

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on February 16, 2016

Judgment delivered on February 23, 2016

+ O.M.P. (T) (COMM.) 7/2016, IAs 2132-2133/2016
SVOGL OIL GAS & ENERGY LTD

..... Petitioner

Through: Mr. Arvind Kumar and Mr.
C.S.Chauhan, Advs.

versus

COMET OVERSEAS PVT. LTD. & ANR.

..... Respondents

Through: Mr. Jagdeep Anand, Adv.
with Mr. Anil Agarwalla,
Adv.

+ O.M.P. (T) (COMM.) 8/2016, IAs 2134-2135/2016
SVOGL OIL GAS & ENERGY LTD

..... Petitioner

Through: Mr. Arvind Kumar and Mr.
C.S. Chauhan, Advs.

versus

OLYMPIC OIL INDUSTRIES LTD. & ANR.

..... Respondents

Through: Mr. Jagdeep Anand, Adv.
with Mr. Anil Agarwalla,
Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

**IA 2133/2016 in O.M.P. (T) (COMM.) 7/2016 and IA 2135/2016
in O.M.P. (T) (COMM.) 8/2016 (filed by petitioner seeking
exemption from filing certified copies, dim annexures and typed
copies of documents)**

Exemption allowed subject to all just exceptions.

Applications stand disposed of.

O.M.P. (T) (COMM.) 7/2016 & O.M.P. (T) (COMM.) 8/2016

1. These petitions under Section 14 of the Arbitration & Conciliation Act impugnes order dated September 25, 2015 received by the petitioner on October 23, 2015 passed by the learned Arbitrator whereby the learned Arbitrator has rejected the application filed by the petitioner herein, in two proceedings i.e Claim Petition No. 1/2015, (M/s Olympic Oil Industries Ltd vs. M/s Shiv Vani Oil and Gas Exploration Services Ltd) and Claim Petition No. 03/2015, i.e Comet Overseas Pvt. Ltd. vs. M/s Shiv Vani Oil and Gas Exploration Services Ltd challenging the jurisdiction of the Tribunal in terms of Section 12, 13 & 14 of the Arbitration & Conciliation Act, 1996 read with Section 23 and 24 of the Indian Contract Act, 1872.

BRIEF FACTS:-

2. The primary challenge of the petitioner in this case, is that the arbitration clause, which empowers the respondent No.1 to unilaterally appoint an Arbitrator is void to the limited extent that under Section 23 of the Indian Contract Act, such clause should be read down to constitute an independent Arbitral Tribunal. Otherwise, for all practical purposes, judicial remedy will become illusory, and this will lead to strong arm tactics by stronger parties against the weaker parties and this unilateral appointment should be deemed to fall under the bar of newly inserted

Section 12 (1) directly or indirectly to give rise to justifiable doubts as to the Arbitrator's independence. Learned counsel for the petitioner would rely upon the following judgments:-

- (i) ***(2012) 2 SCC 759 Denel (Proprietary) Limited vs. Ministry of Defence;***
- (ii) ***(2012) 6 SCC 384 Bipromasz Bipron Trading SA vs. Bharat Electronics Limited (BEL);***
- (iii) ***2013 AD (Delhi) 162 MFAR Construction Pvt. Ltd. (M/s) vs. Director General (Married Accommodation Project);***
- (iv) ***2008 (1) Arb L.R 393 (Delhi) Alcove Industries Ltd. vs. Oriental Structural Engineers Ltd and Anr.;***
- (v) ***Judgment dated April 15, 2004 of this Court in Arb. Petition No. 377/2012, Indo Arya Logistics vs. Central Warehousing Corporation.***

3. He would also state, that even though the present proceedings have been initiated, much before the amendment act has come, the amendments so inserted need to be followed in these proceedings and in that regard, he would rely upon the judgment of the Supreme Court reported as ***1999 (6) Scale 441 Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd.***

4. On the other hand, leaned counsel for the respondent No.1 would state that the petitioner is precluded from challenging the clause relating to arbitration wherein the power to appoint Arbitrator has been vested with the respondent No.1 only on the ground that the said agreement was

entered with open eyes by the petitioner and if there is an apprehension of bias of the learned Arbitrator, the petitioner was within its right to file an application under Section 12, 13 and 14 of the Arbitration & Conciliation Act, which in fact was invoked, resulting in the impugned order.

