

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.3170 of 2017

Order reserved on: 24-11-2017

Order delivered on: 14-12-2017

Surendra Kumar Chhabda, S/o Shri Haveli Ram Chhabda, aged about 65 years, R/o Raipur Road, Bemetara, Thana & Tahsil Bemetara, District Bemetara (C.G.)

---- Petitioner

Versus

1. State of Chhattisgarh, through the Secretary, Revenue & Disaster Management Department, Mahanadi Bhawan, New Raipur, Thana and District Raipur (C.G.)
2. The Additional Commissioner, Durg, Commissionerary Durg, Thana and District Durg (C.G.)
3. The Collector, Collectorate Bemetara, Thana and Distt. Bemetara (C.G.)
4. The Sub-Divisional Officer cum Competent Authority Land Acquisition Officer, Tahsil Bemetara, District Bemetara (C.G.)
5. The Chief Engineer, Public Works Department of National Highway of State of Chhattisgarh, National Highway Zone, Raipur, Thana & Tahsil Raipur, District Raipur (C.G.)
6. Union of India, through the Secretary, Ministry of Road Transport & Highways, NHDP IV A Cell, Transport Bhawan-1, Parliament Street, New Delhi

---- Respondents

For Petitioner: Mr. N.K. Malaviya, Advocate.

For Respondents No.1 to 4 / State: -

Mr. Dhiraj Kumar Wankhede, Government
Advocate, on advance copy.

For Respondents No.5 and 6: -

None present, as no notice has been issued.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Invoking the jurisdiction under Article 226 of the Constitution of India,

the petitioner herein questions the order passed by the Arbitrator appointed by the Central Government under Section 3G(5) of the National Highways Act, 1956 (for short, 'the Act of 1956') and also collaterally calls in question the order of the Central Government appointing arbitrator by the Central Government under Section 3G(5) of the Act of 1956.

2. The aforesaid challenge has been laid on the following factual backdrop: -

2.1) The Sub Divisional Officer (Revenue) being the competent authority declared by the Central Government under Section 3(a) of the Act of 1956, proceeded to acquire land as provided under Section 3A of the Act of 1956 and ultimately, award was passed by the competent authority determining the amount payable as compensation under Section 3G of the Act of 1956 on 3-12-2015 quantifying the compensation as ₹ 31,15,42,782/-.

2.2) Feeling aggrieved against the award passed by the competent authority, the Union of India through its Executive Engineer preferred an application under Section 3G(5) of the Act of 1956 before the Arbitrator (Additional Commissioner, Durg Division, Durg) for determining the amount of compensation. The Arbitrator / Additional Commissioner by its order dated 15-5-2017 passed an order and made certain directions to the Collector, Bemetara.

2.3) Being dissatisfied with the order of the Arbitrator, the petitioner, whose land has also been subjected to acquisition, has called in question the order passed by the Arbitrator appointed by the Central

Government as well as the order appointing Additional Commissioner as Arbitrator holding that while passing the impugned order dated 15-5-2017, he was not arrayed though he was proper and necessary party and secondly, the Additional Commissioner being the officer appointed by the Central Government, cannot act as arbitrator in view of clause 1 of the Seventh Schedule enacted under Section 12 (5) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996').

3. Mr. N.K. Malaviya, learned counsel appearing for the petitioner, would submit that the petitioner was though necessary party and as such ought to have been impleaded in the proceeding before the Additional Commissioner, but he was neither impleaded nor heard and award passed by the competent authority determining compensation has been interfered with. He would secondly, submit that appointment of Additional Commissioner as Arbitrator arises justifiable doubt as to his independence and impartiality as he is an employee of the Central Government serving being a member of Indian Administrative Service and he being an employee of the Central Government, whose services are governed by the Central Civil Services (Classification, Control and Appeal) Rules, 1965, is disqualified by virtue of clause 1 of the Seventh Schedule enacted under Section 12 (5) of the Act of 1996, as such he is ineligible to perform the duties of Arbitrator. Therefore, the impugned order is liable to be set aside.
4. Mr. Dhiraj Kumar Wankhede, learned Government Advocate appearing on behalf of the State/respondents No.1 to 4, on advance

copy, would oppose the petition and would submit that award has been passed by the competent authority which has been interfered by the Arbitrator.

