

\$~118&119

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

% **Date of decision: 28th October, 2021**

+ CM(M) 958/2021

TELECOMMUNICATION
CONSULTANTS INDIA LIMITED Petitioner
Through Mr. Amit Meharia, Mr. Abinash
Agarwal and Mr. Akshat Goel,
Advocates.

versus

B. R. SUKALE CONSTRUCTION Respondent
Through Mr. Ankur Gupta, Advocate.

+ CM(M) 959/2021

TELECOMMUNICATION
CONSULTANTS INDIA LIMITED Petitioner
Through Mr. Amit Meharia, Mr. Abinash
Agarwal and Mr. Akshat Goel,
Advocates.

versus

B. R. SUKALE CONSTRUCTION Respondent
Through Mr. Ankur Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

[VIA VIDEO CONFERENCING]

AMIT BANSAL, J. (Oral)

CM(M) 958/2021 and CM No.959/2021

Page 1 of 11

**CM No.38681/2021 (for exemption) in CM(M) 958/2021; and
CM No.38683/2021 (for exemption) in CM(M) 959/2020.**

1. Allowed, subject to all just exceptions.
2. The applications are disposed of.

**CM(M) 958/2021 and CM No.38680/2021 (for stay); and
CM(M) 959/2021 and CM No.38682/2021 (for stay).**

3. The present petitions filed under Article 227 of the Constitution of India impugn the order/direction (in the form of minutes of the arbitration meeting dated 7th October, 2021) dated 7th October, 2021 and email dated 12th October, 2021 of the sole arbitrator, issued in two separate arbitration proceedings between the same parties.
4. Vide the impugned order/direction dated 7th October, 2021, the sole arbitrator has observed as under:

“b. It is decided that no further evidence by way of witnesses will be held for the time being. Proceedings of the case will begin straightaway by arguments by both claimant and respondents. This was considered appropriate for curtailing delay and all also dispute being of contractual/tender nature and all issues are communicated by parties in writing which have already been filed by both parties and taken on record.”

5. The counsel for the petitioner submits that after the order/direction of 7th October, 2021 was passed by the arbitrator in both the arbitrations, a communication was sent by the counsel for the petitioner to the arbitrator stating that the petitioner be allowed to lead evidence in the matter. The said request on behalf of the petitioner was rejected by the arbitrator vide the impugned email dated 12th October, 2021.

6. The counsel appearing on behalf of the petitioner states that the aforesaid directions passed by the arbitrator are not tenable as the matter requires evidence to be led for proper adjudication of the arbitrations.

7. The counsel for the petitioner submits that, (i) as per Annexure P-12 of the petition being the 'Affidavit of Admission Denial of Documents' filed by the respondent herein, the documents filed on behalf of the petitioner have been denied. In view of the denial of the documents as aforesaid, the same would have to be proved by the petitioner by leading evidence; (ii) these are not fast track arbitrations as envisaged under Section 29B of the Arbitration Act that are required to be disposed of in an expeditious manner and therefore, the arbitrator should have allowed the parties to lead oral evidence; (iii) as per Sections 19 and 24 (along with proviso thereto) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act'), since there has been no agreement between the parties with regard to the dispensation of oral evidence, the arbitrator ought to have given the opportunity to the petitioner to lead evidence; and (iv) as per the proviso to Section 24 of the Arbitration Act, unless otherwise agreed to by the parties, the arbitral tribunal has to hold oral hearings for the presentation of evidence.

8. The counsel appearing on behalf of the respondent on advance notice submits that (i) the arbitrator, who is not a legally trained person but a retired Chief Engineer of Bharat Sanchar Nigam Limited, has taken a considered decision that no evidence by way of witnesses shall be held for the time being and he shall straightaway proceed with arguments of both the claimant and the respondent in order to curtail delay; (ii) as per Sections 19

and 24 of the Arbitration Act, failing any agreement existing between the parties, the arbitrator is free to consider the proceedings in the manner it considers appropriate; (iii) it is in the sole discretion of the arbitrator to decide whether to take oral evidence in a case or straightaway decide the matter on the basis of documents and other materials and in this regard, reliance is placed on the judgment of this Court in ***Silor Associates SA Vs. Bharat Heavy Electrical Ltd.*** 2014 SCC OnLine Del 3407 [FAO(OS) No.370/2014 preferred whereagainst was dismissed on 1st September, 2014]; (iv) taking into account the nature of the dispute between the parties, the sole arbitrator has rightly observed that no oral evidence is required in these cases; (v) the hearings in the cases have already been held on 20th and 22nd October, 2021 and the remaining final arguments are scheduled from 19th November, 2021 onwards; and (vi) there is limited scope of interference under Article 227 of the Constitution of India with the orders passed by the arbitrator in proceedings and in this regard, reliance is placed on the judgment of this Court in ***Surender Kumar Singhal and Others Vs. Arun Kumar Bhalotia and Others.*** 2021 SCC OnLine 3708 [Special Leave Petition (Civil) No. 6171/2021 preferred whereagainst was dismissed on 27th April, 2021].

9. I have heard the rival contentions of the parties.

10. Since both parties have placed reliance on various provisions of the Arbitration Act, the same are set out below for ease of reference:

“18. Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

19. Determination of rules of procedure.—

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

xxx xxx xxx

24. Hearings and written proceedings.—

(1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.”