5. It is his submission, that an apprehension of the petitioner is without any basis and has rightly been rejected as the apprehension must be based on cogent material. In this regard, he would rely upon the judgments of this Court in *2013 II AD (Delhi) 460 Priknit Retails Ltd. vs. Aneja Agencies; AIR 1988 SC 2232 Secretary to Government, Transport Deptt., Madras vs. Munuswamy Mudialiar & Anr.; AIR 2007 SC 1764 Ace Pipeline Contracts Pvt. Ltd. vs. Bharat Petroleum Corpn. Ltd.; AIR 2012 SC 817 Denel (Proprietary Ltd.) vs. Govt. of India, Ministry of Defence*. He would state the petitioners cannot wriggle out of the Arbitration Clause only on an apprehension that a person appointed by the respondent No.1 will not be impartial or objective. According to him, even if the petitioner's view is that the Arbitrator has not acted independently or impartially or has acted bias, it is always open to the petitioner to challenge the final award under Section 34 of the Act. He would also answer the judgments relied upon by the learned counsel for the petitioner, as not applicable in the facts of

this case.

6. Having heard the learned counsel for the parties, before I come to the impugned order, suffice to state that in ***Bipromasz Bipron Trading SA(supra)***, the Supreme Court was considering facts wherein an application under Section 11 of the Arbitration & Conciliation Act was filed. The Supreme Court appointed a retired Chief Justice of the Madras High Court as an Arbitrator upon examination of the facts, which would tend to indicate that the named Arbitrator is not likely to be impartial. In the said case, what prevailed upon the Supreme Court was that the named Arbitrator is a direct subordinate of the CMD and an employee of the respondent. CMD is the controlling authority of all the employees, who have been dealing with the subject matter and also the controlling authority of the named Arbitrator. It was the CMD, who had issued letter dated June 5, 2009 to the petitioner stating that as per the respondent company's directives, all pending supplies as on that date were put on hold.

7. Insofar as the judgment of ***Denel (Proprietary) Limited (supra)***, is concerned, the Supreme Court has in the facts of the case, was of the view that the contract is with the Ministry of Defence. The Arbitrator has been nominated by the Directorate General of Factories (DGOF), who is bound to accept the directions issued by the Union of India. The

Arbitrator is an employee within the same organisation. The attitude of the respondents towards the proceeding is not indicative of an impartial approach. In fact, the mandate of the earlier arbitrator was terminated on the material produced before the Court, which indicated that the arbitrator was biased in favour of Union of India. Reference was made to various notices issued by the arbitrator, but none of which were received by the petitioner within time. Therefore, the petitioner was effectively denied the opportunity to present his case before the sole Arbitrator. Therefore, the apprehensions of the petitioner cannot be said to be without any basis.

8. Similarly, in *M/s Indo Arya Logistics (supra)*, the respondent has admitted that the Arbitrator was the ex-employee of the respondent, CWC. In view of that, this Court had appointed an Arbitrator of its own. In *MFAR Constructions Pvt. Ltd. (supra)*, this Court has on a finding of serious apprehension of the petitioner as to non-impartiality of serving officer being appointed as an arbitrator, the insistence of respondent for appointment of serving officer by Engineer-in-Chief or Director General of Works, Army Headquarters and that too after forfeiture of respondent's rights to appoint its own officers, in the opinion of the Court is highly misconceived and appointed Mr. Amrit Lal Aggarwal, retired Chief Engineer, MCD as an Arbitrator to arbitrate upon the

disputes between the parties.

9. In *Alcove Industries Ltd. vs. Oriental Structural Engineers Ltd. and Anr*, this Court in paras 43 and 44 has held, if the challenge to the appointment of the Arbitrator falls under Sections 12 and 13 of the Act, still the party can move the Court under Section 14 of the Act. The Court further held, that, it is not necessary for the party to raise such a challenge after the award is passed under Section 34 of the Act. Suffice to state, the judgments as referred to and noted above, primarily relates to the facts, so pleaded, there is an apprehension that the Arbitrator would not be impartial, the Court can interfere with the appointment and appoint an Arbitrator. It is not such a case here. As noted above, the petitioner has challenged the very clause of appointment of an Arbitrator by the respondent No.1. That apart, I note, the application filed by the petitioner before the learned Arbitrator reads as under:-

“1. That the Claimants had issued a Legal Notice dated 6.7.2015 from M/s A. Agarwalla & Co., which was replied and also counter Notice dated 10.7.2015 issued by the Defendants. The said Notice was rejoined vide Notice dated 6.8.2015 by M/s. A. Agarwalla & Co. on behalf of the Claimants.