5. I have heard learned counsel for the parties on the question of admission.
6. Undisputedly, the competent authority appointed under Section 3(a) of the Act of 1956 has proceeded with the land acquisition proceeding and award has been passed under Section 3G(1) of the Act of 1956 on 3-12-2015 and the Central Government being aggrieved against the award, preferred an application to the arbitrator appointed by the Central Government under Section 3G(5) of the Act of 1956 in which the arbitrator appointed by the Central Government i.e. the Additional Commissioner, Durg Division, Durg, has interfered with the award against which this writ petition has been preferred.
7. At this stage, it would be appropriate to notice Section 3G(6) of the Act of 1956 which reads as under: -

“(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.”

8. A careful perusal of the aforesaid provision would show that subject to the provisions of the Act of 1956, the provisions of the Arbitration and Conciliation Act, 1996 shall apply to every arbitration under the Act of 1956, meaning thereby, if a matter has been arbitrated by the arbitrator appointed by the Central Government under Section 3G(5) of the Act of 1956 and compensation has been determined and if any

party to the proceeding or a person who is dissatisfied and aggrieved by the amount so determined by the arbitrator appointed by the Central Government, he has remedy to file application for setting aside the award under Section 34(2) of the Act of 1996, as clearly the provisions of the Arbitration and Conciliation Act, 1996, after determination of the amount of compensation, have been made applicable by the Act of 1956.

9. In the matter of Nekkalapudi Ramakrishna Pratap v. The District Collector-cum-Arbitrator, West Godavari District & Anr.¹, the Andhra Pradesh High Court has clearly held that if the award passed by the competent authority under the National Highways Act, 1956 is redetermined and compensation is determined or redetermined by the arbitrator appointed by the Central Government, the aggrieved person has remedy under the Arbitration and Conciliation Act, 1996 and writ petition would not be maintainable.
10. The principle of law enumerated in Nekkalapudi Ramakrishna Pratap (supra) has been followed with approval by the Madras High Court in the matter of R. Srinivasan v. District Collector/Arbitrator, Tamil Nadu and others².
11. It is the basic principle of law long settled, that, if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in the matter of Taylor v. Taylor³, which was followed by

1 AIR 2006 Andhra Pradesh 136

2 AIR 2014 Madras 1

3 (1876) 1 Ch D 426

Lord Roche in the matter of Nazir Ahmed v. King Emperor⁴, who stated as under: -

“Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.”

12. Similar is the proposition laid down in the matter of State of U.P. v. Singhara Singh and others⁵ in which the Supreme Court has clearly held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that the other methods of performance are necessarily forbidden.
13. A power under a statute has to be exercised in accordance with the provisions of the statute and in no other manner. (See J.N. Ganatra v. Morvi Municipality, Morvi⁶ and Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala and others⁷.)
14. Thus, it is held that the writ petition as framed and filed by the petitioner questioning redetermination of compensation or interfering with the order of the competent authority under the Act of 1956, is not maintainable and the remedy for the petitioner is under Section 34(2) of the Act of 1996 and the writ petition is accordingly deserves to be dismissed.
15. This would bring me to the next question as to whether the appointment of arbitrator (Additional Commissioner, Durg Division, Durg) by the Central Government exercising the power under Section 3G(5) of the Act of 1956, is sustainable or not.

