

HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Application No.59 of 2016**

M/s. J.K. Agarwala, Engineers & Contractors, a proprietorship partnership firm owned and controlled by Mr.J.K. Agarwala at I-19, Civil Township, Rourkela - 7690012, represented through its attorney holder Mr. Manoj Kumar Agarwala, aged about 44 years, S/o Shri J.K. Agrawala, R/o I-19, Civil Township, Rourkela (Orissa) 769012

---- Applicant

Versus

Union of India, through-

1. The General Manager, S.E.C. Railway, Bilaspur
2. The Chief Project Manager, S.E.C. Railway, Bilaspur C.G.
3. The General Manager (Arbitration), S.E.C. Railway, 5th floor, 'C' Block, Bilaspur C.G.

---- Respondents

For Applicant	:	Mr.Ashok Mishra, Advocate
For Respondents	:	Mr.H.S. Ahluwalia, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

25/08/2017

1. This is an application under Section 15 read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as 'Act of 1996') for appointment of substitute arbitrator.
2. The arbitral tribunal was constituted by this Court by order dated 1.11.2013 consisting by Mr.S.B. Ninawe, Presiding Arbitrator, Mr.K.C. Sanci and Mr.T.S. Khawas. Mr.S.B. Ninawe has resigned on 8.10.2015 on account of his transfer at Bhubneswar and thereafter on 19.11.2015 the Railways has reconstituted the arbitral tribunal, it was again reconstituted

on 22.12.2015. The applicant has protested against the reconstitution of arbitral tribunal in the light of amendment of Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter called as 'Amendment Act') stating inter-alia that in view of the provisions of the Act of 1996 read with clause 64.7 of the General Conditions of Contract (hereinafter called as 'GCC'), Section 12(5) of the Amendment Act would apply and this Court may appoint the Sole Arbitrator outside the Railway Officer for arbitration proceedings.

- 3.** Reply has been filed opposing the arbitration application.
- 4.** Mr.Ashok Mishra, learned counsel for the applicant, would submit that in view of clause 64.7 of the GCC, Section 12(5) of the Amendment Act would apply and officers of the Railways cannot continue the arbitration proceedings and substitute arbitrator has to be appointed by this Court in accordance with Section 11(6) of the Act of 1996 read with Section 12(5) of the Amendment Act.
- 5.** On the other hand, learned counsel for the respondent would submit that old Act would apply as preliminary proceeding has already been commenced and therefore, the application deserves to be rejected as arbitral tribunal has already been reconstituted, therefore, the second application deserves to be rejected.
- 6.** I have heard learned counsel appearing for the parties,

considered their rival submissions made hereinabove and also gone through the record with utmost circumspection.

- 7.** Arbitration Tribunal was constituted as per clause 64.7 of the GCC consisting of three members on 1.11.2013, but the Presiding Officer Mr.S.B. Ninawe has resigned on 8.10.2015 and thereafter Amendment Act came into force w.e.f. 23.10.2015 in which Section 12(5) has been inserted which states as under:-

“12(5) 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:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

- 8.** Clause 64.7 of the GCC, which is applicable to the parties, states as under:-

“64.7 Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules there under and any statutory modification thereof shall apply to the arbitration proceedings under this clause.”

- 9.** A careful perusal of the aforesaid provisions would show that the parties have agreed that statutory modification in the Act of 1996 would apply to the arbitration proceeding.

- 10.** At this stage, it would be appropriate to notice Section 26 of the Amendment Act which states as under:-

“26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

11. The aforesaid provision clearly states that the Amendment Act does not apply to the arbitral proceedings that had commenced in accordance with the provisions of Section 21 of the principal Act prior to the commencement of the Amendment Act w.e.f. 23.10.2015. However, it is clearly qualified by the words “unless the parties otherwise agree”

12. In the present case, clause 64.7 of the GCC clearly indicates that the parties had agreed that any statutory modification to the Act would be applicable and as such, Section 12(5) of the Amendment Act read with Fifth Schedule would be applicable and by virtue of Section 12(5) read with Seventh Schedule, the Serving Officer of the Railways cannot be appointed as Arbitrator by the General Manager of the Railways.

13. Very recently, Their Lordships of the Supreme Court in matter of **M/s. Voestalpinr Schienen GMBH v. Delhi Metro Rail Corporation Ltd.**¹, 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:-

¹ AIR 2017 SC 939

“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 debar red 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 sub section (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.”

14. In view of the aforesaid discussion, the application is allowed and it is held that this Court is an appropriate High Court for appointing substitute arbitrator for resolving the dispute exists between the parties; there is valid and enforceable agreement between the parties. Therefore, in exercise of my power under Section 11(6) of the Act of 1996 read with Section 12(5) of the Amendment Act, I hereby appoint Hon'ble Mr. Justice L.C. Bhadoo, Former Judge, High Court of Chhattisgarh as the sole arbitrator to adjudicate the dispute that has arisen between the parties, in accordance with the provisions of the Act of 1996.

15. Registry is directed to communicate this order to learned sole arbitrator-Hon'ble Mr. Justice L.C. Bhadoo, Former Judge of this Court to enable him to enter upon the reference and decide the matter as early as possible. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)

Judge