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

+ **O.M.P. (T) (COMM.) 92/2017 & IAs 13712-13/2017 & CAV
1002/2017**

Date of decision: 22nd November, 2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr.Shashi B.Upadhyay, Sr.Adv.
with Mr.Ramesh Kumar, Mr.Nishant
Kumar, Mr.Ananya Misra, Mr.Ashish Jacob
Mathew Mr.Devansh Gupta, Advs.

versus

GWALIOR BYPASS PROJECT LTD Respondent

Through: Mr.M.K.Singh, Ms.Nitana
Bandyopadhyay, Mr.Rahul Pandey,
Mr.Akshat Vijpai, Ms.Shefali Chopra, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

CAV 1002/2017

As the counsel for the respondent has entered appearance on receipt of advance notice, Caveat is discharged. He has been heard.

IA 13713/2017

Exemption allowed subject to all just exceptions.

OMP (T)(COMM) 92/2017

1. This petition under section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed by the petitioner inter alia making the following prayers:-

a) To call for records of the arbitral proceedings in the case of arbitration between M/s Gwalior Bypass Projects Ltd and National Highways Authority of India pending before the Arbitral Tribunal consisting of Mr. Justice (Retd.) Anil Kumar, the Presiding Arbitrator, Mr. Justice (Retd.) V.K. Shali and Ms Madhurima Mridul, Co Arbitrators;

b) To terminate the mandate of the Arbitral Tribunal consisting of Mr. Justice (Retd) Anil Kumar, the Presiding Arbitrator, Mr. Justice (Retd) V.K. Shali and Ms Madhurima Mridul, Co-Arbitrators

c) To disqualify Mr. Justice (Retd) Anil Kumar, the Presiding Arbitrator, Mr. Justice (Retd) V.K. Shali and Ms. Madhurima Mridul, Co-Arbitrators in the matters pertaining to the Petitioner,

d) To direct the Arbitral Tribunal consisting of Mr. Justice (Retd) Anil Kumar, the Presiding Arbitrator, Mr. Justice (Retd) V.K. Shali and Ms. Madhurima Mridul, Co-Arbitrators, to refund the fees paid to them during the course of arbitration proceedings in the present case.

2. The disputes between the parties have arisen out of Concession Agreement dated 9th October, 2006, the Supplementary Agreement dated 18th December, 2012 and the second Supplementary Agreement dated 01.07.2015. This Court vide its order dated 4th October, 2016, passed in Arbitration Petition No. 430/2016, appointed Mr. Justice (Retd.) V.K.Shali as a nominee Arbitrator on behalf of the petitioner. The respondent had appointed Ms. Madhurima Mridul as its nominee Arbitrator. The two arbitrators thereafter appointed Mr. Justice (Retd.) Anil Kumar as the Presiding Arbitrator. The arbitral proceedings commenced on 2nd November, 2016 and various sittings of the Arbitral Tribunal have taken place since that date and presently the proceedings are at the stage of cross-examination of the witness for the respondent.

3. On 22nd August, 2017, the petitioner filed an application inter alia making the following prayers:

“It is, therefore, most respectfully prayed that the Hon'ble Members of the Arbitral Tribunal may be directed by the Tribunal to file disclosures as per Section 12 of the Arbitration & Conciliation Act, 1996 read with Schedule VI thereto, declaring the number of arbitrations in which they have been appointed as Arbitrators for the past three years prior to the respective dates of their appointment as Arbitrators in the present case and thereafter, giving the names of parties in each case and name of the counsel for the party whose Nominee Arbitrator the Members of the Tribunal were appointed as such.”

4. The grievance of the petitioner being that a declaration in terms of Section 12 of the Act had not been filed by the Arbitrators.

5. In the Record of Proceedings dated 24th August, 2017, the Arbitral Tribunal noted that declaration dated 2nd November 2016 of the Presiding Arbitrator was on record and another declaration dated 2nd November, 2017 of the Presiding Arbitrator was also reproduced in that Record of Proceedings.

