

Neutral Citation No. - 2024:AHC:132730-DB

Chief Justice's Court

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 DEFECTIVE No. - 231 of 2024

Appellant :- M/s Dev Associates

Respondent :- M/s Radha Engineering And Construction Co. Pvt. Ltd. And 3 others

Counsel for Appellant :- Chandra Prakash Singh, Shad Khan

Hon'ble Arun Bhansali,Chief Justice

Hon'ble Vikas Budhwar,J.

1. Heard learned counsel for the appellant and perused the record.
2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') is directed against the judgment dated 21.05.2024 passed by Commercial Court No. 1, Meerut, whereby the application filed by the respondents under Section 34 of the Act has been allowed and the award dated 09.07.2018 passed by the sole arbitrator in Arbitration Claim No. 01 of 2015 has been set aside.
3. The dispute arose between the parties in the circumstances, wherein Dev Associates-claimant gave an offer letter dated 11.02.2010 to M/s Radha Engineering and Construction Co. Pvt. Ltd.-respondent regarding executing a construction work to complete balance work of a project in the State of Madhya Pradesh. The work-order was issued on 18.02.2010. A contract agreement dated 27.03.2010 was executed by the claimant and the respondent. Clause-10 of the said agreement dated 27.03.2010 provided that Mr. Ashok Kumar Gupta was to be appointed as the sole arbitrator, in case any dispute arose out of the terms of the said contract.
4. During the process of the execution of the work, six bills were raised and part payments were made. When differences and dispute

arose between the parties regarding the balance payment, matter was referred to the sole arbitrator, Mr. Ashok Kumar Gupta, wherein claimant presented four claims. Based on the pleadings of the parties, the arbitrator framed 11 issues and after going through the same, passed the award dated 09.07.2018 for various amounts qua each claim with the total entitlement of Rs. 1,42,05,130/-.

5. Feeling aggrieved, application under Section 34 of the Act was filed before the Commercial Court, *inter alia*, on the ground that the claimant-respondent received a notice dated 16.04.2015 issued by the sole arbitrator informing about accepting his appointment as arbitrator and directing to appear before him on 16.05.2015. An application was filed under Section 12 of the Act calling upon the arbitrator to make necessary disclosures in terms of Section 12 of the Act. He was called upon to disclose whether he has any personal, professional or social relationship with the claimant. The arbitrator, in his order dated 06.05.2015, recorded the factum of having received the said application. The claimant was required to respond to the said application under Section 12 of the Act. It is submitted that though the application filed under Section 12 of the Act remained pending, the arbitrator required filing of the response to the claim petition. The respondent filed application under Section 16 of the Act on 28.10.2015 requiring the arbitrator to first decide the pending application under Section 12 and the application being filed under Section 16 of the Act before proceeding further in the matter. The application under Section 16 was also responded.

6. Though after hearing the arguments on application under Section 16 of the Act, 09.04.2016 was fixed for order on application, the application was not decided and no further date was fixed. Whereafter in an application filed under Section 9 of the Act before the District Judge during the course of the said proceedings, it was indicated that award was passed on 09.07.2018 itself wherein even the

application under Section 12 was also indicated to have been decided on 18.06.2016.

7. Various allegations were made against the manner in which the arbitrator had dealt with the matter and it was alleged that the arbitrator was brother-in-law of the claimant, Sri Praneet Goel and the close relationship between the arbitrator and partner of the firm is sufficient to give rise to the apprehension of partiality and bias and that the application under Section 12 of the Act was decided without reference to the said relationship. The award was questioned on merits as well.

8. The submissions made were contested before the Commercial Court by indicating that the respondents were well aware of the relationship between the partner of the claimant-firm and the arbitrator. It was mentioned that the arbitrator is an Advocate by profession having 45 years of standing in the field of legal practice. He was not stranger to the respondents as Smt. Geeta Sharma, wife of Alok Sharma is originally resident of house adjoining to the residence of Mr. Praneet Goel and, as such, they were well aware of the relationship and despite that agreed to the decision of the dispute by the sole arbitrator and, therefore, the plea raised in that regard was baseless. Further averments made pertaining to the merits were also denied.

9. The Commercial Court framed four points for determination. On the first point pertaining to failure of the sole arbitrator in terms of Section 12 of the Act, the Commercial Court came to the conclusion that the sole arbitrator was under the duty to disclose his relationship with the partner of the claimant and as provisions of Section 12 are mandatory in nature and there has been a breach of the said provision, the entire proceedings, including the award made by the arbitrator, was held to be vitiated for non compliance of provisions of Section 12 of the Act by the Arbitrator. The Court also recorded a finding that the

sole arbitrator is brother-in-law of Mr. Praneet Goel, being husband of Mrs. Kalpana Gupta, the real sister of Sri Praneet Goel, which relationship was not disclosed by the arbitrator and was bound to raise a justifiable doubt as to the independence and impartiality of the arbitrator in the mind of the respondent. The other three points for determination were decided in favour of the claimant-appellant. However, in view of the findings pertaining to the failure to disclose the relationship, the award was set aside.

