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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
F-204.

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O.M.P. 68/2009

**UTTAR PRADESH RAJKIYA NIRMAN NIGAM
LTD.**

..... Petitioner

Through: Mr. Raman Kapur, Senior Advocate with
Mr. Dhiraj Sachdeva, Advocate.

Versus

NETAJI SUBHAS INSTITUTE OF TECHNOLOGY ...Respondent
Through: None.

CORAM: JUSTICE S. MURALIDHAR

ORDER
07.12.2016

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 7th November, 2008 passed by the sole Arbitrator in the disputes between the Petitioner, Uttar Pradesh Rajkiya Nirman Nigam Ltd., and the Respondent, Netaji Subhas Institute of Technology, arising out of an agreement dated 4th March, 2002 for the construction of three boys' hostels i.e., Hostels 2, 3 and 4. In terms of the agreement, the time allowed for completion of work of Hostel No. 2 was 12 months, Hostel No. 3 was 15 months and Hostel No. 4 was 18 months. Correspondingly, the stipulated dates of completion of the said three hostels

were 2nd March, 2003, 2nd June, 2003 and 2nd September, 2003.

2. According to the Petitioner, it soon became apparent that there was a paucity of funds with the Respondent. With the material that was procured, the Petitioner could construct only Rs. 70 lakhs' worth of work. Of this, the Respondent was able to pay the Petitioner only a sum of Rs.5,85,677. As a result, the work had to be stopped on 24th August, 2002. The Petitioner kept requesting the Respondent to clear its pending bills but for more than a year the work could not be recommenced.

3. A Committee was appointed by the Respondent which was chaired by Mr. S.C. Gupta who was later appointed the sole Arbitrator in the present case. The task of the Committee was to settle the issues pending between the parties. The Committee admitted that there was a paucity of funds. It revised the programme for construction keeping in view the losses already suffered by the Petitioner and gave certain recommendations regarding the payment of amounts due to it. The Petitioner states that it was compelled to accept the said recommendation so that the work could recommence and the Petitioner could recover its amounts.

4. The Petitioner informed the Respondent by letters dated 29th and 31st July, 2003 that it should be allowed 7 days' time to re-mobilize its resources and to remove the bushes developed at the work site. It also asked for time to clean the reinforcement bars. However, the Respondent rejected the above request. On 28th August, 2003, the Respondent issued to the Petitioner a

show cause notice ('SCN') which was replied to by the Petitioner on 3rd September, 2003.

5. The Respondent by its letter dated 3rd September, 2003 *suo motu* extended the time for completion of Hostel No. 2 up to 14th February, 2004, Hostel No. 3 up to 14th May, 2004 and Hostel No. 4 up to 14th August, 2004. The Petitioner gave a revised schedule for the three hostels as 15th August, 2004, 15th November, 2004 and 15th February, 2005. Meanwhile, the Respondent kept issuing notices to the Petitioner which were replied to by the Petitioner. Ultimately, the Respondent rescinded the contract on 25th August, 2004. This was challenged by the Petitioner by filing Writ Petition (C) No. 14714 of 2004 in this Court. In the said petition, an order was passed on 5th October, 2004 recording the consent of the parties to get their disputes settled through arbitration. Mr. S.C. Gupta was appointed as a sole Arbitrator.

6. The Petitioner states that it did not object to the appointment of Mr. S.C. Gupta since he was a former Chief Engineer and he was also Chairman of the Committee appointed by the Respondent to sort out the disputes between the parties. It is stated that at that time the Petitioner was not aware that Mr. Gupta had been a professional advisor to the Respondent since June 2003 and had in fact drawn remuneration in that capacity. It is stated that had these facts been known to it, the Petitioner would have never agreed to his appointment as sole Arbitrator.

7. It is stated that on coming to know the above facts, the Petitioner on 12th January, 2005 filed an application before the Arbitrator under Sections 12 and 13 of the Act challenging his continuance as such. By an order dated 1st March, 2005, Mr. Gupta rejected the above objections and declined to recuse himself from the arbitral proceedings.

8. At this stage, it is important to note that in the said order dated 1st March, 2005, the learned Arbitrator noted one of the submissions of the Petitioner objecting to his continuance as Arbitrator as: "I had been acting as professional advisor to the Respondent since June 2003 and that relates to the Respondent" and further because "I have been drawing the remuneration from the Respondent and thus I am monetarily dealing with the Respondent." The Arbitrator also noted the reply of the Respondent as under:

"It is factually incorrect that Shri S.C. Gupta is drawing remuneration from the respondent or otherwise employed/related/indebted/connected/associated with the Respondent as ought to be made out by the Claimant in their application in question. It is only since June 2003 that Shri SC Gupta occasionally acted as a professional advisor to the Respondent on the schedule of fee prescribed by the Respondent which is applicable to all such professional advisors. He was paid prescribed fee for rendering professional advice as and when his advice was solicited.

Therefore, the Applicant Claimant is neither entitled nor has grounds to challenge the appointment of Shri SC Gupta as Learned Sole Arbitrator and therefore the application may please be dismissed."

9. In other words, there was an admission by the Respondent that Mr. Gupta did occasionally act as its Professional Advisor since June 2003 and that he was being paid as per the schedule of fee prescribed by the Respondent for professional advisors.

