

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2016

DELIVERED ON: 09.12.2016

CORAM:

THE HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE

O.P.No.466 of 2016

Offshore Infrastructure Limited
22, Udyog Kshetra
Mulund Link Road
Mulund (W), Mumbai – 400 080.
rep. by Vishal Sachdev,
Managing Director.

.. Petitioner

Vs.

1. Bharat Heavy Electricals Limited
Power section – Southern Region
690, Anna Salai, Nandanam
Chennai – 600 035
rep. by General Manager, Contracts.

2. B.P.Bheemannna, Retd. GM (BHEL EDN)
No.4, Model House List
Basavangudi
Bangalore – 560 064
Karnataka.

.. Respondents

PRAYER: Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 to (i) appoint a Sole, independent and impartial Arbitrator to adjudicate and decide the disputes between the parties; and (ii) pass such further or other orders as the Court may deem fit and proper in the facts and circumstances of the case.

(2)

For Petitioner : Mr.R.Murari, Senior Counsel
for M/s.Thriyambak J.Kannan

For Respondents : Mr.Krishna Srinivasan
for M/s.S.Ramasubramaniam
& Associates
for 1st respondent

ORDER

An important question of law arises for consideration as to whether an ex-employee of any party seeking resolution of disputes by arbitration is disqualified from acting as an arbitrator in view of the amendments to the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "*the said Act*"), by Act No.3 of 2016.

2.1. The petitioner, a company incorporated and registered under the Companies Act, 1956, was awarded with a contract by the Bharat Heavy Electricals Limited/first respondent for the work of fabrication and erection of structural steel in power house, mill bunker bay, auxiliary buildings and pipe rack, etc. for 1 unit of 2 x 600 MVVTPP at North Chennai (for TNEB), Athippattu, Chennai, Tamil Nadu, under the Letter of Intent dated 29.6.2009 culminating in the Contract Agreement dated 23.9.2009. The

(3)

work was for a value of Rs.30,27,45,245/- and was to be completed in 25 months from the date of commencement of the work.

2.2. It is the case of the petitioner that they carried out the work diligently, but the work was extended by an additional 34 months for reasons not attributable to the petitioner and consequently, extensions of time had been granted by the first respondent.

2.3. The petitioner raised the final bill on 30.6.2014, which is stated to have been certified by the first respondent, but not released for payment. The first respondent also continued to hold the bank guarantee issued by the petitioner. In the course of exchange of letters and discussion *inter se* parties, the first respondent raised issues about alleged discrepancies noticed in the final bill. No settlement was, however, arrived at.

2.4. Finally, on 19.5.2016, the petitioner called upon the first respondent to resolve the disputes in terms of the dispute

redressal mechanism contained in the agreement and called upon the first respondent to appoint an arbitrator in terms thereof. Thereafter also some further meetings for settlement took place, but to no avail.

2.5. The dispute redressal mechanism is contained in Clause 44.0 of the General Conditions of Contract, which form a part and parcel of the contract agreement. In terms of the arbitration clause, the arbitrator has to be appointed by the General Manager of the first respondent with the stipulation that there would be no objection to such appointment on the grounds that the Arbitrator is a government servant; or employee of the first respondent; or that he has dealt with the matter the contract relates in the course of his duties, etc.

2.6. The amendment to the said Act came into force from 23.10.2015. The request for arbitration was made by the petitioner on 19.5.2016 and, thus, it is undisputed that the amended provisions would govern the arbitration *inter se* the parties. This is in the context of the first respondent vide its

letter dated 24.6.2016 appointing Sri B.P.Bheemanna, an ex-employee of the first respondent, as an arbitrator.

2.7. The petitioner has, thus, filed the present petition under Section 11(6) of the said Act seeking appointment of an arbitrator by this Court on the ground that Sri B.P.Bheemanna was ineligible to be appointed as an arbitrator, being an ex-employee.

2.8. Since the appointment was alleged to be not in accordance with the provisions of the said Act, it has been pleaded that the first respondent has forfeited the right to appoint the arbitrator and that is why the jurisdiction of this Court was being invoked.

3. On issuance of notice in the petition, interim orders were granted staying the proceedings before the second respondent/arbitrator.

4. The first respondent has contested the petition disputing

that the second respondent was disqualified from acting as an arbitrator in view of being an ex-employee under the amended provisions.

5. The controversy is in a narrow compass and in order to appreciate the same, it is apposite to reproduce Section 12 of the said Act as under:

“Section 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,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.— The grounds stated in the

(7)

Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.— The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(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.

(5) Notwithstanding any prior agreement to the

contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

6. In terms of Clause (a) of sub-section (1) of Section 12 of the said Act, on a person being approached in connection with his possible appointment as an arbitrator, he is required to disclose the existence of any direct or indirect, past or present relationship with or interest in any of the parties, or in relation to the subject matter in dispute, which can give rise to justifiable doubts as to his independence or impartiality. This is, thus, a disclosure clause. As to circumstances in which a person may have such justifiable doubts, the Fifth Schedule seeks to enlist the instances as a guide to it. Thus, if any of the circumstances as set out in Fifth Schedule exist, there can be justifiable doubt.

