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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 199/2008

M/S. LANCO-RANI (JV)

..... Petitioner

Through: Dr. Amit George with Mr. Swaroop
George & Ms. Rajsree Ajay, Advocates.

versus

NATIONAL HIGHWAYS
AUTHORITY OF INDIA LIMITED

..... Respondent

Through: Mr. Rajiv Kapoor, Advocate.

CORAM: JUSTICE S.MURALIDHAR

ORDER

06.12.2016

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner, M/s. Lanco-Rani (JV), is to the impugned Award dated 5th January, 2008 passed by the Arbitral Tribunal ('AT') in the disputes between the Petitioner JV and the Respondent, National Highways Authority of India Limited ('NHAI') arising out of the contract awarded to the JV for the construction of "Four Laning of km 419.00 to km 447.00 of Purnea to Gayakota of NH-31 in the State of Bihar.

2. It is stated that the work of construction of the Kishangunj Flyover in KM-473-475 on NH No. 31 spanning over 738 meters was added to the said contract work by an addendum to the tender. The start date of the work was reckoned as 19th September, 2001 and the Kishangunj Flyover was to be completed by March 2002. The entire contract work, apart

from the Kishangunj Flyover, was to be completed within 36 months, i.e., by 18th September, 2004.

3. The dispute between the parties arose from the delay in completion of piling works for the Kishangunj Flyover. Resultantly, the Petitioner submitted a detailed statement of facts, supported with evaluation of additional costs and losses, for a decision of the Engineer under Clause 44.1 of the Contract. The Engineer by his letter dated 23rd March, 2004 conveyed his decision to the Team Leader that the Petitioner was not entitled to any compensation. The matter was then referred at the instance of the Petitioner to the Dispute Review Expert (DRE) who gave his recommendation on 29th January, 2005. The Petitioner being dissatisfied with the recommendation of the DRE referred the matter to the AT for a decision.

4. By the impugned Award dated 5th January, 2008, the AT held Issue Nos. 1, 2, 3(a) and 6 against the Petitioner whereas Issue No. 5 was held in favour of the Petitioner. The AT did not decide on Issue Nos. 3(b) and 4.

5. At the outset, Dr. Amit George, learned counsel appearing for the Petitioner stated that he was confining the challenge to the impugned Award on the ground of bias. He drew the attention of the Court to the fact that on 2nd May 2008, an application being IA No. 5527 of 2008 was filed in the present petition by the Petitioner seeking permission to urge an additional ground 'K'. IA No. 5527/2008 was allowed by the Court by its order dated 9th July, 2008.

6. In the said application it was pointed out that on 28th April, 2008, while discussing some business affairs with the General Manager of M/s. Progressive Constructions Limited (PCL), another construction company taking up identical contracts with NHAI, it was revealed to the Petitioner that one of the Arbitrators nominated by NHAI in the AT which passed the impugned Award, Mr. Basant Kumar, had taken up employment with NHAI in or about January 2007. He had been acting as an Arbitrator, nominated by NHAI, in another similar arbitration case between PCL and NHAI.

7. PCL provided to the Petitioner a copy of the proceedings of the 34th hearing dated 19th January, 2007 in the said arbitration case between PCL and NHAI. A copy of the said proceedings was enclosed as Annexure A to the said application. These were proceedings of the AT comprising Mr. G.S. Tawarmalani (the Presiding Arbitrator) and two other Arbitrators viz., Mr. Basant Kumar and Mr. Y. Lal. It showed that in the said arbitration, on 19th January 2007 Mr. Basant Kumar referred to Section 12 of the Act and declared that he “had taken up the assignment to act as technical expert/advisor in some other arbitration cases of NHAI, which are in no way connected with this arbitration case.” The representatives of PCL then informed the said AT that the declaration earlier given under Section 12 of the Act had changed. They, accordingly, objected to the continuation of Mr. Basant Kumar as an Arbitrator. The proceedings then recorded as follows:

“On hearing the objection registered by the Contractor’s Representatives, learned Shri Basant Kumar immediately stated that he resigns from the Tribunal.”

