

.* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Pronounced on: July 01, 2013*

+ **ARB.P. No.296/2012**

M/S PRADEEP OIL CORPORATION Petitioner
Through Mr.Sakal Bhushan, Adv.

versus

NORTHERN RAILWAYS Respondent
Through Mr.Chandan Kumar, Adv.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The petitioner, M/s. Pradeep Oil Corporation was allotted lands measuring 41280 Sq. Ft., 62156 sq. ft. and 216.35 sq. ft., by the respondent for the purpose of constructing an oil depot at Rohtak Road, Shakur Basti, New Delhi vide conveyance deeds dated 15th January, 1975 and 3rd January, 1978.

2. The respondent is the northern division of the Indian Railways, which is wholly run by the Ministry of Railways. These deeds contained an arbitration clause which reads, *“In the event of any question, dispute or difference arising under these presents or in connection with (except as to any matters the decision of which is specifically provided for by these presents), the same shall be referred to the sole arbitration of a officer appointed to be the arbitrator by the Divisional Superintendent, Northern Railway, Delhi. It will be no objection that the arbitrator is a Government servant, that he had to deal with the matters to which these presents relate to*

that in the course of his duties as a government servant he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties.”

3. Disputes arose between the parties which culminated in the termination of the contract, vide notice dated 23rd March 1988, w.e.f 23rd June 1988. Since the land was still in the possession of the petitioner, along with other heavy machinery present on it, the respondents had sought the eviction of the petitioner, under the provisions of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. This was dismissed by the officer and the same order was upheld on appeal.

4. The respondents further filed a writ petition challenging these orders, which was eventually dismissed by the Delhi High Court on 25th November 2011, stating that, the Railways must continue this matter by initiating fresh proceedings of ejection. However, the respondent took no further action in this regard. On 7th May 2011, railway officials came to the property and proceeded to demolish the constructions put up by the petitioner.

5. In response to this act, the petitioner filed another writ petition before this court on 7th July 2011 which directed an ad interim order to maintain status quo. However, the High Court eventually dismissed the petition, directing the petitioner to file a suit for damages.

6. The appeal to this order is still pending before the Supreme Court.

Arguments of the petitioner in brief:

7. The petitioner submits that, the respondent had caused it loss which runs to the amount of Rs.71 crores and 15 lac on account of demolition of the site and that despite repeated notices, it has failed to pay the amount outstanding. With reference to the arbitration clause reproduced above, the

petitioner requests the court to appoint an independent Arbitrator to settle the dispute.

8. However, it must be noted at this juncture to the legal notice sent by the petitioner to the respondent dated 2nd December 2011, which clearly states that the Divisional Superintendent who as per the arbitration clause is required to appoint an arbitral tribunal, was responsible for the arbitrary action that resulted in huge loss to the petitioner. And in view of peculiar facts and circumstances, the petitioner argues that it would be completely unfair and unjust for him to exercise his powers in the manner provided for in the contract and striking the balance between the parties and to provide true justice which is the scheme of Act, an independent person be appointed by this Court as no prejudice would be caused to the respondent incase prayer in the petition is allowed.

Arguments of the respondent in brief:

9. The respondent has only filed a short response to the petition and argues that the applicant has no cause of action to file the present petition, as the aforementioned notice sent to the respondent does not invoke arbitration. The prerequisite for a Section 11(5) application is that notice must be sent by the party invoking the arbitration clause to the other party. If the other party fails to appoint an arbitrator, only then can the first party move the court for the appointment of a tribunal. The notice to the respondent dated 2nd December, 2011, might not mention that the petitioner wishes to invoke the arbitration clause in order to settle the dispute, however, this notice needs to be read in the context of the paragraph which alleges bias on the authority named in the arbitration agreement to appoint a tribunal. This therefore would result in the application being allowed.

