

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Application No. 4 of 2016****Order reserved on : 12.05.2017****Order passed on : 19.05.2017**

M/s Asha Construction, through its Partner Shri Ajay Jain, having its Partner Shri Ajay Jain, having its office at Near Shivrath Hyundai, G.E. Road, Tatibandh, Raipur, (C.G.)

---- Petitioner**Versus**

1. NTPC-SAIL Power Company Private Limited, A joint venture of NTPC and SAIL, Through its General Manager, Post-Bhilai, District – Durg (C.G.)
2. The Chairman, NTPC-Sail Power Company Private Limited, A Joint Venture of NTPC and SAIL, 4th floor, NBCC Tower, 15 Bhikaji Cama Place, New Delhi-110066.

---- Respondents

For Applicant :	Mr. Ankit Singhal, Advocate.
For Respondents:	Mr. B.D. Guru, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order [C.A.V.]****19/05/2017**

(1) This is an arbitration application filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (henceforth 'Act, 1996') read with paragraph No. 2 and 3(2) of the Scheme for Appointment of Arbitrator by Hon'ble Chief Justice of Chhattisgarh High Court, 2002 for appointment of sole Arbitrator in terms of Clause 56 of the agreement dated 2.12.2010 executed between

the parties.

(2) An agreement dated 2.12.2010 was entered into between the parties, which contained an arbitration Clause i.e. Clause 56. The disputes have arisen between the parties and the arbitration clause 56 contains a stipulation that the appellant was required to approach the General Manager of the NTPC-SAIL for working as Arbitrator or for appointment of an Arbitrator. Applicant approached the General Manager of the NTPC-SAIL for appointment of arbitrator by sending a letter dated 05.11.2015. According to the applicant, he did not receive any reply to the same and, therefore, he filed an application for appointment of Arbitrator before this Court on 21.01.2016.

(3) Respondent - NTPC have filed reply before this Court stating *inter alia* that on 12.11.2015 a Senior Manager of HR of the respondents had recommended that the arbitrator be appointed and thereafter, as per his note sheet, Shri Pradeep Kumar Upadhyaya, General Manager & Business Unit Head, NSPCL has been appointed as Arbitrator. This order has been signed by the General Mnage (HR) and confirmed by the CEO and, therefore, an Arbitrator has already been appointed and document Annexure R-1 has been filed to demonstrate the said fact.

(4) The respondent - NTPC has also filed letter (Annexure R-3) sent by Shri Pradeep Upadhyaya, Sole Arbitrator to the petitioner

as well respondent-SAIL; and the order sheet dated 08.03.2016 has been recorded by the arbitrator.

(5) The petitioner-Company has filed its rejoinder stating *inter alia* that he was never communicated about the appointment of Shri Pradeep Upadhyaya as Sole Arbitrator, as such, it ought to have communicated to the applicant-Company and since the applicant was never communicated with the order of appointment of sole arbitrator, an application for appointment arbitrator has already been filed, therefore, overruling the objection raised by applicant-Company, the arbitrator be appointed.

(6) I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and gone through the record with utmost circumspection.

(7) It is not in dispute that the agreement was entered into between the parties which contained an arbitration clause. It is also not in dispute that disputes have arisen between the parties and the arbitration clause in the agreement contains a stipulation that the applicant should approach the General Manager concerned of the NTPC-SAIL, but the applicant did so by sending letter dated 05.11.2015. According to the applicant, he received no reply to the same and therefore, he filed the present application for appointment of Arbitrator on 21.01.2016.

(8) The respondent has come with a plea that Shri Pradeep

Upadhyaya, General Manager & Business Unit Head, NSPCL has already been appointed as an Arbitrator for resolving the dispute between the parties. It is submitted that said communication was sent by an ordinary post. If the respondent-NTPC had appointed an Arbitrator, they would have definitely sent a letter by registered post or at least maintain a record in their department. The Respondents must have a dispatch section in their office, but no record has been produced to show how the letter has been sent. The applicant denies that it ever received this communication. In fact, the respondent have failed to establish that the order appointing arbitrator was ever communicated to the petitioner, there is no document on record to establish the said fact by respondents.

(9) The Supreme Court in the matter of **Duludin Vs. State of Assam & others**¹ while emphasizing the need for effectively communicating the order of termination, held that mere passing of an order of dismissal would not be effective unless it is published & communicated to employee concerned. It was further held that if the order is passed and kept in file, it would not be treated as an order terminating services nor shall order be deemed to have been communicated.

(10) Recently, the High Court of Bombay in the matter of **Voltas Limited Vs. Rolta India Limited**² has held as under:-

¹ (2016) 1 SCC 622

² 2011 Bombay LR 393

“Absent anything to the contrary in the appointment procedure, an appointment can be said to be made only when the appointor communicates the appointment to a concerned party such as the other side or an institution where the arbitration agreement refers to one or to the arbitrator. An appointment which remains only in the mind or even on the records of the appointor is no appointment. Till such time as the appointment is sought to be communicated, there is no appointment at all. It is then but an intention to appoint the arbitrator which intention can always be changed or revoked till it is communicated. It is axiomatic, therefore, that a valid appointment requires at least a transmission of the communication thereof to a concerned party. The communication must name the arbitrator failing which it would not constitute a communication of the appointment at all. In others words it is not sufficient for a party to merely state that it has appointed an arbitrator but will not disclose the name. The purpose of the communication is then not served.”