7. Sub-section (5) of Section 12 of the said Act goes further and begins with a non-obstante clause and enlists in the Seventh Schedule the relationship with parties or counsel, which would *ipso facto* make a person ineligible for appointment as an arbitrator.

8. Now turning to the Fifth Schedule, it is found that it refers to Section 12(1)(b) of the said Act. This is obviously a mistake in the said Act, as the reference should be to Section 12(1)(a) of the said Act. There are further sub-heads as under:

- (a) Arbitrator's relationship with the parties or counsel;
- (b) Relationship of the arbitrator to the dispute;
- (c) Arbitrator's direct or indirect interest in the dispute;
- (d) Previous services for one of the parties or other involvement in the case;
- (e) Relationship between an arbitrator and another arbitrator or counsel;
- (f) Relationship between arbitrator and party and

(10)

others involved in the arbitration; and

(g) Other circumstances.

9. The first clause falling under the first sub-head "*Arbitrator's relationship with the parties or counsel*" is as under:

"1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."

10. The other relevant clause falling under sub-head "*Relationship between arbitrator and party and others involved in the arbitration*" is as under:

"31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity such as a former employee or partner."

11. The learned counsel for the petitioner canvassed that the expression "*employee*" in clause (1), includes an ex-employee.

12. Turning to the Seventh Schedule, which is in reference

to Section 12(5) of the said Act, once again there are different sub-heads as under:

- (a) Arbitrator's relationship with the parties or counsel;
- (b) Relationship of the arbitrator to the dispute; and
- (c) Arbitrator's direct or indirect interest in the dispute.

13. The relevant clause (1) under the first sub-head "*Arbitrator's relationship with the parties or counsel*" is as under:

"1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."

14. The petitioner's case, thus, is that Clause (1) is identical in both the Fifth and Seventh Schedules. There is no corresponding clause to Clause (31) set out under the Fifth Schedule. Thus, the expression "*employee*" used in the Seventh Schedule would include an ex-employee.

15. It is the case of the petitioner that the second respondent is a Former General Manager and Clause (1) of the Seventh Schedule, if read as a whole, bars an employee, consultant, advisor or a person who has had "*any other past or present business relationship with a party*". The use of the words "*any other*" is stated to be crucial in this behalf. This is also in the context of the 246th Law Commission Report dealing with the amendments to the said Act, which at paragraph (56) emphasized the issue of neutrality, which had been tested by the Hon'ble Supreme Court in the context of contracts with State entities. The object of the Seventh Schedule taken from IBA Guidelines on Conflict of Interest in International Commercial Arbitration was to avoid any conflict of interest. In fact, it is not actual bias, but justifiable doubts as to the independence or impartiality which is the test. This interpretation is stated to be in conformity with the mischief which was sought to be cured by the amendment and, thus, reflects the legislative intent.

16. Per contra, the learned counsel for the first respondent has emphasized that the Amendment Act has to be read as a

whole. The expression "*former employee*" is not alien, but forms part of Clause (31) of the Fifth Schedule. Thus, a distinction is made between an employee and an ex-employee. If it is an existing employee, then *ipso facto* there will be a justifiable doubt as per Clause (1) of the Seventh Schedule. However, if it is an ex-employee, a hiatus period of three years was pre-supposed to be sufficient for appointment as an arbitrator and, thus, a justifiable doubt could arise only if an employee, within the period of three years of his/her retirement, was appointed as an arbitrator.

17. It is also the plea of the first respondent that Clause (31) of the Fifth Schedule is not a stand alone clause in terms of time period, but that Clauses from (20) to (24) of the Fifth Schedule under the sub-head "*Previous services of one of the parties or other involvement in the case*" each provide for a hiatus period of three years in case the proposed arbitrator: (a) served as counsel for one of the parties; (b) was appointed as an arbitrator on two or more occasions by one of the parties; (c) his law firm acted for one of the parties; and (d) served as an

arbitrator in another arbitration on related issue.

18. In the case of the second respondent, he is stated to have retired from service at Bangalore in the year 2010. BHEL, Bangalore is stated to be a completely different entity functioning independently without any working relationship with the Chennai office. In fact, the second respondent is stated to have never served in the division of the first respondent nor had anything to do with the contract in question.

19. It is the case of the first respondent that though Clause (31) may not be repeated in the Seventh Schedule, a common interpretation should be given to the phraseology used in the Fifth and Seventh Schedules.