10. With regard to the issue concerning bias, were an arbitrator to be appointed, IOCL v. Raja creates an exception where, if circumstances arose that would lead to justifiable doubt regarding the independence or impartiality of the arbitrator, the appointing authority can deviate from the procedure specified in the arbitration agreement. IOCL only sought to create a rebuttable presumption wherein bias cannot be alleged against a government officer, merely because he is involved with one of the parties to the dispute.

11. The issue about employee/officer of large corporations being nominated as Arbitrators has been dealt with and discussed by the Supreme Court in the various matters which are referred as under:-

(a) ***Indian Oil Corporation v. Raja Transport (P) Ltd.***, (2009) 8 SCC 520:

“The process of arbitration is a binding and voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the Arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining

part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named Arbitrator contained in the arbitration clause.

“It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the Arbitrator, are neither void nor unenforceable.”

“There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named arbitrator body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

(b) ***Department of Telecommunications v. Gujarat Co-operative Milk Marketing Federation Limited***, 2010 (10) SCC 86:

The Apex Court has held that the fact that the named Arbitrator is an employee of one of the parties is not ipso

facto a ground to raise a presumption of bias or partiality of lack of independence on his part. The Hon'ble Supreme Court has observed that although there can be a justifiable apprehension about the independence or impartiality of an employee Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named Arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

- (c) ***Secretary To Government, Telecom Department, Madras v. Munuswamy Mudaliar and Anr.***, AIR 1988 SC 2232:

The Apex Court has held that although reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator however, there must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct.

- (d) ***Union of India v. Singh Builders Syndicate***, (2009) 4 SCC 523:

The Apex Court while dealing with a situation of an arbitration clause mandating the nomination of employee

arbitrators, held that the process as contemplated under the Arbitration clause has to be adhered to 9para 13, 14) as closely as possible and it was only in an exceptional circumstance (see paras 4 to 9, 18 and 19) that the Court would intervene.

(e) It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the arbitrator are neither void nor unenforceable.

(f) In *Executive Engineer v. Gangaram Chhapolia* [(1984) 3 SCC 627] this Court was considering the validity of the appointment of the arbitrator where the arbitration required that the disputes shall be referred to the sole arbitration of a Superintending Engineer of the Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned.

(g) The Supreme Court in *Gangaram's* case [(1984) 3 SCC 627] held: (SCC pp. 631-32, para 9)

“9. The use of the expression ‘Superintending Engineer, State Public Works Department’ in Clause 23 qualified by the restrictive words ‘unconnected with the work’ clearly manifests an intention of the parties that all questions and disputes arising out of a works contract shall be referred to the sole arbitration of a Superintending Engineer of the department concerned. From the very nature of things, a dispute arising out of a works contract relating to the Department of Irrigation has to be referred to a Superintending Engineer, Irrigation as he is an expert on the subject and it cannot obviously be referred to a Superintending Engineer, Building & Roads. The only limitation on the power of the Chief Engineer under Clause 23 was that he had to

appoint a 'Superintending Engineer unconnected with the work' i.e. unconnected with the works contract in relation to which the dispute has arisen. The learned Subordinate Judge was obviously wrong in assuming that since D. Sahu, Superintending Engineer, Irrigation was subordinate to the Chief Engineer, he was not competent to act as an arbitrator or since he was a Superintending Engineer, Irrigation, he could not adjudicate upon the dispute between the parties. The impugned order passed by the learned Subordinate Judge is accordingly set aside."

- (h) In another case, namely *Larsen & Turbo Ltd. Vs. Ferlizer and Chemicals Travancore Ltd.*; 2008 (1) SCC 252, the Supreme Court has held as under:

"9. In *Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar* [1988 Supp SCC 651] it was noted as follows: (SCC p. 653, para 7)

"7. Pursuant to this the Superintending Engineer of that Circle, at the relevant time, was previously appointed as arbitrator. There was succession to that office by another incumbent and the succeeding Superintending Engineer wanted to continue the arbitration proceedings but before that an application was made under Section 5 of the Arbitration Act, 1940 (hereinafter called 'the Act') for removal of the arbitrator, before the learned Judge of the City Civil Court, Madras."