(11) In the present case, the respondents-NTPC have failed to establish that the arbitrator was appointed pursuant to the request made by applicant before filing application by the application on 21.01.2016 and communicated the same to the petitioner before filing an application for appointment of arbitrator by appellant, as such, the preliminary objection raised by the respondent that arbitrator has already been appointed, therefore, the present application for appointment of arbitrator is not maintainable is hereby overruled.

(12) This would bring me to the next question of appointment of Arbitrator.

(13) According to the agreement, the applicant should approach the General Manager concerned of the NTPC-SAIL for working as Arbitrator or for appointment of an Arbitrator.

(14) The Arbitration and Conciliation Act, 1996 was amended vide Act No. 3 of 2016 w.e.f. 23.10.2015 that in terms of amended provisions of the Act, no person whose relationship with the party or subject matter falls within any of the categories specified in the seventh schedule shall be ineligible for appointment as an arbitrator.

(15) Section 12 (5) of the Arbitration and Conciliation Act, 1996 provides 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 shall be ineligible to be appointed as an arbitrator. Seventh schedule enacted under Section 12(5) of the Act, 1996 clearly states that if the arbitrator is Manager, Director or part of Management, or has a similar controlling influence, is ineligible to be appointed as an arbitrator. Sub-section 5 of Section 12 of the Act, 1996 has been given overriding effect over any prior agreement to the contrary. Therefore, independence and impartiality of arbitrator as mandated by the Act of 2015 has now been made a paramount

consideration for appointment of Arbitrator.

(16) The Supreme Court in the matter of **Northern Railway Administration Vs. Patel Engineering Company Limited**³

observed that Section 11(6) of the Act of 1996 provides that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to; (a) any qualifications as are likely to secure the appointment of an independent and impartial arbitrator. It was held that appointment of arbitrator or arbitrators named in the arbitration agreement is not a must, but while making appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. Mandate of law contained in sub-section (6) of section 11 of the Act has to be followed in all such cases, which provides that, 'a party may request the Chief Justice or any person or institution designated by him to take the necessary measures.' The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. This expression has to be read with the requirement in Section 11(8) of the Act that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have 'due regard' to the two cumulative conditions contained in Section 11(8) (a) and (b) relating to qualifications and other considerations are are likely to

3 (2008) 10 SCC 240

secure the appointment of an independent and impartial arbitrator.

(17) As held by the Supreme Court in Northern Railway Administration, Ministry of Railway, New Delhi (supra), the Court must first ensure that the remedies provided for are exhausted. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. The expression 'due regard' means that proper attention to several circumstances have been focused. The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures are the steps which are reasonably required to be taken, one of which is to secure appointment of an independent and impartial arbitrator.

(18) Very recently, their Lordships of the Supreme Court in matter of **M/s. Voestalpinr Schienen GMBH v. Delhi Metro Rail Corporation Ltd.**⁴, while dealing with amended provision contained in Section 12(5) of the Act of 1996 held that non-obstante clause gives power to Court to appoint arbitrator if arbitrator agreed to by parties falls in any category mentioned in Schedule-7 and held as under:-

“17. Keeping in mind the afore-quoted 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 arbitration agreement.”

Their Lordship further held that Section 12(5) doesn't debar all past or present employee of Government Statutory Corporation or PSU from appointment as arbitrator. Only those who fall in category mentioned in Schedule seven get debarred and held as under:-

“24. Section 12 has been amended with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The amended provision is enacted to identify the ' circumstances — which give rise to ' justifiable doubts— about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, Seventh Schedule mentions those circumstances which would attract the provisions of subsection (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to

act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empaneled by the respondent are not covered by any of the items in the said list.

25. It cannot be said that simply because the person is retired officer who retired from the Government or other statutory corporation or public sector undertaking and had no connection with DMRC (party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide ' to determine whether circumstances exist which give rise to such justifiable doubts— . Such persons do not get covered by red or orange list of IBA guidelines either.

28. Some comments are also needed on the clause 9.2(a) of the GCC/SCC, as per which the DMRC prepares the panel of ' serving or retired engineers of Government departments or public sector undertakings— . It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is

imperative that panel should be broad based. Apart from serving or retired engineers of Government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy etc. Therefore, it would also be appropriate to include persons from this field as well.”

(19) This, in view of the aforesaid discussion, the General Manager of NTPC-SAIL named in arbitration agreement agreed between the parties is debarred from acting as an arbitrator, as General Manager fall under fifth category specified in seventh schedule and shall be ineligible to be appointed as an arbitrator. Accordingly, it is held that this Court is an appropriate High Court for appointing an arbitrator for resolving the dispute exists between the parties; there is valid and enforceable agreement between the parties and there is live arbitrable issue existing between the parties. Therefore, in exercise of my power under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with para 3(2) of the Scheme for Appointment of Arbitrators by the Chief Justice, Chhattisgarh High Court, 2002, I hereby appoint Hon’ble Mr. Justice Dharendra Mishra, Former Judge, High Court of Chhattisgarh, resident of Tilak Nagar, Bilaspur, District Bilaspur, Chhattisgarh as the sole arbitrator to adjudicate the disputes that have arisen between the parties, in accordance with the provisions of the Act of 1996.

(20) The Registry is directed to communicate this order to the learned sole arbitrator- Hon'ble Mr. Justice Dhirendra Mishra, Former Judge, High Court of Chhattisgarh forthwith to enable him to enter upon the reference and decide the matter as expeditiously as possible. No order as to costs.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-