that respondent No. 1 falls within the scope and ambit of the AMRD, first and foremost AMRD is a mechanism for *settlement* of commercial disputes between certain governmental organizations and departments and is a successor to the Permanent Machinery of Arbitration ('PMA') which was put in place in March 1989. The intent, purport and purpose of the AMRD, following upon that of the PMA, is best understood in the words of the Hon'ble Supreme Court in *Northern Coalfields Ltd. vs. Heavy Engg. Corpn. Ltd.*,¹ and in the subsequent order of the Hon'ble Supreme Court in *MTNL vs. Canara Bank & Ors.*,² the relevant portions of which are extracted below:

Northern Coalfields (*supra*)

"23. The net effect of the above can be summarised as under:

23.1. The Permanent Machinery of Arbitration was put in place as early as in March 1989, even before ONGC-2 [Oil and Natural Gas Commission v. CCE, 1995 Supp (4) SCC 541] was decided on 11-10-1991.

¹ (2016) 8 SCC 685

² (2019) 10 SCC 32

23.2. The Permanent Machinery of Arbitration was outside the statutory provision then regulating arbitrations in this country, namely, the Arbitration Act, 1940 (10 of 1940).

23.3. The award made in terms of the Permanent Machinery of Arbitration being outside the provisions of the Arbitration Act, 1940 would not constitute an award under the said legislation and would therefore neither be amenable to be set aside under the said statute nor be made a rule of the court to be enforceable as a decree lawfully passed against the judgment-debtor.

23.4. The Committee on Disputes set up under the orders of this Court in the series of orders passed in ONGC cases did not prevent filing of a suit or proceedings by one PSE/PSU against another or by one government department against another. The only restriction was that even when such suit or proceedings were instituted the same shall not be proceeded with till such time the Committee on Disputes granted permission to the party approaching the Court.

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23.7. The Committee on Disputes' experience was found to be unsatisfactory and the directives issued by the Court regarding its constitution and matters incidental thereto were recalled by the Constitution Bench [Electronics Corpn. of India Ltd. v. Union of India, (2011) 3 SCC 404 : (2011) 1 SCC (Civ) 729 : (2011) 1 SCC (L&S) 514] of this Court thereby removing the impediment which was placed upon the courts'/tribunals' powers to proceed with the suit/legal proceedings. The Department of Public Enterprises has subsequent to the recall of the orders in the ONGC line of cases modified its guidelines deleting the requirements for a CoD clearance for resorting to the Permanent Machinery of Arbitration; and

23.8. The Permanent Machinery of Arbitration was and continues to be outside the purview of the Arbitration Act, 1940 now replaced by the Arbitration and Conciliation Act, 1996.”

MTNL (*supra*)

“4. The Government of India has now set up AMRCD, which has replaced the Permanent Machinery of Arbitration (PMA). The objective of AMRCD is to bring about a time-bound settlement of commercial disputes between Central Public Sector Enterprises (CPSEs) inter se and CPSE and Government Departments/Organisations.

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“5. The counsel for the appellant submits that since the disputes in the present case have arisen between two PSUs inter se, the matter should be referred to AMRCD.

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“7. We have considered the submissions made by the parties. Though as a logical sequitur to the judgment dated 8-8-2019 [MTNL v. Canara Bank, 2019 SCC OnLine SC 995], CANFINA stands impleaded in the pending arbitral proceedings which ought to be taken to the logical conclusion, in our view, an attempt must be made if the disputes between the two public sector enterprises could be settled through AMRCD. If any settlement is brought about through such an attempt, it will not only save public funds, but will ensure the true spirit of coordination amongst different public bodies. Guided purely by these considerations, we direct all the three parties i.e. MTNL, Canara Bank, and CANFINA, to approach AMRCD for settlement of their disputes. If, however, the disputes are not settled by 15-1-2020 the disputes will then be resolved through the pending arbitration proceedings as directed vide the judgment and order dated 8-8-2019 [MTNL v. Canara Bank, 2019 SCC OnLine SC 995].”

7. Clearly therefore, the AMRD is only a mechanism for possible settlement of disputes *inter-se* governmental organisations, in this case between the petitioner and respondent No. 1, in an effort to obviate need for more expensive and time-consuming adjudicatory mechanisms. The AMRD is *not a substitute for arbitration* in cases where there is an arbitration agreement between the parties.
8. In the present case, a learned Arbitrator has already been appointed to adjudicate upon the disputes between the petitioner and respondent No. 1 *vide* order dated 12.02.2020 made in Arb. P. No. 799/2019; and is already seized of the matter, having issued notice dated 11.03.2020 calling-upon the parties to fix a date for the preliminary meeting in April 2020 under the aegis of the Delhi International Arbitration

Centre ('DIAC'). To be sure, the learned Arbitrator was appointed *before* the said O.M. came to be issued on 31.03.2020.

9. As recorded above, though respondent No.1 had initially consented to termination of the mandate of the learned Arbitrator in Memorandum of Settlement dated 10.03.2021, and had agreed to take recourse to the AMRD, for the reasons explained by respondent No. 1, they have now withdrawn such consent.
10. While on the subject of termination of the mandate of an arbitrator, this court is also obliged to consider the grounds for termination of mandate available in section 14(1) of the A&C Act, which provision recites as under:

“14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate 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; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.”

11. In the present case, the learned arbitrator appointed has neither become *de-jure* nor *de-facto* unable to perform his functions; nor has the arbitrator failed to act without undue delay; nor has he withdrawn from his office; and the consent to terminate the arbitrator's mandate has since been withdrawn by respondent No. 1.
12. In light of the aforesaid facts and circumstances, this court is of the view that no ground is made-out for termination of the mandate of the

learned Arbitrator who is seized of the proceedings in the matter, least of all as contemplated in section 14(1) of the A&C Act.

13. The petition is accordingly dismissed; and parties are directed to approach the learned Arbitrator appointed in the matter *vide* order dated 12.02.2020 in Arb. P. 799/2019; with a direction to the learned Arbitrator to proceed with arbitration in terms of that order.
14. Pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J

OCTOBER 19, 2022

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