2. It is respectfully submitted that the averments made by the Defendants through their Counsel in their Reply/Notice dated 10.7.2015 be read herein and hereto and the same are not reproduced herein for the sake of brevity. A copy of the said Reply/Notice is annexed hereto and marked as Annexure-A.

3. *It is respectfully, submitted that the present Arbitral Tribunal is neither legally constituted nor has jurisdiction to deal with any dispute between the parties and is non-est.*

4. *In any case, to the best of knowledge of the Defendants, the Claimants have neither filed any Claim Statement nor served any Claim Statement on the Defendants. As such, the present proceedings are at initial stage itself and the same should be immediately terminated.*

5. *It is respectfully submitted that filing of the present Application should not be deemed to be the acknowledgment of the jurisdiction of the Arbitral Tribunal to decide any issue or adjudicate in any manner between the parties.*

6. *The Defendants reserve their right to file an appropriate Petition or appointment and/or constitution of Arbitral Tribunal before appropriate judicial forum and/or challenge the present Arbitral Tribunal if it continues with the matter.”*

10. The learned Arbitrator with regard to challenge under Section 12

(1) of the Act, has in paras 32, 33 and 34 has held as under:-

“32. At the very outset; with regards to the challenge u/s.12(1) of the Act, I hold that both the Defendants herein have completely misunderstood the provisions of Sections 12(1) of the Act, in-as-much-as the provisions contained therein do not cast any negative onus on the Arbitral Tribunal to keep sending written communications with self certifications about its independence and the non-existence of any circumstances giving rise to justifiable doubts about its independence or partiality. This Tribunal is fully conscious of its duties obligations u/s.12(1) of the Act and shall keep all parties informed in

writing, on any occasion when such circumstances arise. In order to clarify this aspect beyond any doubts, the Counsels for the Defendant Nos.1 and 2 were categorically asked by this Tribunal if they were aware of any circumstances contemplated u/s.12(1) of the Act concerning this Tribunal, other than the bald allegations made in their respective Applications. Both the Defendants' Advocates, despite lengthy technical arguments, were unable to pin point any specific instance of any such circumstance within their knowledge which would be a ground for fearing a bias in the mind of the Arbitrator. The Defendant No.2's Counsel relied upon the decision of the Hon'ble Bombay High Court in the matter of UOI v. Tolani Bulk Carriers (2002(2)BomCR256) in support of his contentions about Sec. 12(1) of the Act. After hearing the arguments of the Counsels of both the Claimants opposing the Application, this Tribunal directed them to make categorical averment/s, if this Tribunal; was in- any manner associated with Counsels for both the Claimants or both the Claimants, or either of their Directors / the relatives of the Directors in any personal or professional capacity ever in the past. The Counsels for both the Claimants categorically denied any such relationship or interest. The Counsel for both the Claimants relied upon the Judgement of the Hon'ble Supreme Court in the matter of Secretary v. Munuswamy (AIR1988SC2232) in support of their contentions that a reasonable apprehension of bias must be based upon cogent materials.

33. Before proceeding further, an important point needs to be clarified with regards to para 27 of the rejoinder filed by def. No.2 wherein in the 2nd half of the said paragraph 27, the Defendant. No.2 has stated that this Tribunal and the Claimants have failed to furnish information as requested by the Defendant No.2. During the course of the hearing, this Tribunal called upon the Counsel of M/s. Practical Properties Pvt. Ltd. to explain in detail and justify with documents what has been written in paragraph 27 of the Rejoinder. After going through the contents of para 7 of the Rejoinder the Ld.

Counsel clarified that no such request was made to this Tribunal under section 12 but what is stated in para 27 of the rejoinder, only refers to the averments in both the Applications made by the Defendant No.2, Similarly the Counsel for the Defendant No.2 clarifies that no such letter was sent to the Claimant by the Defendant No.2 either. This Tribunal directs M/s. Practical Properties Pvt. Ltd. and its Counsel to clarify by e-mail to both, the Arbitrator and the Claimant in the said regard with copy to all other parties to both the Agreements.