20. In the context of the provision having been borrowed from the IBA Guidelines, it has been submitted that the Fifth Schedule is in the Orange List, while the Seventh Schedule is in the Red List. Clause (1) of the Seventh Schedule is stated to have been adopted from a Non-Waivable Red List. The case of

the second respondent, which may give rise to doubts and contained in the Orange List, has to be tested in terms of Clause (1) and Clause (31) of the Fifth Schedule and even justifiable doubts under Clause (31) would be in case of a proposed arbitrator who is an ex-employee within the period of three years of retirement.

21. The learned counsel for parties stated that there were two different opinions available – one of the Delhi High Court and one of the Punjab and Haryana High Court.

22. The Delhi High Court in *Assignia-Vil JV v. Rail Vikas Nigam Ltd.*, 2016 SCC Online Del 2567 : (2016) 230 DLT 235, took the view that both the serving or retired officer would stand precluded from acting as an arbitrator in view of the Seventh Schedule.

23. On the other hand, the Punjab and Haryana High Court in *Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd.* [Arbitration Case No.166 of 2016 (O&M),

decided on 27.10.2016], opined to the contrary.

24.1. In the latter case, the appointment of a Former Chief Secretary of a State as an arbitrator was called into question. The distinction between sub-section (1) and sub-section (5) of Section 12 of the said Act was noticed as the first one had the requirement of a person to disclose in writing circumstances which are likely to give rise to justifiable doubts, while the latter rendered a person ineligible for appointment as an arbitrator. In fact, Explanation 1 provides that the grounds in the Fifth Schedule are only a guide and thus would not be exhaustive.

24.2. Clause (1) of the Seventh Schedule only using the expression "*employee*", it was opined that there was no bar against the former employee. The words "*or has any other past or present business relationship with a party*" was held not to include a former employee, consultant, advisor of the party. The expression "*other*" is in the context of past or present relationship with the party and, thus, it was held that if the intention was to bar even former employees, consultant, advisor, clause (1) would

have been worded entirely differently.

24.3. Chief Justice S.J.Vazifdar, in his judgment, also held that the nature of control over an employee in service is entirely different from the nature of relationship between an employer and a former employee. The judgment also referred to the recommendations of the Law Commission.

25. The crucial fact, in my view, is that the attention of the learned Judges in both these cases was not drawn to Clause (31) of the Fifth Schedule.

26. I find myself in agreement with the opinion of the Chief Justice, S.J.Vazifdar of the Punjab and Haryana High Court and more so in the context of Clause (31) of the Fifth Schedule. It is common cause that while sub-section (1) of Section 12 of the said Act read with Explanation (1) sets out the circumstances in which there can be justifiable doubts as to the independence or impartiality of an arbitrator, sub-section (5) of Section 12 of the said Act read with the Seventh Schedule prescribes an absolute

bar. In a sense, it is presumed that on the existence of the said relationships, it would be not permissible for a person to act as an arbitrator.

27. There are two expressions used in the Fifth and Seventh Schedule. The Fifth Schedule in Clause (31) uses the expression "*former employee*". The natural corollary is there is a difference between an employee and ex-employee. Thus, while being an employee is sufficient for justifiable doubts, such justifiable doubts would arise in case of an ex-employee only if he is within the window of three years from the date of ceasing to be an employee.

28. The Seventh Schedule does not have any clause for an ex-employee. Clause (1) of Seventh Schedule is identically worded to Clause (1) of the Fifth Schedule. Thus, the expression "*employee*" has to be understood similarly at both the places. The absence of any clause for ex-employee in the Seventh Schedule itself implies that there is no prohibition in the appointment of an ex-employee as an arbitrator *per se*.

However, the use of expression “*former employee*” in Clause (31) of the Fifth Schedule would show that if the proposed arbitrator has ceased to be an employee within the window of three years, there would be justifiable doubts to the independence or impartiality of the arbitrator, though there is no absolute bar as under the Seventh Schedule.

29. It is not as if being an employee implies that the said equation continues for all times to come and as observed in the judgment in *Reliance Infrastructure Ltd., case, supra*, the equations between the parties itself changes, i.e., an employer and an employee and an employer and an ex-employee.

30. In the light of the aforesaid principle if the facts of the present case are examined, the second respondent ceased to be an employee six years ago. He, thus, does not come within Clause (31) of the Fifth Schedule. Not only that, he is stated to have retired from Bangalore, was not under the Chennai Division and had nothing to do with the contract in question. It, thus, cannot be said that the second respondent has incurred any

disqualification as submitted by the petitioner.

31. It may be noticed that the petitioner rushed to the Court before even the disclosure could be made by the arbitrator and it is, thus, clarified that if there is any other reason which is required to be disclosed as per Section 12(1) read with the Fifth Schedule of the said Act, naturally the second respondent would do so.

In view of the aforesaid legal position, as also the factual matrix, the present petition is not liable to be maintained and is, accordingly, dismissed leaving the parties to bear their own costs.

(S.K.K., CJ.)
9.12.2016

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Internet : Yes
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THE HON'BLE CHIEF JUSTICE

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