

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CR No.4968 of 2016(O&M)
Date of Decision-16.09.2016**

Punjab Water Supply & Sewerage Board and others
... Petitioners

Versus

M/s Shree Balaji Construction Company Bathinda through its
Partners ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Vijay Kaushal, Advocate for the petitioners.
Mr. P.S. Rana, Advocate for the respondent-caveator.

RAJ MOHAN SINGH, J.

[1]. Petitioners are aggrieved of order passed by Additional District Judge, Bathinda in Arbitration Case No.3/35 of 20/08/2010/16/09/2013.

[2]. Respondent filed petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for revoking powers of respondent No.3 as sole proprietor and for appointment of independent and impartial sole arbitrator to adjudicate disputes which have arisen between parties out of contract agreement No.131 of 2007-08 for execution of work of "Integrated Development of Urban Infrastructure Project at Bathinda", construction of storage and sedimentation tank of size

855' X 735' and construction of inlet channel of size 4' X 3' and all other works contingent thereto at water works near Rose Garden at Bathinda.

[3]. Respondent alleged that respondent is a partnership firm. Present petitioners invited tenders. Respondent submitted his tender on 16.04.2007 and same was found to be lowest. No negotiation was held by Superintending Engineer, but he illegally interfered and directed the respondent to have negotiations with him vide letter dated 03.05.2007. Superintending Engineer was the sole arbitrator in the controversy in issue. He is also taken a decision at the highest level and therefore, respondent thought it appropriate to move an application for change of arbitrator. Engineer-in-Chief has no right to enter into correspondence with Superintending Engineer. Once a decision has been taken on the recommendation of the Superintending Engineer by the highest officer of the Board i.e. Managing Director, then it is not appropriate for the department authorities to adjudicate the dispute between the parties. Precisely for this reason, respondent moved an application under Sections 14 and 15 of the Act for revoking powers of respondent No.3-Superintending Engineer as sole arbitrator and for appointment of independent and impartial sole arbitrator in his place.

[4]. I have heard learned counsel for the parties.

[5]. Learned counsel for the petitioners has vehemently submitted that first of all application under Sections 12 and 13 of the Act, 1996 was required to file before the Arbitrator himself and then in the event of dismissal thereof, the respondent was at liberty to assail proceedings in terms of Section 34 of the Arbitration Act. Learned counsel contended that the Superintending Engineer has not done anything wrong and illegal, rather it was the respondent who had committed fault by not depositing 10% of the call money in respect of the claims raised by company. When the respondent was at fault, respondent was not entitled to any relief. The correspondence between Engineer in Chief and Superintending Engineer (Arbitrator) was as per rules and regulations of the department governing the contract. No such ill-will can be predicted out of such communication as the same was directory in terms of rules and regulations of the department.

[6]. Learned counsel for the petitioners also emphasized that party alleging bias is firstly required to follow the procedure in terms of Sections 12 and 13 of the Act and thereafter, party has to wait till the stage of Section 34 of the Act comes. Learned counsel relied upon **National Highways Authority of India Vs. K.K. Sarin and others, 2009(3) Arb. LR 241 (Delhi)** to contend that party alleging bias has to resort to Sections 12 and 13 of the Act and thereafter, in case of being unsuccessful has a choice of waiting till stage of Section 34 or if he feels that bias can be summarily

established or shown to the Court, approach the Court immediately under Section 14 of the Act after the challenge being unsuccessful.

[7]. It is a settled principle of law that power to remove Arbitrator has to be exercised sparingly and with utmost caution. Section 14 of the Act empowers a party to approach the Court to return a finding as to whether the Arbitrator has become *de jure* or *de facto* and is unable to perform his functions. Section 14 of the Act is specific in nature, otherwise the Court prohibits intervention except where it is so provided. Unless Section 14 permits, judicial intervention in a case of a bias against an Arbitrator, would not be permissible. Except Section 14 of the Act, there shall be no other interpretation of power given to the Court to terminate the mandate of Arbitrator when the Arbitrator *de jure* has inability to perform his functions. *De jure* impossibility is nothing, but impossibility in law. The bias vitiates all solemn acts including entire judicial arbitration process and renders entire proceedings nugatory.

[8]. Question as poised before the Court is whether before invoking Section 14 of the Act, the party was required to follow the procedure as enshrined in Sections 12 and 13 of the Act. Section 12(3) of the Act permits challenge by the party to the Arbitrator if circumstances exists, that would give rise justifiable doubts as to his independence and impartiality. Section 13 of the Act provides the procedure for such challenge in the absence of any agreed procedure.