34. It is necessary to place on record that the judgement relied upon by the Defendant No.2's Counsel (UOI v. Tolani) deals with a completely different circumstance wherein the Arbitrator therein was the father of the partner of the Law Firm representing the claimants, which is not even remotely the case in the present matter. As discussed above, the Counsels for both the Defendants could not pin-point any specific circumstance based upon cogent material which would lead to an apprehension of bias on the part of the Arbitrator. This Tribunal also categorically states that it has no personal interest in the proceedings or claim and further states that it has no relationship of any nature whatsoever either, personal or professional with any of the Claimants or any of its directors, associates, shareholder, officers assigns or anyone associated with them. This; Tribunal also clarifies that there are no circumstances which are likely to give rise to any justifiable doubts as to the independence or impartiality of this Tribunal. It is further held that the disclosure as required under section 12(1) is only to be given if there exists such circumstances about the independence or impartiality of the Tribunal and the same can be given at any stage of the proceedings as per section 12(2) of the Act. In view of the above, and in view of the fact that this Tribunal has no personal/ professional interest with any of the parties herein, the challenge u/s 12 r/w Sec.13 of the Act is rejected.”

11. Insofar as the unilateral right to appoint an Arbitrator, the learned

Arbitrator has held in paras 35, 36 and 37 as under:-

“35. The next objection is founded on the common reply on behalf of both the Defendants which was sent by Counsel C.S. Chauhan by his notice dated 10.07.2015 (a copy of which was also marked to this Tribunal) wherein both the Defendants have challenged the Appointment of this Tribunal as a sole Arbitrator on the grounds that:

“Para 10: a unilateral right to appoint an Arbitrator by one party in dispute with another party makes a contract illegal, unlawful and void, and thus the Arbitration Clause entitling, the Claimants to appoint the Sole Arbitrator is void, non-est and unenforceable.

Para 12: That the Defendants call constitute an Arbitration Tribunal...

Para 13: ...The Defendants appoint Shri. Satish Mishra as their Arbitrator and call upon the claimants to appoint their Arbitrator, and the two Arbitrators can appoint the third Arbitrator and constitute a 3 member Arbitral Tribunal..."

This objection has been specifically raised by the Defendant No.1 in both its Applications dated 08.08.2015 in paragraphs 1-3. This objection has also been raised by the Defendant No. 2 in both its Rejoinders dated 12.09.2015 in paragraph 20. It was further argued by both the defendants' Counsels that a party could not be the Judge of its own cause and thus the Claimant had no right to appoint the sole Arbitrator without the consent of both the Defendants. The Claimants vehemently opposed this ground and relied upon the Judgement in the matter of Ace Pipeline v. Bharat Petroleum (AIR2007SC1764) in support of their contention that "once a party enters into Agreement with eyes wide open, it cannot wriggle out of situation that if any person is appointed as Arbitrator, he will not be impartial".

36. These objections by both the Defendants to the appointment of the present Tribunal as the sole

Arbitrator, and their demand to, appoint a 3 member Arbitral Tribunal, can be disposed of by referring to the terms of the "Loan Agreement" dated 08.08.2013 in respect of Claim Petition No.1 of 2015 and the terms of the "Trade Advance Agreement" dated, 08.08.2013 in respect of Claim Petition No.3 of 2015. In both the documents, the Arbitration clause (set out. in para 13 therein) clearly set out that "The Arbitral proceedings shall be conducted by a sole Arbitrator to be appointed by the Lender (Claim Petition No.1 of 2015) /Buyer /Service Receiver (Claim Petition No.3 of 2015)". Thus in view of the unequivocal provisions of clause No.13 in both the concerned documents, it is the Claimant-who is entitled to appoint the sole Arbitrator, and the Defendants cannot wriggle out of the same. The Judgement in the matter of Denel (Proprietary Limited) v/s Govt. of India Ministry of Defence : (2012) 2 SCC .759 : MANU/SC/0010/2012 relied upon by the Defendants is not applicable to the present matter as it was given in the peculiar circumstances of that matter. This objection is thus disposed of as rejected.

37. The Defendant No.2 has put up a further case that it is only a confirming, party to both the Agreements viz. "Loan Agreement" dated 08.08.2013 in respect of Claim Petition No.1 of 2015 and the terms of the "Trade Advance Agreement" dated 08.08.2013 in respect of Claim Petition No.3 of 2015 and thus it is neither a necessary nor a proper party. And moreover, it is not described as a party to the Agreement in the description of party and parties in the respective Agreements, and thus this Tribunal has no jurisdiction to proceed against the Defendant No.2. The Counsel for Defendant No.2 relied upon the judgement of (1998) 3 SCC 573 (titled K.K. Modi Vs. K.N. Modi), and the Judgment passed on 29th March, 2011 by the Hon'ble Supreme Court of India in the matter of Deutsche Post Bank Home Finance Ltd. Vs. Taduri Sridhar & Anr in support of his submissions."