Again in paras 11 to 13 it was noted as follows: (SCC pp. 654-55)

"11. This is a case of removal of a named arbitrator under Section 5 of the Act which gives jurisdiction to the court to revoke the authority of the arbitrator. When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the

fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the Superintending Engineer at that time to begin with, who, however, could not complete the arbitration because he was transferred and succeeded by a successor. In those circumstances on the facts stated no bias can reasonably be apprehended and made a ground for removal of a named arbitrator. In our opinion this cannot be, at all, a good or valid legal ground. Unless there is allegation against the named arbitrator either against his honesty or capacity or mala fide or interest in the subject-matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under Section 5 of the Act.

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 Edn., p. 214. *Halsbury's Laws of England*, 4th Edn., Vol. 2, Para 551, p. 282 describes that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias.

13. This Court in *International Airports Authority of India v. K.D. Bali* [(1988) 2 SCC 360] held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Government to be the

arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator. Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator.”

10. The apprehension that named arbitrator may not act fairly is without any foundation. The High Court has rightly held that by Article 16 of the special terms and conditions of purchase there was an amendment to Article 25 which reads as follows:

“The provisions of the Arbitration Act, 1940, and the Rules made thereunder, any statutory modifications thereof for the time being in force will be applied. The venue of the arbitration shall be Cochin, and the language of the proceedings shall be the English language. During the arbitration proceedings, both parties shall continue to discharge their obligations under the purchase order.”

- (i) The Delhi High Court in a case titled as ***Valecha Engineering Ltd. Vs. D.S. Construction Ltd. and Another***; 162 (2009) DLT 228 held as under:

“28. The plea of the petitioner that the named arbitrator is impartial and biased cannot be accepted in view of *Dina Nath's case* (supra). When the petitioner itself has agreed that the dispute pertaining to both the contracts ought to be referred to MD, DSC, it cannot now take a stand that respondent no. 2 is acting in a subjective manner. The respondent No. 2 has entered into reference and initiated arbitration proceedings. If after making the award by the arbitrator, the petitioner has any objections to the award, he can file objections under Section 34 of

the Act. The provisions of Section 11(6)(c) cannot be invoked in the present case. The clause referred above in both the contracts is clearly an arbitration clause though the words ‘arbitration’ or ‘arbitrator’ are not included (*Dina Nath's case* (supra)).”

- (j) The Delhi High Court in a case titled as ***Shyam Telecom Ltd. Vs. A.R.M. Ltd.***; 2009 (2) R.A.J. 4 (Del.) held as under:

“(19) The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statute are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act of 1940 by codifying the law relating to appeals in Section 39....”

- (k) A Division Bench of this Court reported in 2011 (5) R.A.J. 7 Delhi in the case of ***Progressive Career Academy Pvt. Ltd. Vs. FIIT JEE Ltd.*** held as under:

“20. A comparison of the provisions dealing with the challenge to the arbitrator’s authority in the A&C Act and the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Arbitral Tribunal. However, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further Appeal. It seems to us,

therefore, that there is no room for debate that the Indian Parliament did not want curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13(5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral Tribunal, a challenge on this score is possible in the form of Objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is palpably different also to the English, Australia and Canadian Arbitration Law. This difference makes the words of Lord Halsbury in *Eastman Photographic Materials Co.* all the more pithy and poignant.

21. In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in *Interstate Constructions* is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in *Pinaki Das Gupta*, *Neeru Walia*, *Ahluwalia Contracts (India) Ltd.* and *Newton Engineering and Chemicals Ltd.* We are of

the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings.