8. The AT in the said arbitration proceedings between PCL and NHAI noted that a vacancy had occurred in the AT on the withdrawal of Mr. Basant Kumar, NHAI's nominee. The AT, accordingly, directed NHAI to nominate a substitute Arbitrator under Section 15(2) of the Act within 30 days.

9. Dr. Amit George points out that in the present case Mr. Basant Kumar was nominated as an Arbitrator by NHAI by the letter dated 30th March, 2005. The proceedings in the present case commenced on 9th July, 2005. After 19 sittings, the Award was made on 5th January, 2008. The fact that Mr. Basant Kumar had during this period taken up an assignment with NHAI as its technical expert/advisor was not disclosed under Section 12 of the Act. It is pointed out that if Mr. Basant Kumar had given such a declaration, as he was mandated to do under Section 12 of the Act, the Petitioner would have objected to his continuation as an Arbitrator. The disclosure by Mr. Basant Kumar would have given a ground for justifiable doubts as to his independence and impartiality during the arbitral proceedings. By not disclosing his assignment with NHAI, Mr. Basant Kumar violated Section 12 of the Act. It is pointed out that the above fact came to the knowledge of the Petitioner only on 28th April, 2008 and without losing time, the said application had been filed on 2nd May 2008.

10. The precise ground that has been permitted by this Court to be urged by the order dated 9th July 2008, reads as under:

“The Award is liable to be set aside for non disclosure of taking up engagement by Shri Basant Kumar, the Arbitrator nominated by the Respondent as an advisor for remuneration with the Respondent. Shri Basant Kumar was duty bound to disclose the

same in writing to the petitioner under Section 12 of the Act. The taking up engagement by Shri Basant Kumar with the Respondent has given rise to justifiable doubts as to his independence and impartiality and the same was reflected in the Award also. Shri Basant Kumar has disclosed his taking up assignment with the Respondent in similar arbitration case and he himself had resigned from acting as Arbitrator in that case on the basis of his taking up engagement with the Respondent made him ineligible to continue as Arbitrator in all Arbitration cases. It is therefore clear that the impugned Award is liable to be set aside under Section 34(2) of the Act.”

11. Dr. Amit George has also placed reliance on the decision of the Court of Appeal (Civil Division), United Kingdom dated 21st December, 2000 in case No. C/2000/3582 (*Director General of Fair Trading v. The Proprietary Association of Great Britain*), *A.K. Kraipak v. Union of India* (1970) 1 SCR 457, *Union of India v. U.P. State Bridge Corporation Ltd.* 2014 (3) Arb. LR 538 (SC), the decision of the learned Single Judge in *IJM-Gayatri Joint Venture v. National Highways Authority of India* ILR (2012) III Delhi 721 affirmed by the Division Bench by the order dated 10th July, 2012 in FAO (OS) No. 285/2012.

12. Mr. Rajiv Kapoor, learned counsel appearing for NHAI, sought to urge that the said additional ground would be time barred as the application was filed only on 2nd May, 2009 whereas the impugned Award was dated 5th January, 2008. Reliance is placed on the decision in *Delhi Jal Board v. Vijay Kumar Goel* 124 (2005) DLT 712. Secondly, it was submitted that the impugned Award was by an AT of three members of which Mr. Basant Kumar was only one of the Members. The Award was a unanimous one and accordingly, the plea of bias was not available to the Petitioner.