10. Learned counsel for the appellant made submissions that the Commercial Court was not justified in setting aside the award on the ground that relationship between the arbitrator and partner of the firm was not disclosed to the respondents inasmuch on account of the long standing acquaintance between the families of the claimant and the respondents, the respondents were well aware of the relationship and agreed for his appointment as arbitrator and, therefore, the situation would be governed by provisions of Section 12(4) of the unamended provisions of the Act, which specifically provides that challenge to the appointment of an Arbitrator, in whose appointment the party has participated, can be raised only for the reasons of which he becomes aware after the appointment has been made and as the claimant was well aware of the relationship, he was not entitled to raise the issue. Reliance was placed on **Indian Oil Corporation Ltd. & others Vs. M/s Raja Transport (P) Ltd. : (2009) 8 SCC 520**.

11. We have considered the submissions made by counsel for the appellant and have perused the material available on record.

12. Section 12 of the Act came to be amended with retrospective effect from 23.10.2015 and the relevance of the amendment is that under the amended provisions of Section 12, irrespective of the parties agreeing to the appointment of the arbitrator, on account of relationship, he is disqualified/ineligible to proceed with the arbitration. However, in the case in hand, the arbitrator assumed

jurisdiction on 16.04.2015, based on the reference which was made to him in terms of the clause-10 of the agreement by the claimant, and Section 12 came to be amended with retrospective effect from 23.10.2015.

13. The unamended provisions of Section 12 of the Act, which would be relevant in the present circumstances, read as under:

“12. Grounds for challenge.— (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.”

14. A bare look at the provisions of Section 12 of the act above would reveal that a duty is cast on a person, who is approached in connection with his possible appointment as an arbitrator that he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Further, sub-section (3) provides for a challenge based on the existence of circumstances that give rise to justifiable doubts as to independence or impartiality. However, under sub-section (4), the challenge has been restricted in a case where the arbitrator has been appointed by a party, only for the reasons of which he becomes aware after the appointment has been made.

15. In the present case, we need not go to sub-section (3) and sub-section (4) of Section 12 of the Act pertaining to challenge and the acceptance to such a challenge inasmuch as the arbitrator admittedly failed to perform the duty cast on him under sub-section (1) of Section 12 wherein he was required to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Not only this, even when the respondent moved specific application (Annexure-6) requiring the arbitrator to disclose whether he has any personal, professional or social relationship with the claimant, whether he has conducted any court proceedings for or against the claimant, whether he has received any monetary benefits, remuneration of any nature from the claimant, whether he has acted as arbitrator for the claimant in any matter. In the reply filed by the claimant, it was indicated that the respondent has no right to raise these queries because of scope of challenge under Section 12(3) (a)&(b) is limited. The arbitrator, in his order dated 18.06.2016, took the application as a challenge to his appointment and referred to the arbitration agreement and it was indicated that respondents cannot take the plea that they had not agreed to the appointment of the arbitrator and that they have not disclosed any reason which they came to know about the arbitrator, which would affect the impartiality or capacity of the arbitrator. Further, no ground has been mentioned, which give rise to justifiable doubts as to his independence or impartiality and consequently dismissed the application.

16. From the above, it would be seen that though specific assertion was made by the respondents seeking disclosure of relationship, if any, the arbitrator despite being under obligation under Section 12(1) of the Act, which relationship of the arbitrator being brother-in-law of the claimant should have been disclosed beforehand, even on making of the application in this regard, chose to suppress/did not bring it on record, which clearly vitiates the award impugned.

17. The submissions made that the respondents were aware of the relationship on account of situs of one of the opposite parties house near that of the claimant, is too far fetched and no material has been disclosed pertaining to respondents being aware of the relationship. This is besides the fact that the failure of the arbitrator in disclosing the relationship is writ large on record. Consequently, the order passed by the Commercial Court setting aside the award impugned, cannot be faulted.

18. So far as the judgment in the case of **Indian Oil Corporation Ltd. (supra)** is concerned, the same would have no application to the facts of the case in hand on account of the findings recorded pertaining to the failure of the arbitrator in not performing his mandatory duty under Section 12(1) of the Act.

19. Learned counsel for the appellant made submissions that award having been set aside on account of the arbitrator being relative of the claimant, the Court may permit the claimants to take appropriate proceedings/ re-initiate the arbitration process.

20. The submissions made cannot be countenanced inasmuch as after setting aside of the award for non-disclosure by the arbitrator under Section 12(1) of the Act, the claimants have to act in accordance with law and no permission is required for the purpose.

21. In view of above discussions, there is no substance in the appeal. The same is, therefore, dismissed.

Order Date :- 13.8.2024

P.Sri.

(Vikas Budhwar, J) (Arun Bhansali, CJ)