

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

% Judgment Delivered on: March 02, 2017

+ **FAO(OS) (COMM).47/2017 & CM Nos.7153/2017 (for stay)**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. S. Nandakumar, Mr. M.S. Saran Kumar
and Mr.P. Srinivasan, Advocates.

versus

BAHARAMPORE-FARAKKA HIGHWAYS LTD.

..... Respondents

Through: MR. Dayan Krishnan, Sr. Advocate with
Ms. Malavika Lal and Ms. Aakash Lodha,
Advocates.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

ORDER

INDIRA BANERJEE, J

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the 1996 Act, is against a judgment and order dated 22.11.2016 passed by the learned Single Bench, rejecting the application of the appellant under Section 34 of the 1996 Act, *inter alia* holding that the petition under Section 34 was misconceived as the order dated

11.08.2016 of the Arbitral Tribunal, impugned in the said petition was not an arbitral award.

2. The appellant, National Highways Authority of India invited tenders for the work of improvement of about 101 kms of the existing road on the Behrampore to Farakka Section of National Highway No. 14.
3. After evaluation of bids, M/s. Hindustan Construction Company Ltd. was declared the successful bidder. The bid of M/s. Hindustan Construction Company Ltd. was accepted.
4. In terms of the contract between M/s. Hindustan Construction Company Ltd. and the appellant, a concessionaire agreement was executed pursuant to which, the respondent was incorporated as a public company limited by shares, to carry out the contract work.
5. In course of execution of the work, disputes and differences arose between the respondent and the appellant whereupon the respondent invoked the arbitration clause in the Concessionaire Agreement and nominated Shri N.C. Saxena as its Arbitrator. The appellant nominated Shri K.B. Lal Singal as its Arbitrator on 19.05.2015.
6. Section 21 of the 1996 Act provides that unless agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request to refer that dispute to arbitration is received by the respondent. In this case, the request was obviously received by the appellant on or before 19.05.2015.

The arbitral proceedings thus commenced on or before 19.05.2015.

7. While the arbitral proceedings between the respondent and the appellant were pending, but before the third arbitrator was appointed, parliament enacted the Arbitration and Conciliation (Amendment) Act, 2015 hereinafter referred to as the 2015 Amendment Act, whereby several sections of the 1996 Act, including Section 12 were amended and some new sections, sub sections, provisions, explanations and schedules were added. The 2015 Amendment Act was, as per Section 1(2) thereof, to be deemed to have come into force on 23.10.2015.
8. Section 26 of the 2015 Amendment Act provides as follows:

“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.”

9. Section 12 of the 1996 Act as amended by the Amendment Act of 2015 provides as follows:-

“12. Grounds for challenge —

[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(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:

PROVIDED FURTHER that this sub-section shall not apply to cases where an arbitrator has already been appointed on or before the commencement of the Arbitration and Conciliation (Amendment) Ordinance, 2015.”

10. Prior to amendment, Section 12 provision as follows:-

“12. Grounds for challenge -

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) He does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.”

11. In terms of the Concessionaire Agreement, the two Arbitrators nominated by the petitioner and the respondent respectively were to select the Presiding Arbitrator. By agreement of the appellant and the respondent, Indian Road Congress was requested to appoint the Presiding Arbitrator. The Indian Road Congress appointed Shri B.N. Sinha as the Presiding Arbitrator. On or about 02.02.2016, the Arbitral Tribunal constituted of the two

Arbitrators nominated by the appellant and respondent and the Presiding Arbitrator held a preliminary meeting.