13. Thirdly, it is submitted that the record of the proceedings of the arbitration between PCL and NHAI dated 19th January, 2007 showed that Mr. Basant Kumar had taken up an assignment only as a technical expert/advisor and that too in some other project, which could not be construed to be an employment at all. It is urged that the said ground is “far fetched and remote in nature and even remotely does not construe to be giving rise to any justifiable doubt as to the impartiality of the arbitrator at all.” It is further submitted that the said Arbitrator is a reputed and a retired Government officer and had no interest in the Respondent Authority at all. Further, the Petitioner had “failed to bring out even a single instance of bias attributable to the said member of the Arbitral Tribunal.”

14. The Respondent referred to the decisions in *State of Punjab v. Davinder Pal Singh Bhullar* 2012 AIR (SC) 364; *Amar Pal Singh v. State of U.P.* 2012 (5) Scale 642; *Chandra Kumar Chopra v. Union of India* 2012 (5) Scale 384; *V.K. Dewan & Co. v. Delhi Jal Board* 2004 (112) DLT 646 and the decision of the Madras High Court dated 17th June, 2003 in *Novel Granites Limited v. Lakshmi General Finance Limited* 2003 (3) CTC 148.

15. As far as the first submission of Mr. Rajiv Kapoor is concerned, it appears to proceed on a factually erroneous basis about the date of filing of IA No. 5527 of 2008. In the present case, the Petitioner has explained that it came to know of the proceedings dated 19th January, 2007 in the arbitration between PCL and NHAI only on 29th April, 2008 when PCL itself provided the Petitioner with a copy thereof. Within a few days

thereafter, on 2nd May, 2008, IA No. 5527 of 2008 was filed. The date stamp of the Registry confirms this. In fact, the said application was allowed by this Court on 9th July, 2008. It is, therefore, apparent that NHAI wrongly noted the date of its filing as 2nd May, 2009. Consequently, there is no merit in the contention of NHAI that there was any delay in urging the additional ground. The decision in **Delhi Jal Board v. Vijay Kumar Goel** (*supra*) would have no application to the facts of the present case.

16. The substantial ground of challenge is regarding the 'likelihood' of bias on the part of one of the members of the AT which rendered the impugned Award, viz., Mr. Basant Kumar. The statutory requirement for an Arbitrator to disclose not only at the beginning of the arbitral proceedings but also during the continuation thereof at all stages is based on one of the principles of natural justice concerning bias.

17. The Supreme Court in **A.K. Kraipak v. Union of India** (*supra*), held that the principles of natural justice would apply to administrative proceedings as well. It explained as under:

“the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely (1) no one shall be a judge in his own case (*Nemo debet esse judex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon there- after a third rule was envisaged and that is that quasi- judicial enquiries must be held in good faith, without bias and not arbitrarily [(1) [1967]

2 S.C.R. 625] or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have a more far reaching effect than a decision in a quasi-judicial enquiry.”

18. Recently, in *Union of India v. U.P. State Bridge Corporation Ltd.* (*supra*), the Supreme Court explained that the English Arbitration Act, 1996 (EAA) was enacted on the lines of the UNCITRAL Model Law, i.e. in the same year as the Act now applicable in India. Commenting upon the structure of the EAA, Mustill and Boyd in their “Commercial Arbitration, 2001 Companion Volume to the Second Edition” noted that it was founded on four pillars, and the first of these pillars comprised ‘three general principles’ on which the entire edifice of the said legislation was said to be structured. In *Department of Economics Policy and Development of the City of Moscow v. Bankers Trust Co.* (2004) EWCA Civ 314 it was explained, thus, in relation to the EAA:

“...Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic

fairness'. Section 1 of the Act sets forth the three main principles of arbitration law, viz. – (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles.”

19. The emphasis therefore is on "a fair trial by an impartial Tribunal". This forms the basis of Section 12 of the Act. Incidentally, there have been some significant changes to Section 12 with effect from 23rd October, 2015 which have further strengthened the requirements of disclosures by arbitrators to obviate any likelihood of bias. However, as far as the present case is concerned, when the AT was seized of the matter, Section 12 of the Act as it stood prior to the above amendment was relevant and it reads as under:

“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 likely to give rise to justifiable doubts as to his independence or impartiality.

