$~2

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ARB.P. 42/2017

DELHI INTERNATIONAL AIRPORT PVT LTD ..... Petitioner

Through: Mr Sandeep Sethi, Senior Advocate with Mr Abhinav Agnihotri and Ms Abhilasha Singh, Advocates.

Versus

AIRPORT AUTHORITY OF INDIA ..... Respondent

Through: Mr Anil Kathuria, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **20.04.2017**

<u>VIBHU BAKHRU, J</u>

1. The petitioner has filed the present petition under Section 12(5) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'),*inter alia,* praying as under:-

> "(i) appoint an arbitrator on behalf of the Respondent so as to enable the two appointed arbitrators to appoint the third (presiding) arbitrator and constitute the Arbitral Tribunal to adjudicate the claims of the Petitioner in accordance with the Arbitration and Conciliation Act, 1996"

2. The respondent has already nominated its arbitrator - Mr A. N. Chatterjee, former Deputy Comptroller and Auditor General of India.

3. It is the petitioner's case that Mr A. N. Chatterjee is disqualified from acting as an arbitrator in view of Section 12(5) of the Act read with the Seventh Schedule to the Act. According to the petitioner, the disputes between the parties arose from the opinion/observations made by the Office of the Comptroller and Auditor General of India (CAG) that certain items of customs duty were to be shared between the two parties in terms of the Operation, Management and Development Agreement dated 04.04.2006 (OMDA). It is the petitioner's case that the said items were not items of revenue that were required to be shared between the parties. Mr Sethi, learned senior counsel appearing for the petitioner contends that the entire genesis of the dispute is the opinion of CAG and therefore, an ex-officer of the CAG would be disqualified to be appointed as an arbitrator. He has also drawn the attention of this Court to entry No.1, 15 & 16 of the Seventh Schedule to the Act, which reads as under:-

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

4. The present petition was taken up on 13.02.2017 and the petitioner was directed to approach Mr Chatterjee with a request to make full disclosure regarding his involvement in the matter, if any. The petitioner was also permitted to frame appropriate questions to elicit a response from

Mr Chatterjee regarding his involvement in CAG's opinion, if any.

5. It appears that, thereafter, the petitioner taking advantage of the said order had sent a detailed questionnaire - which is in the nature of a detailed examination rather than seeking a clarification - to Mr Chatterjee to ascertain whether he was involved in any manner in issuing the opinion in question.

6. A perusal of the said questionnaire and the answers furnished by Mr Chatterjee clearly indicate that although he had held various posts in the Office of CAG but he was not involved in giving opinion, which is stated to be one of the cause of disputes between the parties. In view of the aforesaid, this Court is unable to accept that any of the entries of the Seventh Schedule are attracted.

7. In the present case, Mr Chatterjee has neither been an employee nor a consultant or an advisor to any of the parties. There is no material to indicate that he had any business relationship with any party either. Thus, entry No. 1 of the Seventh Schedule is wholly inapplicable.

8. Further the answers given by Mr Chatterjee to the questionnaire clearly indicate that Mr Chatterjee was never involved in giving legal advice or expert opinion to any of the parties nor has any previous involvement in the case.

9. It is also material to mention that the CAG is a constitutional functionary appointed under Article 148 of the Constitution of India. The CAG is charged with performing functions in relation to the accounts of the States and the Union as may be prescribed. Under Article 151 of the

Constitution of India, the CAG is required to submit audit reports regarding accounts of the Union and the States. Thus, officers functioning in the Office of the CAG, would in their course of functioning, have interaction with various Government Departments and Public Sector Undertakings. However, that would not render all employees/ officers of the Office of CAG ineligible to act as arbitrators in disputes between the Public Sector Enterprises/Government Undertakings and other private parties.

10. In the facts of the present case, there is no material to establish that the Mr Chatterjee had given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties or that he had any previous involvement in the case. Thus, it cannot be accepted that he is disqualified to act as an arbitrator by virtue of Section 12 (5) read with the Seventh Schedule to the Act

11. Before concluding, it is also relevant to mention that that the present petition is misconceived as an arbitrator cannot be appointed once an arbitrator had already been appointed. The provisions of Section 11 cannot be used to displace an arbitrator who had already been appointed by a party on the ground that circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator or that he is disqualified to act as an arbitrator. In certain cases, where the arbitrator is ineligible to act by virtue of Section 12(5) of the Act, the petitioner may have a recourse to Section 14 of the Act. In other cases, the petitioner would be required to await the final award before pursuing his challenge to an arbitrator, in the event such challenge is not sustained by the arbitral tribunal.

12. Accordingly, the present petition is dismissed with costs quantified at ₹25,000/-.

VIBHU BAKHRU, J

APRIL 20, 2017
MK