12. Since, as observed above, the arbitral proceedings in this case commenced long before the 2015 Amendment came into force, the amendments made to the 1996 Act by the said 2015 Amendment Act, would not have applied to these arbitral proceedings. However, from the minutes of the Meeting of the learned Arbitral Tribunal held on 02.02.2016, it appears that the parties had agreed that the arbitration proceedings would be conducted in accordance with the 2015 Amendment Act and/or in other words, in accordance with the 1996 Act, as amended by the 2015 Amendment Act.
13. At the meeting before the Arbitral Tribunal on 02.02.2016, the Arbitral Tribunal observed that Section 12 and in particular, Schedules (v), (vi) and (viii) would not be applicable to Mr. N. C. Saxena and Mr. K. B. Lal Singhal who had been appointed before the amendments came into force. Both the aforesaid Arbitrators, however, gave a declaration in writing in accordance with Section 12(1) of the 1996 Act, as the provision stood, before amendment by the 2015 Amendment Act, that they had nothing to disclose which could create justifiable doubts as to their independence or impartiality. Neither of the parties objected to the declaration.

14. The Presiding Arbitrator, Mr. B. N. Sinha also gave a declaration under the amended provisions of the 1996 Act that he had nothing to disclose which could create justifiable doubts as to his independence or impartiality as an Arbitrator.
15. In the minutes of the meeting of the learned Arbitral Tribunal held on 2.2.2016, it was recorded that the desired information as per Schedule V, VI and VII, as applicable had been given. None of the provisions of Schedule V were attracted. The minutes further recorded that the parties had stated that they had no objection to the declaration.
16. Initially the declaration as given by the Presiding Arbitrator was accepted and the appellant and the respondent proceeded with the arbitration. However, at a later stage, at the time of hearing on 26.07.2016, an officer of the appellant allegedly informed the Counsel appearing on behalf of the appellant that he had come to know that the Presiding Officer Shri B. N. Sinha and he Arbitrator nominated by the respondent Shri N. C. Saxena, were working in the same company. Admittedly, the information was not authenticated, as pleaded in paragraph 3.7 of the petition filed in this Court.
17. It is pleaded in paragraph 3.7 of the petition, that in reply to a query from Counsel, Shri Sinha and Shri Saxena both confirmed that they were working in the same company.

18. It is further pleaded that on receipt of confirmation, the appellant requested the two arbitrators to give a declaration in terms of Item No.25 of Schedule V as required under the amended provisions of Section 12 of the 1996 Act, but they refused to do so.
19. The appellant filed an application under Section 12(3) of the 1996 Act. On 05.08.2016, calling upon the two arbitrators to declare if they were both working in the same company, that is ICT Ltd. The appellant prayed that if both the arbitrators were working in the same company one of them should recuse himself, and a different arbitrator appointed. The said application was unanimously rejected on 11.08.2016. The Presiding Arbitrator Shri B. N. Sinha and the arbitrator nominated by the respondent Shri N. C. Saxena being the majority, gave a common decision, whereas Shri K. B. Lal Singhal, the Arbitrator nominated by the appellant gave a separate decision. Both the decisions are reasoned decisions. All the Arbitrators unanimously held that the application filed by the appellant was time barred. On merits there were some differences. The majority, that is the two Arbitrators who were alleged to be working in the same company, ICT Ltd. not only found the application to be time barred, but also stated that Shri N. C. Saxena was an employee of ICT Ltd. whereas Shri B. N. Sinha was not an employee but only a consultant working for

ICT Ltd.; they worked independently; there was no scope for influencing each other and the Fifth Schedule had no application.

20. The third Arbitrator, however, observed that on 02.02.2016 when each of the arbitrators gave their brief introduction, it had transpired that both the Presiding Arbitrator and the Arbitrator nominated by the respondent were working for ICT Ltd. The respondent raised no objection there. The application moved after six month was time barred. He, however, found that the ground of challenge in relation to Item No.25 of Schedule V was not without merits.
21. The appellant moved an application under Section 34 of the 1996 Act before a Single Bench of this Court for setting aside of the award dated 11.08.2016. The application has been rejected by the judgment and order under appeal.
22. Learned counsel appearing on behalf of the appellant argued that the learned Single Bench erred in holding that the order dated 11.08.2016 was not an award and could not, therefore, be set aside under Section 34 of the 1996 Act.
23. The expression award is defined in Section 2(1)(c) of the 1996 Act “Arbitral award includes any interim award”. The definition of award is wide. The learned Single Bench has not given any reasons for his finding that the order of 11.08.2016 is not an award.