(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."

20. Section 12(2) of the Act requires an Arbitrator from the time of his appointment and throughout the arbitral proceedings, to mandatorily disclose to the parties, "without delay" and "in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him." The circumstances under sub-section (1) of Section 12 of the Act as it stood prior to 23rd October, 2015 were "any circumstances likely to give rise to justifiable doubts as to his independence or impartiality."

21. At this point, it is necessary to recapitulate the distinction between 'actual bias' and 'apparent bias'. In ***Director General of Fair Trading v. The proprietary Association of Great Britain*** (*supra*), this distinction has been succinctly explained by the Court of Appeals as under:

"38. The decided cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase 'actual bias' has not been used with great precision and has been applied to the situation:

(1) where a Judge has been influenced by partiality or prejudice in reaching his decision and

(2) where it has been demonstrated that a Judge is actually prejudiced in favour of or against a party.

'Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been, or may be, biased."

22. Referring to the decision in ***Rex v. Sussex Justices, ex. P. McCarthy*** (1924) 1 K.B. 256, the Court of Appeals in ***Director General of Fair***

Trading v. The proprietary Association of Great Britain (*supra*) discussed the leading judgment of Lord Hewart C.J. The facts of that case were that one of the Clerks to the Justices was a member of a firm of solicitors acting in a civil claim against the Defendant arising out of an accident that had given rise to the prosecution. The Clerk retired with the Justices who returned to convict the Defendant. On learning that the Clerk was a member of the firm of solicitors acting against the Defendant, the Defendant applied to have the conviction quashed. Lord Hewart CJ, who was satisfied that the conviction must be quashed reasoned that “a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

23. Explaining the above opinion of Lord Hewart CJ, the Court of Appeals in *Director General of Fair Trading v. The proprietary Association of Great Britain* (*supra*) observed as under:

“42. Had Lord Hewart asked the question ‘was there any likelihood that the Clerk's connection with the case influenced the verdict?’ he would have answered in the negative on the basis that he accepted the evidence that the Clerk had not intervened in the Justices' discussion. Had he asked the question ‘would a reasonable onlooker aware of all the material facts, including the fact that the Clerk did not speak to the Justices after retiring, have concluded that the Clerk's connection with the case might have influenced the verdict?’ he would equally have answered in the negative. His decision was reached on the premise that what actually transpired between the Clerk and the Justices behind closed doors was not relevant. The fact that the Clerk had retired with the Justices gave an appearance of the possibility of injustice, and that was enough to lead to the quashing of the verdict.”

24. The two alternative tests applied by the Courts in considering whether a decision was vitiated on account of bias or not, are as under:

“(1) Did it appear to the Court that there was a real danger that the Judge had been biased?

(2) Would an objective onlooker with knowledge of the material facts have a reasonable suspicion that the Judge might have been biased?”

25. Turning to the facts of the present case, it is plain that there was a mandatory requirement that Mr. Basant Kumar should have made a disclosure in terms of Section 12(2) of the Act to the parties about him being engaged as an advisor/technical expert in some other arbitration cases of NHAI. Those arbitration cases may have nothing to do with the case in which he was acting as an Arbitrator but that is not the point. This was a circumstance that certainly would give rise to “justifiable doubts as to his independence and impartiality.” In fact, as the proceedings dated 19th January, 2007 at the 34th hearing of the arbitration in the dispute between PCL and NHAI show, Mr. Basant Kumar himself referred to Section 12 of the Act and thought it necessary to make the disclosure. He obviously realised that this was a case of 'apparent bias' which was anticipated by the legislature in enacting Sections 12 (1) and 12 (2) of the Act. No sooner had he made the disclosure, the representatives of PCL objected to his continuation as an Arbitrator. He then had no hesitation in announcing his resignation. This was at the time when the arbitration in the present case was in progress. Therefore, there was no excuse for Mr. Basant Kumar to not have made a similar voluntary disclosure when the proceedings in the present arbitration were in progress.

26. To recapitulate, the arbitration proceedings commenced in the present proceedings on 9th July, 2005 and there were 19 sittings prior to the making of the Award on 5th January, 2008. Almost a year earlier to the making of the Award, Mr. Basant Kumar was engaged as a technical expert/advisor to NHAI. There can, therefore, be no excuse for his not complying with the mandatory requirement of disclosure as stipulated in Section 12(2) of the Act. The failure to do so has vitiated the impugned Award. It is not a mere irregularity which can be rectified.

27. The fact that the Award may have been unanimous and that Mr. Basant Kumar was only one of the Members of the AT does not make even one bit of a difference to the above conclusion. This aspect of the matter has already been dealt with by the Supreme Court in ***A.K. Kraipak v. Union of India*** (supra). There again, it was urged that the “mere fact that one of the Members of the Board was biased against some of the Petitioners cannot vitiate the entire proceedings.” The Supreme Court negated this plea since the Court was essentially concerned with the question whether the “decision taken by the Board can be considered as having been taken fairly and justly.” This was because of the “conflict between duty and interest.” In other words, even if one of the Members of the AT has compromised the essential requirement of fairness by failing to disclose the circumstances which may give rise to justifiable doubts as to independence and impartiality, the Award of the AT would get vitiated.

28. In ***IJM-Gayatri Joint Venture v. National Highways Authority of India*** (supra), it was held that the requirement to make such a disclosure

under Section 12(2) of the Act was mandatory and the failure to do so would vitiate the Award. The Division Bench upheld the above decision by dismissing the appeal of NHAI. The submission of NHAI in this regard, therefore, deserves to be rejected.

29. Turning to the decisions cited by Mr. Kapoor, in ***State of Punjab v. Davinder Pal Singh Bhullar*** (*supra*), all that was emphasised was that the allegations of bias made against a Judge ought not to be made “without any substance.” It was, first of all, not a case under the Act. In any event, it did not deal with a mandatory requirement of the statute itself for a disclosure to be made, which mandatory requirement was violated. In ***Amar Pal Singh v. State of U.P.*** (*supra*), the issue was about a distinction having to be drawn between “a message and a rebuke” and the need “to maintain sobriety, calmness, dispassionate reasoning and poised restraint.” Again, this was not a case arising under the Act much less about the failure of a Member of the AT to make a disclosure under Section 12(2) of the Act. ***Chandra Kumar Chopra v. Union of India*** (*supra*) was a decision under the Army Act, 1950 dealing with Court Martial proceedings. The well-known principle that “suspicion or apprehension is not good enough to entertain a plea of bias” was stressed. However, Section 12(1) of the Act speaks of circumstances which give rise to justifiable doubts regarding the independence and impartiality of the Member of the AT.

30. In ***V.K. Dewan & Co. v. Delhi Jal Board*** (*supra*), the Arbitral member in question had declined to accept the assignment offered by the Respondent. In those circumstances, it was held that it could not give rise to any justifiable doubt as regards his impartiality. However, in the

present case, Mr. Basant Kumar did accept the assignment as technical expert/advisor and this was what led him to make a disclosure in the other arbitration involving PCL and NHAI leading to his resignation from that AT. In *Novel Granites Limited v. Lakshmi General Finance Limited* (*supra*), there was a delay in raising the challenge under Section 12 of the Act, whereas here the Petitioner came forth with IA 5527 of 2008 as soon as it came to know of the relevant facts.

31. For the aforementioned reasons, the Court is satisfied that the impugned Award dated 5th January, 2008 of the AT is unsustainable in law. It is, accordingly, set aside.

32. The petition is allowed but in the circumstances with no orders as to costs.

DECEMBER 06, 2016

RM/b'nesh

S. MURALIDHAR, J.