6. Learned senior counsel for the petitioner submits that the fact that a purported declaration on 2nd November, 2017 has been mentioned in the Record of Proceedings dated 24th August, 2017, raises a doubt regarding the authenticity of the said declaration. I, however, am unable to agree with the same. The question is one of filing of declaration and not of the date. Once the declaration has been made, the petitioner has to take its remedy in accordance with the Act. Mere discrepancy in the date of such declaration, in my opinion, in the facts of this case would not give any ground to the petitioner to interdict arbitral proceedings at this stage.

7. The Arbitrator appointed by this Court has also given his declaration in terms of Section 12 of the Act and the petitioner has placed the same on record at page 239 of the paper book. Learned senior counsel for the petitioner submits that in the said declaration the grounds that are stated in Fifth Schedule of the

Act have not been specifically adverted to and no disclosure regarding these have been made.

8. Section 12(1) of the Act reads as under:-

“12. Grounds for challenge.— 1 [(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.]”

9. I am unable to accept the challenge made on the above ground. The declaration of the Arbitrator is in form specified in Sixth Schedule of the Act. Therefore, no grievance can be raised with respect to the said disclosure inasmuch as Explanation 2 to Section 12(1) of the Act provides the

disclosure to be made in the form specified in the Sixth Schedule. The said Schedule does not mandate that the Arbitrator must also specifically deal with each of the grounds that are mentioned in the Fifth Schedule while giving such disclosure.

10. Reading of Explanation-1 and Explanation-2 would show that while giving a disclosure in the form specified in the Sixth Schedule, the Arbitrator would keep in mind the grounds stated in the Fifth Schedule as a guide. It, however, does not mean that while giving a disclosure in the form specified in the Sixth Schedule, the Arbitrator must also separately refer to each and every grounds that has been stated in the Fifth Schedule.

11. Learned senior counsel for the petitioner, placing reliance on paragraph 17 of the judgment of Supreme Court in ***HRD Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited (Formerly Gas Authority of India Ltd.)*** 2017 SCC Online SC 1024, has contended that the disclosure has to be made with reference to each of the items given in the Fifth Schedule otherwise it would not be possible for a party to decipher if the Arbitrator suffers from a disqualification in terms of Section 12(5) of the Act.

12. In my opinion, reliance on paragraph 17 of the judgment of the Supreme Court in ***HRD Corporation*** (supra) is ill-founded. In paragraph 17, the Supreme Court was only dealing with the submission of over-lapping of grounds that are found

in the Fifth Schedule and the Seventh Schedule. The Court did not deal with the disclosure being made as per the Sixth Schedule under the Act, and requirements thereof. I may only note that barring mention of non-disclosure of the ground specified in the Fifth Schedule, no specific ground of disqualification has been raised before me qua any of the Arbitrators at this stage. In fact, no challenge to the Arbitral Tribunal under Section 13 has so far been raised even before the Arbitral Tribunal. The question is only of proper disclosure under Section 12.

13. As far as the third Arbitrator is concerned, the counsel for the respondent submits that disclosure had been filed even by the third Arbitrator before the Arbitral Tribunal. Learned senior counsel for the petitioner refuted the same and submits that no such disclosure was made or given to the petitioner at least. This controversy, however, need not detain me as a copy of the disclosure by the third Arbitrator has now been handed over to the learned senior counsel for the petitioner. It would be always open to the petitioner to seek his remedies on such disclosure before the Arbitral Tribunal, if so advised.

14. Learned senior counsel for the petitioner has further contended that one of the members of the Arbitral Tribunal has been appointed as a Member of the Armed Force Tribunal and, therefore, would not be able to devote sufficient time to arbitration. In my opinion, once the disclosure has been made

by the Arbitrator, in case the petitioner wants to challenge the same, the same has to be done only before the Arbitral Tribunal itself and not before this Court. I may only draw reference to paragraph 29 of the judgment of the Supreme Court in ***HRD Corporation*** (supra) in this regard.

15. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

IA 13712/2017

Application is dismissed in view of the above order.

NOVEMBER 22, 2017
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NAVIN CHAWLA, J