4 AIR 1936 PC 253 (2)

5 AIR 1964 SC 358

6 (1996) 9 SCC 495

7 (2002) 1 SCC 633

16. The Central Government in exercise of power conferred under sub-section (5) of Section 3G of the Act of 1956 appointed the Additional Commissioner, Durg Division, Durg to be the arbitrator for the purpose of arbitration arising out of acquisition of land for rehabilitation and up-gradation of National Highways in the State of Chhattisgarh by order dated 2nd September 2016, which has been challenged on the ground that since he is an employee of the Central Government being an IAS officer and his service conditions are governed as per the Central Civil Services (Classification, Control and Appeal) Rules, 1965, he would have an official bias in favour of the Central Government to decide the arbitration and as such, he is disqualified from acting as arbitrator by virtue of the provision contained in clause 1 of the Fifth Schedule enacted under Section 12(1)(b) of the Act of 1996 which provides as under: -

“THE FIFTH SCHEDULE

[See section 12(1)(b)]

The following grounds give rise to justifiable doubts
as to the independence or impartiality of arbitrators:

Arbitrator's relationship with the parties or counsel

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

17. In the matter of Hindustan Petroleum Corporation Ltd. v. Yashwant Gajanan Joshi and others⁸, the Supreme Court has declined to interfere with the order of the High Court appointing a retired District Judge as a suitable person for the purpose of arbitration and held as

under: -

“12. We have given our careful consideration to the arguments advanced by learned counsel for the parties and have thoroughly perused the record. There is no provision in the Act prohibiting the Central Government to make an appointment of an employee of the Corporation as competent authority. Apart from determining the compensation, many other functions are assigned to the competent authority and there may be one competent authority for all the above purposes or different persons or authorities may be authorised to perform all or any of the functions of the competent authority under the Act. The scheme of the Act shows that a competent authority has to discharge various and diverse duties under the Act. He has to attend survey of land required for pipeline, verification of land revenue records of the surveyed area, drawing up of panchnama for land, crop, plantation, trees or any other agricultural or non agricultural activity carried on in the surveyed land or the pipeline, issue of notification under Section 3(1) of the Act, receipt of claims/ objections for assessment of damages, disputes etc., issue of clearance to concerned oil company and deciding all the disputes arising out of the authorised persons, power to enter notified lands and various other duties. Thus such person becomes a better qualified and experienced person equipped with a proper background to decide the amount of compensation also. We cannot accept the contention of Mr. Dholakia that merely because a person is an employee of the corporation, he would have a bias in deciding the compensation under Section 10(1) of the Act.

13. It may also be pertinent to note that the Legislature

has used the words “the amount of which shall be determined by the competent authority in the first instance” (emphasis supplied) in sub-section (1) of Section 10 of the Act. This clearly shows that in the first instance it has to be decided by the competent authority and such determination shall not attain any finality. Then under sub-section (2) of Section 10 itself it has been provided that if the compensation is not acceptable to either of the parties then an application can be filed before the District Judge. No doubt there is a marked difference in this regard between the provisions of this Act and the provisions contained in the Land Acquisition Act, 1894 but in our view under Section 10 (1) the compensation is to be determined by the Competent authority only in the first instance. A party is entitled to raise the ground of bias against an appointment of an individual officer as competent authority on sufficient material placed on record in this regard, but not merely because such competent authority is an employee of the corporation. It cannot be a ground for any disability or disqualification in appointing such person as competent authority. If we take the matter to its logical conclusion the result would be that no employee of the State Government or the Central Government as the case may be will be appointed as competent authority where petroleum and minerals pipelines are to be laid for a project initiated by the State Government or the Central Government respectively. It would be too broad a proposition to extend the theory of bias to exclude persons only because such person draws the salary from the bodies like public corporation, State Government or Central Government. It would altogether be a different case if it was a case of a private employer and his employee. We cannot equate the case of person in private

employment with that of a person in public employment. The authorities mentioned above and relied upon by Mr. Dholakia are clearly distinguishable.

14. ... We however wish to make it clear that we do not agree with the general proposition of the High Court that an officer of the corporation cannot be appointed as a 'competent authority' because he may be biased in favour of the corporation by reason of his employment. ...”

18. The Supreme Court in the matter of The Secretary to the Government, Transport Deptt., Madras v. Munuswamy Mudaliar and others⁹, applying the test of reasonable apprehension of bias, held as under: -

“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 on Mustill and Boyd. Commercial Arbitration, 1982 Edition, page 214. Halsbury's Law of England, fourth Edition, Volume 2, para 551, page 282 describe that the test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias.”

