

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

ARBITRATION APPLICATION NO. 3 OF 2016
WITH
CIVIL APPLICATION NO. 13970 OF 2016

...
M/S. SHRI. BALAJI FLOORING
VS.
THE UNION OF INDIA AND ORS.

...
Advocate for applicant : B.S. Shinde
Advocate for respondent Nos. 1 to 3 : Mrs. Dipali Jape-Ansingkar
...

CORAM : T.V. NALAWADE, J.
DATED : 23rd January, 2017.

ORDER :

1. The application is filed under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator. Both the sides are heard.

2. A copy of agreement is on record and the relevant portion, the agreement with regard to referring the dispute to arbitrator is as under :-

"ARBITRATION : All disputes & differences arising out of or in any way touching or concerning this agreement (Except those for which specific provision has been made herein) shall be referred to sole arbitrator to be appointed by Director General Ordinance Factories, Government of India. The arbitrator so appointed shall be a Government

Servant who had not dealt with matters to which this agreement relates and in course of his duties had not expressed views on all or any of the matter in disputes or differences. The arbitral awards of the sole arbitration shall be final and binding on the parties."

3. The submissions made and say filed by respondent, employer and particularly para 7 of the say shows that one arbitrator is appointed.

"7. I say & submit that in the instant case, Shri. Raghvendra Pratap Singh, Joint General Manager is an Officer of Ordnance Factory Varangaon which is a separate unit of Ministry of Defence. The Officer is not a Manager, Director of Part of Management of Ordnance Factory Bhusawal and has no controlling influence in an affiliate of one of the parties. Hence, his appointment is very much legal and as per law."

4. The learned counsel for applicant has objection to aforesaid appointment due to amendment made to section 12 of the Act. The learned counsel is relying on the following amended provision which is section 12 (5) of the Act.

"12. Grounds for challenge. - (1).....

(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:"

5. Seventh Schedule created under section 12 (5) of the Act is as under :-

"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.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a

significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.- The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.- The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.- For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.'."

6. The learned counsel for applicant submitted that the aforesaid arbitrator appointed by the employer will fall atleast in category No. 1 and 5 of Seventh Schedule. The learned counsel for employer submitted that the arbitrator appointed is not working in the unit from Bhusawal and he is working in the unit from Varangaon and so, the provisions cannot come in the way of employer. This submission is not at all acceptable. Both the units are the units of Defence Ministry and the arbitrator named is employee of Defence Ministry. At the end, the liability, if any, will be fastened on the Defence Ministry. In view of these circumstances, this Court holds that there is bar of amended provision to such appointment.

7. The learned counsel for applicant submitted that in view of the aforesaid bar, this Court needs to use power under section 11 (5) of the Act and this Court needs to appoint another arbitrator. This submission is also not acceptable. The parties have agreed to give power to particular person to appoint arbitrator and so the aforesaid amendment cannot take away that power. The power will remain there, but it will be subject to limitation now given by the amended provisions. So, this Court holds that the arbitrator appointed cannot work as arbitrator in

view of the amendment made to the Act. It will be open to the employer to make appointment of other person whose appointment is not barred by the aforesaid provision.

8. With these observations the application is partly allowed and disposed of. This Court expects that the process is undertaken immediately and arbitrator is appointed as early as possible. Civil application is also disposed of.

[T.V. NALAWADE, J.]

ssc/