24. The definition of award as observed reads that an award includes an interim award. However, what exactly an award is, is nowhere defined. An award is an adjudication and a decision on the contentions of the respective parties. An award may be a final award. A final award is an award which puts an end to the arbitral proceedings. An award may, as per its definition in Section 2 (1) (c) also be an interim award.
25. In the context of the question of what exactly an award is reference may be made to some other provisions of the 1996 Act and in particular, Section 31 of the 1996 Act. Section 31 of the 1996 Act as it stood before amendment by the Amendment Act of 2015 provided as follows:-

“31. Form and contents of arbitral award –

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceeding with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless-

(a) The parties have agreed that no reasons are to be given, or

(b) The award is an arbitral award on a-reed terms under section 30

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise a reed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen percent per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties, -

(a) The costs of an arbitration shall be fixed by the arbitral tribunal

(b) The arbitral tribunal shall specify-

(i) The party entitled to costs,

- (ii) The party who shall pay the costs,
- (iii) The amount of costs or method of determining that amount, and
- (iv) The manner in which the costs shall be paid.

Explanation. -For the purpose of clause (a), “costs” means reasonable costs relating to-

- (i) The fees and expenses of the arbitrators and witnesses,
- (ii) Legal fees and expenses,
- (iii) Any administration fees of the institution supervising the arbitration, and
- (iv) Any other expenses incurred in connection with the arbitral proceeding and the arbitral award.

26. After amendment by the 2015 Amendment Act, Section 31 provides as follows:-

“31. Form and contents of arbitral award—

- (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
- (2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.
- (3) The arbitral award shall state the reasons upon which it is based, unless—
 - (a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.—The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)];

[(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.]”

27. On a perusal of Section 31 as it originally stood, Section 31 as amended by the Amendment Act, 2015 read with Sections 32 and 33, it is patently clear that an award is not just a money award. Any adjudication of the contentions of the parties constitutes an award, orders are those issued under Section 31(2) and / or ministerial orders in the nature of directions which do not adjudicate any rights or contentions. The definition of ‘award’ in Section 2(1) (c) makes it amply clear that an award includes an interim award.
28. Section 34 of the 1996 Act provides that recourse to a Court against an arbitral award may be only by making an application for setting aside such award in accordance with sub Sections (2) and (3) of the said Section. In view of the definition of arbitral award, an application could be made for setting aside of a final award or an interim award.
29. On 11.08.2016, an Arbitral Tribunal adjudicated the contentions of the respective parties with regard to the constitution of the Tribunal. In other words, it upheld the power and or authority of the Tribunal as constituted to continue with the reference. It cannot be said that the order of the Arbitral Tribunal of 11.08.2016 was not an award. It was an interim award.

30. We are unable to agree with the learned Single Bench to the extent, as the learned Single Bench held that the order of 11.08.2016 is not an award. Whether the decision of 11.08.2016 which, in our view, was an interim award, was liable to be interfered with, in proceedings under Section 34 of the 1996 Act, is a different issue.
31. The only ground of challenge to the constitution of the Arbitral Tribunal was that the Arbitrator nominated by the respondent and the Presiding Arbitrator work/were working in the same company. The question is, even assuming that they were working in the same company which of course has been refuted by the respondent by reference to the majority decision, would this in itself be a disqualification? The answer of the aforesaid question has to be in the negative for the following reasons:-
32. Section 12 of the 1996 Act as amended requires that when a person is approached in connection with his possible appointment as an Arbitrator, he is to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The circumstances that would give rise to justifiable doubts as to the independence or impartiality of the Arbitrator are enumerated in Schedule V and Schedule VII to the 1996 Act.
33. Section 13 of the 1996 Act as amended by the 2015 Amendment Act provides:-

“13. Challenge procedure—

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.”

34. In terms of Section 13 sub Section 2, an Arbitrator might be challenged within fifteen days of the party becoming aware of

the constitution of the Arbitral Tribunal or after becoming aware of any circumstances referred to in sub Section 3 of Section 12. Sub Section 3 of Section 13 provides that unless the Arbitrator challenged under sub Section 2 withdraws from his office or the other party agrees to the challenge, the Arbitral Tribunal shall decide on the challenge.

35. Sub Section 4 of Section 13 provides that if a challenge under any procedure agreed upon by the parties or under the procedure under sub Section (2) is not successful, the Arbitral Tribunal is to continue with the arbitral proceedings and make an arbitral award. Sub Section 5 provides that where an arbitral award is made under sub Section 4, the party challenging the Arbitrator may make an application for setting aside such an arbitral award in accordance with sub Section 34.
36. On a conjoint reading of Section 13 with Section 34 of the 1996 act, it appears to us that there is no bar in law to challenging a decision of an Arbitral Tribunal on the challenge to the constitution of the Arbitral Tribunal, which is an interim award, by filing an application under Section 34 of the 1996 Act. Section 13 read with Section 34 is to be construed to mean that an unsuccessful challenge to the Arbitral Tribunal would not in itself entitle the unsuccessful appellant to stay away from the arbitral proceeding or to insist on stay of the arbitral proceedings. The arbitral proceedings would continue until and unless the

challenge succeeded. If the unsuccessful party filed an application under Section 34 for setting aside of the interim award, the arbitral proceedings would continue until party challenging the Arbitrator succeeded and the interim award was actually set aside by the Court.

37. In this case, the only challenge to the constitution of the Arbitral Tribunal was based on the allegation that the Arbitrator nominated by the respondent and the Presiding Arbitrator were working in the same company. The allegation that the presiding Arbitrator and the Arbitrator nominated by the respondent, were working in the same company is seriously disputed. The impugned decision of the majority Arbitrators states that Shri N. C. Saxena was an employee of ICT Ltd. but the Presiding Arbitrator Shri Sinha was only a consultant who worked for ICT Ltd. but was not an employee of the company. Item No.25 of Schedule V and / or Schedule VII to the 1996 Act disqualifies lawyers working in the same firm from being co-arbitrators. Counsel appearing on behalf of the appellant argued upon reference to Section 12 that the 5th and the 7th Schedule are only in the nature of guidelines and the circumstances mentioned in the schedule are illustrative and not exhaustive. If two lawyers from the same firm are disqualified, two employees working in the same company are also to be disqualified, on a parity of reasoning.

38. Apart from the fact that it has seriously been refuted that the two Arbitrators worked in the same company, we are of the view that the restriction to two lawyers working in a law firm from being co-arbitrators cannot be extended to two employees of a company in the absence of specific materials to show that the two were closely connected to each other. If it had been the intention of the Legislature that working in the same company itself would be a disqualification, this would have specifically been mentioned. In this context, we cannot, but take judicial notice of the reality that law firms functioning in this country cannot be compared with other corporate bodies. The question which arises before us is, would an employee working in an altogether different division of the same company and posted in a different place be disqualified from being a co-arbitrator. The answer would possibly be 'No'. In any case, there is a time limit for challenging the constitution of an Arbitral Tribunal. The unanimous factual finding of the application of the appellant being time barred, does not call for interference under Section 34 of the 1996 Act.
39. The Court exercising jurisdiction under Section 34 does not sit in appeal over an award. Factual findings are not liable to be interfered with in the absence of perversity. The impugned decision of the Arbitral Tribunal which is an interim award, does not warrant interference under Section 34 of the 1996 Act.

40. Counsel has referred to website information. However, in an appeal under Section 37 from an order under Section 34 of the 1996 Act, the Court has to confine itself to the materials before the Arbitral Tribunal. The Court cannot consider fresh materials. However, in the event any materials are discovered which may raise serious doubts with regard to the fairness and impartiality of the Arbitrators, this may be a ground in case of challenge to a final award under Section 34. The costs imposed by the learned Single Bench are, however, set aside. The appeal is disposed of accordingly.
41. The pending application also stands disposed of.
42. A copy of this order be given *dasti* under the signatures of the Court Master.

INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J

MARCH 02, 2017/gm