19. In the matter of International Airport Authority of India v. K.D. Bali and another¹⁰, on the issue of bias and in the context of revocation of authority of the Arbitrator, the Supreme Court held as under: -

9 AIR 1988 SC 2232

10 AIR 1988 SC 1099

“5. Several points were taken in support of the application for revocation. It was sought to be urged that the petitioner had lost confidence in the sole arbitrator and was apprehensive that the arbitrator was biased against the petitioner. It is necessary to reiterate before proceeding further what are the parameters by which an appointed arbitrator on the application of a party can be removed. It is well settled that there must be purity in the administration of justice as well as in administration of quasi justice as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; arbitrator must not do anything which is not in itself fair and impartial. See Russell on Arbitration, 18th Edition page 378 and observations of Justice Boyd in *Re Brien and Brien*, (1910) 2 IR 84 at P. 89. Lord O'Brien in *King (De Vesci) v. Justice of Queen's County*, (1908) 2 IR 285 observed as follows :

"By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that their vague suspicions of whimsical capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds was reasonably generated but certainly mere flimsy ground elusively generated and morbid suspicions should not be permitted to form a ground of decision."

(Emphasis supplied)

See Queen v. Rand, (1866) 1 QB 230; [Ramnath v. Collector, Darbhanga](#), [ILR](#) 34 Pat 254: (AIR 1955 Pat 345); Queen v. Meyer, (1875) 1 QBD 173 and Eckersley v. Mersey Docks and Harbour Board, (1894) 2 QB 667.”

20. Thus, in view of the above-stated legal proposition it cannot be held that the arbitrator appointed by the Central Government under sub-section (5) of Section 3G of the Act of 1956, being a higher officer to the competent authority, will be biased and there will be official bias in such arbitration and in deciding the arbitration application. It is, therefore, held that the Additional Commissioner appointed by the Central Government under Section 3G(5) of the Act of 1956 as Arbitrator is a person not connected with various stages of land acquisition and in determination of compensation which is fixed by the competent authority under Section 3G(1) of the Act of 1956.

21. The Supreme Court in Munuswamy Mudaliar's case (supra), applying the test of reasonable apprehension, upheld the appointment of officer of Government as arbitrator in absence of tangible ground demonstrating reasonable apprehension of bias in the mind. Therefore, the petitioner's contention that merely because the arbitrator is appointed by the Central Government and the officer appointed is an IAS; there is likelihood of bias, cannot be accepted.

22. Highlighting the scope and ambit of amended Section 12 of the Act of 1996, the Supreme Court in the matter of Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited¹¹ held as under: -

¹¹ (2017) 4 SCC 665

“18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury*¹², underlined that:

“an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.”

24. Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor

¹² *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.

or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the petitioner.”

23. Apart from the fact that the order passed by the Additional Commissioner being an arbitrator is not final and does not attain finality and it can be questioned by the party aggrieved before the District Judge under Section 34 (2) of the Act of 1996 and thus, applying the principle of law laid down in Yashwant Gajanan Joshi's case (supra) and other decisions cited herein-above (supra) and also merely because the arbitrator IAS officer has been appointed by the

Central Government there is likelihood of bias, it cannot be held that the Additional Commissioner has suffered disqualification under clause 1 of the Seventh Schedule enacted under Section 12 (5) of the Act of 1996, particularly when the petitioner has not appeared before the said authority and has not challenged his authority and has not placed any material even. As such, the decision of the Supreme Court cited by Mr. Malaviya i.e. TRF Limited v. Energo Engineering Projects Limited¹³ is not applicable to the facts of the present case.

24. For the foregoing reasons, the writ petition deserves to be and is accordingly dismissed at the admission stage itself without issuing notice to the other side, leaving the parties to bear their own cost(s). However, the petitioner is at liberty to proceed in accordance with law to challenge the order passed by the learned Arbitrator.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma