

**THE HON'BLE SRI JUSTICE RAMESH
RANGANATHAN**

And

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTI

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C.R.P.No.4289 of 2014

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

The petitioner, a contractor with the Indian Railways, filed an application on 03.09.2014 before the Arbitral Tribunal questioning the appointment of the 3rd respondent as the Presiding Arbitrator of the Arbitral Tribunal consequent upon the transfer of Smt. Usha Ahok Kumar, who was earlier appointed as the Presiding Arbitrator, and, in her place, the 3rd respondent, who was previously the Joint Arbitrator, was appointed as the Presiding Arbitrator.

Clause 64(3)(a)(ii) of the General Conditions of Contract stipulated that the Arbitral Tribunal shall consist of a panel of three Gazetted officers not below JA grade, as the arbitrators; for this purpose, the railways would send a panel of more than three names of Gazetted Railway Officers, of one or more departments of the Railways, to the Contractor who would be asked to suggest to the General manager upto two names, from out of the panel, for appointment as the contractor's nominee; the General manager would simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the "Presiding Arbitrator" from those appointed; and, while nominating the arbitrators, it would be necessary to ensure that one of them is from the Accounts Department. Clause 64(3)(a)(iii) of the General Conditions of Contract stipulates that, if one or more of the arbitrators, vacated his/their office/offices as arbitrator, the General Manager should appoint a new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed; and such reconstituted Tribunal may proceed with the reference from the stage at which it was left by the previous arbitrator(s).

Clause 64(3)(a)(ii) of the General Conditions of Contract

merely enables the contractor to suggest two names, from out of the panel, as his nominee. The other two arbitrators, including the Presiding Arbitrator, are to be appointed by the General Manager. In the present case, Smt. Usha Ashok Kumar was appointed as Presiding Arbitrator, Sri S.K.Das was appointed as the petitioner's nominee and the 3rd respondent was appointed as the nominee of the respondent railways. Consequent on the transfer of Smt. Usha Ashok Kumar, the 3rd respondent was appointed as the Presiding Arbitrator and, in his place, the 4th respondent was appointed as the Joint Arbitrator. Consequent on the transfer of Sri S.K.Das, the 5th respondent is said to have been appointed as the nominee of the contractor.

The petitioner's application, questioning the appointment of the Presiding Arbitrator, is on grounds that the 3rd respondent was not recording all the contentions raised by him in the Minutes of the meeting, but was recording the contentions in favour of the respondents, indicating his favourable discrimination; and he was acting totally in contradiction to the spirit of the Arbitration and Conciliation Act, 1996 (for short "the Act") and the conditions laid down in the contract. The petitioner contended that he had made out a *prima facie* case under Sections 12, 13 and 16 of the Act and, as per Section 12(3)(a) of the Act, a person can challenge the appointment of an Arbitrator, whenever circumstances exist that give rise to justifiable doubts as to his independence or impartiality. The petitioner prayed the Tribunal to allow the petition under Section 13(2) read with Section 12(3)(a) of the Act, and change the presiding arbitrator as the petitioner had raised justifiable doubts as to his independence and impartiality.

Section 12(3)(a) of the Act enables a person to challenge the appointment of an arbitrator if circumstances exist that gives rise to justifiable doubts as to his independence and impartiality. In the absence of any procedure prescribed in the contract for seeking such a change, Section 13(2) of the Act requires a party to make the

challenge within 15 days after becoming aware of any circumstances referred to in Section 12(3) of the Act, and to send a written statement, of the reasons for the challenge, to the Arbitral Tribunal. Section 13(4) of the Act stipulates that, if a challenge is not successful, the Arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award. Section 13(5) of the Act stipulates that, where an arbitral award is made under Section 13(4) of the Act, the party challenging the arbitrator may make an application for setting aside the arbitral award in accordance with Section 34 of the Act. Under Section 13(6) of the Act, where an arbitral award is set aside on an application made under Section 13(5) of the Act, the Court may decide as to whether the Arbitrator, who is challenged, is entitled to any fees.

While the application submitted by the petitioner was mainly under Section 12(3)(a) of the Act, the Arbitral Tribunal passed the impugned order on 18.11.2014 under Section 16(2) of the Act rejecting the petitioner's request for change of the arbitrator. While the impugned order is ostensibly made under Section 16(2) of the Act it is in fact an order made under Section 13(4) of the Act, for it is not even contended before us that the Arbitral Tribunal lacks jurisdiction. Even otherwise, consequent on the change in the presiding Arbitrator, the relevant clauses in the general conditions of contract, referred to hereinabove, empower the General manager to appoint a new arbitrator/arbitrators. It is in exercise of the powers conferred by the aforesaid clause, that the General Manager had appointed the 3rd respondent, who was hitherto the Joint Arbitrator, as the Presiding Arbitrator, and another Joint Arbitrator in his place. As the 3rd respondent was appointed as the presiding arbitrator by the General manager, in accordance with the general conditions of the contract, it cannot be said that the Arbitral Tribunal lacks jurisdiction to adjudicate the disputes raised before it.

It would be inappropriate for this Court to examine the contentions urged on merits, or to determine whether the circumstances mentioned in the application give rise to justifiable doubts as to the independence and impartiality of

the 3rd respondent as the Presiding Arbitrator, for Section 13(5) of the Act stipulates that, where an arbitral award is made under Section 13(4) of the Act, the party who made the challenge can make an application, for setting aside the arbitral award, under Section 34 of the Act. The legislative intent, in enacting Section 13(5) of the Act, is to ensure that arbitral proceedings are not interdicted before its completion; and, therefore, the remedy provided for under the Act is for the aggrieved party to question the order passed, on a challenge made under Section 12(3)(a) of the Act, by way of an application before Civil Court under Section 34 of the Act, after an award is passed. As the petitioner's remedy, to question the impugned order, is only under Section 34 of the Act, after an award is passed, we see no reason either to entertain this revision or to interdict the arbitral proceedings in the interregnum.

The civil revision petition is, accordingly, dismissed. Miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M.SATYANARAYANA MURTHY, J

21st January 2015.
JSU