11. The legal position that emerges from a reading of the aforesaid provisions of the Arbitration Act is summarised below:

- (i) The Arbitral Tribunal is not bound by the procedure laid down under the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.
- (ii) Parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings.
- (iii) If there is no agreement between the parties, the Arbitral Tribunal may conduct the proceedings in the manner it considers appropriate.
- (iv) The Arbitral Tribunal has the power to determine the admissibility, relevance, materiality and the weight of any evidence.
- (v) Unless it has been otherwise agreed to by the parties, the Arbitral Tribunal has the power to decide whether proceedings shall be conducted on the basis of documents and other materials or whether oral evidence is required or not.
- (vi) In the event that the Arbitral Tribunal decides that oral evidence is required, it would hold hearings for presentation of evidence on a day-to-day basis.

12. The scope of the aforesaid provisions have been duly considered by this Court in *Silor Associates SA* (supra), wherein it has been observed as under:

“17. Section 19(1) of the Act, inter alia, provides that “The Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Evidence Act, 1872(1 of 1872)”. This means that the Tribunal is not bound by the rigor and strict provisions of the Code of Civil Procedure, 1908 (CPC), or the Evidence Act, 1872 (Evidence Act).

*18. Section 19(2) states that subject to the provisions of Part I, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. **In the present case, the parties have not agreed on any specific procedure to be followed by the Arbitral Tribunal in conduct of its proceedings. Section 19(3) states that “failing any agreement referred to in sub-section (2), the Arbitral Tribunal may, subject to this part, conduct the proceedings in the manner it considers appropriate”. Therefore, the Arbitral Tribunal is free to devise its own procedure, subject to the condition that such procedure should conform with the provisions of Part I of the Act. The procedure that the Tribunal may devise should meet the basic tenets of an adjudicatory process, namely, that the procedure should treat parties equally, and each party should be given a full opportunity to present its case (see Section 18). The procedure to be evolved by the Tribunal cannot be such that it curtails the rights of the parties under Sections 13, 16, 17, 22, 23, 24, 25 & 26 of the Act, or any of them.***

(emphasis supplied)

*19. There is nothing in the Act to contra indicate the existence of jurisdiction/power in the Tribunal to require the parties to produce documents, exhibits or other evidence, as the Arbitral Tribunal may determine. **The aforesaid provision has the effect***

of vesting the Tribunal with much greater autonomy in the matter of regulating its procedure for conduct of the arbitration proceedings, than that exercised by a civil court — which is bound by the rigour of the Code of Civil Procedure (CPC) and the Evidence Act. The scheme contained in Section 19 of the Act is not to denude the Arbitral Tribunal of its power to regulate its procedure for effective and expeditious conduct of the arbitration proceedings in a transparent and fair manner. On the contrary, the legislative intent appears to be vest the Arbitral Tribunal with autonomy and flexibility in the matter of conduct of its proceedings so as to expedite the proceedings and cut the procedural wrangles witnessed in courts — which are governed by the CPC and the Evidence Act.

20. The procedure that the Tribunal may adopt for conducting the proceedings need not be evolved by consensus of the parties. It is for the Tribunal to devise its own procedure, if the parties have themselves not evolved the procedure consensually under Section 19(2).”

13. Admittedly in the present petitions, there is no agreement between the parties with regard to the procedure for carrying out the arbitration proceedings. In the absence of any agreement between the parties, the sole arbitrator has the absolute authority to decide on whether to allow evidence in a particular case or to proceed with the adjudication of the matter on the basis of documents and other materials. In the present cases, the sole arbitrator having decided that the matter can be adjudicated on the basis of the documents on record, has held that no evidence by way of witnesses/oral evidence is required for the time being. No fault can be found in the decision of the arbitrator in this regard.

14. Furthermore, the reliance of the counsel for the petitioner on the provisos to Section 24(1) of the Arbitration Act is totally misplaced. The provisos have be read in context of the main provision being Section 24(1) of the Arbitration Act, which states that the arbitral tribunal shall, *inter alia*, decide whether to hold oral hearings for the presentation of evidence. The provisos to the main provision cannot be read as taking way the absolute discretion of the arbitral tribunal as provided under Section 24(1) of the Arbitration Act, or as making the presentation of evidence through oral hearing procedurally mandatory.

15. There is no merit in the submission of the counsel for the petitioner that since, the present arbitrations are not fast track arbitrations as envisaged under Section 29B of the Arbitration Act, there was no requirement to dispense with oral evidence for early disposal of the dispute. The mandate of the Arbitration Act, as amended from time to time, is to ensure early and expeditious disposal of all arbitration proceedings. Merely because the arbitration is not being conducted in the fast track procedure, does not mean that the arbitration need not be decided in an expeditious manner. Furthermore, it may be noted that a time limit of 12 months from the date of completion of pleadings for making an arbitral award has been statutorily specified under Section 29A of the Arbitration Act.

16. As regards the objection of the counsel for the petitioner that the respondent has denied the documents filed on behalf of the petitioner, even if the said documents have been denied by the respondent, it does not mean that the arbitrator cannot consider the admissibility and the materiality of the said documents at the stage of final hearing.

17. The counsel for the respondent has rightly relied upon the judgment of this Court in *Surender Kumar Singhal* (supra), wherein the scope for interference with regard to arbitration matters, in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India has been prescribed. Paragraph 25 of the said judgment is set out below:

“25. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be 'exceptional circumstances';

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction under Article 226/227;

(ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided. ”

18. Since no exceptional circumstances or exceptional rarity have been demonstrated/made out in the petitions or during the hearing and given the stage at which the arbitration proceedings are, there is no occasion to warrant the exercise of jurisdiction by this Court under Article 227 of the Constitution of India.

19. In view of the above, there is no merit in the present petitions.

20. The petitions and all pending applications are dismissed.

AMIT BANSAL, J.

OCTOBER 28, 2021

dk

सत्यमेव जयते