12. Further, the application filed by the petitioner before the learned Arbitrator does not give any specific instances of bias. If it was a case of real apprehension of bias, the application should have pointed out the same. Even, the reply dated July 10, 2015 to the notice of the respondent No.1, the petitioner has stated as under:-

“10. Our Clients stated that M/s Comet Overseas Pvt. Ltd. does not have a right to appoint any Arbitrator much less Shri Dinesh Kumar Seth as a Sole Arbitrator in the dispute. Without prejudice to the aforesaid contentions of our Clients, it is also stated that any unilateral right to appoint an Arbitrator by one party in dispute with another party makes the contract illegal, unlawful and void. Our Clients do not agree to the alleged appointment of the Sole Arbitrator i.e Sh. Dinesh Kumar Seth by M/s Comet Overseas Pvt. Ltd. and hereby state that the said agreement/clause which allegedly entitles your Clients to appoint the said Sole Arbitrator is void, non-est and unenforceable.

11. Further, without prejudice to the aforesaid it is stated that Shri Dinesh Kumar Seth in any case based in Mumbai and cannot conduct an arbitration which is to take place In Delhi.

12. Without prejudice to the aforesaid contentions, our Clients hereby, give notice that your Clients are in breach of understanding between the parties and our Clients call upon M/s Comet Overseas Pvt. Ltd. to constitute an arbitral panel to resolve the disputes between the parties.

13. Our Clients hereby appoint Shri Satish Mishra as their arbitrator in the matter and call upon your Client M/s Comet Overseas Pvt. Ltd. to appoint their Arbitrator within 30 days of this notice such that two arbitrators can appoint a third arbitrator and

constitute a 3 member arbitral tribunal to adjudicate upon the disputes between the parties.”

Surely, the contents of the reply does not reflect a plea of bias against the learned Arbitrator. The plea of appointment of arbitral panel instead of a Sole Arbitrator is unsustainable being at variance with the arbitration clause.

13. In *Secretary to Government, Transport Deptt., Madras (supra)*, the Supreme Court in paras 11, 12 and 13 has held as under:-

“11. This is a case of removal of a named arbitrator under Section 5 of the Act which gives jurisdiction to the Court to revoke the authority of the arbitrator. When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the Superintending Engineer at that time to begin with, who, however, could not complete the arbitration because he was transferred and succeeded by a successor. In those circumstances on the facts stated no bias can reasonably be apprehended and made a ground for removal of a named arbitrator. In our opinion this cannot be, at all, a good or valid legal ground. Unless there IS allegation against the named arbitrator either against his honesty or capacity or mala fide or interest in the subject matter or reasonable apprehension of the bias, a name and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under section 5 of the Act.

12. Reasonable apprehension of bias in the mind of a

reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, Commercial Arbitration, 1982 Edition, page 214. Halsbury's Laws of England, Fourth Edition, Volume 2, para 551, page 282 describe that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias.

13. This Court in International Authority of India v. K.D. Bali and Anr., MANU/SC/0197/1988: [1988] 3 SCR 370 held that there must be PG No 678 reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Govt. to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator. Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator."

14. In ***Ace Pipeline Contracts Pvt. Ltd. (supra)***, the Supreme Court has in paras 14 and 15 held as under:-

“14. In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent-BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under Section 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.

15. In view of our above discussion, we find no reason to interfere with the order passed by the learned Single Judge of the High Court of Delhi in Arbitration Petition No.181 of 2005. The arbitrator has already been appointed. He should proceed in the matter and decide the dispute expeditiously. Consequently, the appeal is dismissed with no order as to costs.”

15. Since, this Court, has rejected, the challenge to the order of the learned Arbitrator on merit, it would not be necessary for this Court, to go into the aspect of non maintainability of these petitions, when an order is passed, on the challenge to the Arbitrator under Section 12 (3) and Section 13(2) of the Act in view of Section 13(4) and 13(5) of the Act.

16. Noting the aforesaid, I am of the view that the challenge in the present petitions is without any merit. The petitions are liable to be rejected. Ordered accordingly. No costs.

IA 2132 in O.M.P. (T) (COMM.) 7/2016 and IA 2134/2016 in O.M.P. (T) (COMM.) 8/2016 (filed by petitioner seeking stay of arbitration proceedings under Section 14 of the Arbitration and Conciliation Act, 1996 read with Section 151 CPC)

In view of the fact that the present petitions have been dismissed,
the applications are also dismissed.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 23, 2016

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