10. The Arbitrator had in the same order dated 1st March, 2005 in para 4 held as under:

“4. ...Furthermore, it is factually incorrect that I have been closely connected/associated/related and indebted to the Respondent, am predisposed to decide the case irrespective of merits and have been drawing remuneration from the Respondent or otherwise associated with them as an employee as it sought to be made out by the Claimant in their application in question.

Accordingly I find no substance in the application of the Claimant and accordingly dismiss the same.”

11. In the above assertion, the learned Arbitrator denies the fact that he had, in fact, been a professional advisor to the Respondent since June 2003 and was being paid remuneration in that capacity as per the schedule of fees prescribed by the Respondent for professional advisors. This clearly contradicts what the Respondent stated in writing before the Arbitrator.

12. In terms of Section 13(4) read with Section 13(5) of the Act where the challenge to an Arbitrator under Section 12 by a party fails, such party has to wait to raise a ground on that basis when challenging the ultimate Award under Section 34 of the Act. This is precisely what the Petitioner has done in

the present case.

13. Although the Arbitrator in the above order asserted that it was factually incorrect that he has been drawing remuneration from the Respondent, in the impugned Award dated 7th November, 2008, he stated in para 3(ii)(a) as under:

“Regarding declaration under Section 12 of the Act in respect of undersigned’s independence or impartiality, the sole arbitrator declared as under:-

"I retired as Chief Engineer, CPWD, Government of India on 30.6.97. I had no association/contact and never dealt with NSIT during my service and after retirement except that,

I acted as Chairman of the committee, constituted and notified by NSIT on 28.4.2003 having Er. K.P.S. Shishodia, GM, M/s UPRNNL and Er. Anil Arora, Ex. Engineer (C), NSIT, New Delhi as members, to go into the contract/agreement executed between the Institute and M/s UPRNN Ltd. and to make recommendations on the claims/amount for settlement so that the construction work is started. Report detailing recommendations of the committee was submitted on 20th May, 2003. I understand both the parties have since accepted and acted on recommendations made by the committee.

I have been acting occasionally as a professional advisor to NSIT on prescribed fee basis since June,2003."”

14. Therefore, the Arbitrator contradicted himself by denying, on the one hand, in his order dated 1st March, 2005 that he had not drawn any

remuneration and, on the other, admitting in the Award that he had been acting as a professional advisor to the Respondent on prescribed fee basis since June 2003.

15. The requirement of an Arbitrator having to make a full and complete disclosure of any circumstance that might give a justifiable ground about his impartiality has to be mandatorily made in terms of Section 12(1) of the Act not only at the beginning of the arbitration but in terms of Section 12(2) of the Act throughout the arbitration as and when such circumstances exist. The underlying principle informing this mandatory statutory requirement is that there should not even be a likelihood of bias as far as the impartial functioning of the Arbitrator is concerned.

16. In ***IJM-Gayatri Joint Venture v. National Highways Authority of India*** ***ILR (2012) III Delhi 721***, this Court set aside an Award where it was found that the Arbitrator had failed to make a disclosure that was mandated by Section 12(2) of the Act. The said judgment was affirmed by the Division Bench by order dated 10th July, 2012 in FAO (OS) No. 285 of 2012. Recently, by an order dated 6th December, 2016 in OMP No. 199 of 2008 (***M/s. Lanco-Rani (JV) v. National Highways Authority of India***), this Court has, after reviewing the case law on the issue, reiterated the mandatory nature of the declaration that has to be made under Section 12(2) of the Act.

17. In the present case, the Arbitrator failed to make requisite disclosure

about him acting as a professional advisor of the Respondent since June 2003 and having been paid remuneration as per the schedule of fees devised by the Respondent. It was plain from what was informed by the Respondent that he had been acting as its Professional Advisor since June 2003. In other words, the said arrangement continued even during the time when the present arbitration was taking place. There could, therefore, be no excuse for the Arbitrator not making a full disclosure on the said fact which he was mandatorily required to do under Section 12(2) of the Act.

18. The above ground by itself is sufficient enough to set aside the impugned Award.

19. Nevertheless, Mr. Raman Kapur, learned Senior counsel appearing for the Petitioner, has also pointed out that the Arbitrator seriously erred in allowing counter-claim No. 6 of the Respondent for Rs. 3.24 crores towards the risks and costs. The case of the Respondent was that after the termination of the contract with the Petitioner which took place on 25th August, 2004, it had to get the work done through another agency to whom it awarded a further contract on 19th September, 2006. What the learned Arbitrator appears to have overlooked is that there was a gap of more than two years between the termination of the contract with the Petitioner and awarding the balance work to another agency. This by itself disentitled the Respondent to claim any compensation towards the risks and costs. The decision in *Union of India v. Alfa Laval (India) Ltd.* 2006 (2) Arb. LR 363 (Del) (DB) supports the case of the Petitioner in this regard. The Court is,

therefore, satisfied that there was no occasion for the learned Arbitrator to have allowed the counter-claim of the Respondent and awarded it Rs.3.24 crores towards risks and costs. On this ground also, the impugned Award deserves to be set aside.

20. For the aforementioned reasons, the Court sets aside the impugned Award dated 7th November, 2008 passed by the learned Arbitrator but in the circumstances with no order as to costs.

DECEMBER 07, 2016
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S. MURALIDHAR, J