22. Having arrived at the conclusion that curial interference is not possible at the pre-Award stage on the allegations of bias or impartiality of the Arbitral Tribunal on the one hand, and our understanding that the Appeals are not maintainable on the other hand, is any further relief to be granted? We think it expedient to abjure from passing any further orders for several reasons including – firstly, the reality that arbitration proceedings would inevitably have already come to an end in those instances where the arbitrator had been removed by orders of the Court, and secondly the availability of redress under Article 136 of the Constitution of India. All pending applications stand disposed of. The Referral Order is answered by reiterating that the statute does not postulate judicial interference in arbitral proceedings till the Award is published, whereupon Objections can be raised also on the platform of the alleged bias of the Tribunal. This challenge is possible provided the grievance is articulated in consonance with Section 13 of the A&C Act.”

12. The above judgments clearly go on establish that Arbitration Agreements, containing named Arbitrators in the employment of a party, mostly being a PSU or a State owned company, are valid Arbitration Agreements and secondly, the apprehension of an Arbitrator being bias must be based on cogent material and not otherwise. It is also realized that the petitioner has signed this agreement with open eyes wherein no objection has been given by him to appoint the officials of the respondent as arbitrator

even if the said official has dealt with the matters of the railways. Thus, the petitioner cannot be allowed to say now that just because the proposed arbitrator is going to be official of respondent, therefore he is likely to be biased. The petitioner has to show biasness as a matter of fact which is missing in the instant case. In the present case, no cogent material has either been pleaded or specified by the appellant, which would create reasonable apprehension in his mind so as to indicate the pre-disposition of the Arbitrator.

13. The appellant's claim is based on mere apprehensions which are whimsical as the respondents have appointed an official of the company. The said apprehension cannot be said to be one which should persuade this court to appoint a fresh arbitrator.

14. A reading of Section 11(8) further reveals that while exercising jurisdiction vested under Section 11(6), the court can take due regard. The consideration under Section 11(8) shall become relevant only upon satisfaction of the provisions under Section 11(6). This is relevant due to the reason that if the eventualities existing under Section 11(6) are not satisfied, the court shall not even proceed further as the said Section 11(8) shall not come into play. It is only when the court's jurisdiction is exercised, (by way of presence of the eventualities under Section 11(6), the court can have due regard for the purposes of the sub-section (8).

15. Admittedly, the Arbitration Proceedings have not even commenced. As such there cannot be any basis for the appellant to contend that there is an apprehension in his mind regarding bias of the Arbitrator. The apprehension of the appellant that merely because the Arbitrator is an employee of the respondent so he would be biased is thus, without any basis and merit.

16. It is well settled that the jurisdictional facts which are necessary for the court to step in to appoint arbitrator under the provisions of the Section 11(5) of the Act is notice seeking appointment of the arbitrator by one party to another and if within 30 days when there is no agreement qua the appointment, only then the court will proceed to appoint the arbitrator as per the provisions of Section 11 (5) of the Act. A careful reading of the notice issued in the instant case would reveal that though the petitioner raises a dispute but states that the petitioner may seek appointment of the arbitrator in the near future. Thus, the said notice is not fulfilling the requirements of the provisions of Section 11 (5) as it nowhere in unequivocal terms call upon the respondent to appoint the arbitrator as per the clause. Thus, the prerequisite jurisdictional facts for this court to assume jurisdiction are not clearly present in the instant case. Therefore, this court is not inclined to exercise jurisdiction to appoint arbitrator in view of the absence of the notice to appoint the arbitrator as per Section 11 (5) of the Act.

17. After having considered the facts stated in the petition and arguments advanced by the respondent coupled with law settled on this aspect, this court is not inclined to deviate from the procedure specified in the Act and not agreeable to appoint an independent Arbitrator as prayed for. However, in the interest of justice, equity and fair play it is appropriate to appoint a sole Arbitrator as per procedure specified in the arbitration agreement within four weeks from today. The petition is disposed of.

18. Copy of order be given dasti to both parties under the signatures of Court Master.

(MANMOHAN SINGH)
JUDGE

JULY 01, 2013