[9]. Learned counsel for the petitioners also relied upon **Trishul Construction Company Vs. Delhi Development Authority, 1994(0) AIJ-DL 1310285 (1994)** and contended that reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the Arbitrator. But 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, unless there is allegation against the named arbitrator either against his honesty or capacity or mala fide or interested in the subject matter or reasonable apprehension of the bias.

[10]. In the instant case, arbitrator is by designation and in view of correspondence between the Managing Director and Superintending Engineer based on inter-departmental communication, a legal bias cannot be ruled out which may give rise to reasonable apprehension in the mind of a reasonable man like the respondent to resort to proceeding for removal of the arbitrator. Mere apprehension of bias would not confer the Court with jurisdiction to remove an arbitrator. Arbitration is a voluntarily chosen forum by the parties for adjudication of their disputes. Having entered into a contract for the benefit of securing a work, a contractor must be held bound by the arbitration clause. The contractor has to be attributed with the knowledge that having conferred upon the authority to nominate an arbitrator. The authority could very well nominate an employee of the department an arbitrator and the officer or employee as an arbitrator would not

be disqualified merely on account of his being associate with the contract work.

[11]. Learned counsel for the petitioners further relied upon **Huawei Technologies Co. Ltd. Vs. Sterlite Technologies Ltd., 2015(0)AIJ-SC 836** where the Hon'ble Apex Court held that under Section 15(2) of the Arbitration Act where the mandate of the arbitrator is terminated, a substitute arbitrator is required to be appointed as per rules applicable to the appointment of arbitrator. The interpretation of rules was the subject matter in the said case. Since there were institutional rules under which dispute between the parties could be referred to arbitrator, therefore, the Court interpreted the rule appearing in Section 15(2) of the Act to be the rule referable to the provisions for appointment of arbitrator as contained in Supply Contract. While interpreting Clause-22.3 of Supply Contract, the Hon'ble Apex Court came to the conclusion that as per mandate of Section 15(2) of the Act, it was incumbent on the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent. It was only on failure thereof, an application under Section 11(6) of the Act could have been filed. In that context, the case was decided. No such preposition of law is involved in the instant case, therefore, the said judgment has no application in the facts and circumstances of instant case.

[12]. On the other hand, learned counsel for the respondent submitted that admittedly the arbitrator in this case is by designation and not by name. Orders and decisions passed by earlier Managing Director and Superintending Engineer are written orders which cannot be easily ignored by the Superintending Engineer (Arbitrator). Though the parties have agreed to for the arbitration to be done by the Superintending Engineer, but once a decision has been taken on the recommendation of the Superintending Engineer by the highest officer of the Board i.e. Managing Director, it is reasonably expected from the Superintending Engineer not to be swayed away from the decision taken by the Managing Director on the recommendation of the Superintending Engineer at the highest level of the Board. Learned counsel for the respondent relied upon **Arbitration Case No.123 of 2009** titled as **Vinod Kumar Angi Vs. Punjab Water Supply and Sewerage Board and others** decided on 28.04.2011 to contend that petition under Section 14 of the Act is maintainable.

[13]. In **Vinod Kumar Angi's case (supra)**, the controversy was with regard to appointment of arbitrator in respect of dispute regarding work allotment. The tender was accepted after negotiations of dispute ensued between the parties and earnest money was forfeited. The contractor was debarred from tendering for 2 years by the Managing Director of the Board. In the revision petition, the contractor was relegated to the alternative remedy i.e. arbitration. Thereafter, he approached the Court for appointment of

arbitrator. Perusal of the decision reveals that though the parties had agreed for arbitration by the Superintending Engineer, but once on the basis of recommendation of the Superintending Engineer, the Managing Director being highest officer of the Board took some decision, therefore, in the fitness of things, Superintending Engineer was considered to be not appropriate and fair department authority to adjudicate the dispute between the parties.

[14]. The facts and circumstances of the aforesaid case appear to be paramateria with that of present litigation. Since the Superintending Engineer/sole Arbitrator was an arbitrator by designation and not by name, therefore, there can be a legal bias based on documented evidence. Forming an opinion by the arbitrator on such documents which he or his predecessor had recommended for taking ultimate decision by the Managing Director/Head of Department would be an issue which may not lie under the domain of Sections 12 and 13 of the Act. Personal bias is not capable of being established and therefore, the procedure as prescribed under Sections 12 and 13 of the Act would be of no use.

[15]. The facts as depicted in **Vinod Kumar Angi's case** (**supra**) are paramateria in nature and this Court appointed alternative arbitrator by changing earlier arbitrator. Therefore, in my considered opinion, the impugned order does not suffer from

any illegality or impropriation. This revision petition is accordingly dismissed.

16.09.2016

Prince

(RAJ MOHAN SINGH)
JUDGE

Whether Reasoned/Speaking Yes/No
Whether Reportable Yes/No