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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 5th July, 2018

+ O.M.P. (T) (COMM.) 51/2018

M/S ERA INFRA ENGINEERING LIMITED Petitioner
Through Mr.Lovkesh Sawhney, Adv.

versus

AIRPORT AUTHORITY OF INDIA Respondent
Through Ms.Sonal Kr. Singh, Ms.Swati Sehgal
and Mr.Rajat Dasgupta, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

IA No.8438/2018 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. (T) (COMM.) 51/2018

1. The petitioner has filed the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for termination of the mandate of the Arbitrator appointed by the respondent.
2. There is no dispute that the Arbitrator has been appointed in accordance with the Arbitration Agreement between the parties. Learned counsel for the petitioner submits that the Arbitrator so appointed is

ineligible as he would fall under Entry 1 of the Seventh Schedule to the Act, being a former employee of the respondent.

3. Section 12(5) of the Act is reproduced herein below:

*“ (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 subsection by an express agreement in writing.”*

4. A reading of the above position would show that any person who falls in a category specified in the Seventh Schedule to the Act shall be ineligible to be appointed as an Arbitrator.

5. Entry 1 of the Seventh Schedule is reproduced herein below:

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

(Emphasis Supplied)

6. A reading of the above would show that it is only the person who is an employee, consultant, advisor or has any other past or present business relationship with the party, who has been made ineligible for being appointed as an Arbitrator. The above entry in the Seventh Schedule is to be distinguished from Entry 31 contained in the Fifth Schedule, which is reproduced herein below:

“31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.”

(Emphasis Supplied)

7. Therefore, while a former employee has been put in the Fifth Schedule to the Act, the present employee would fall under the Seventh Schedule to the Act.

8. In ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited***, (2017) 4 SCC 665, the Supreme Court construed the scope of Entry 1 of the Seventh Schedule in relation to the former employees of the Government and held as under:

“24. Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant

or the advisor or had any past or present business relationship with DMRC. No such case is made out by the petitioner.

25. *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, the 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 empanelled by the respondent are not covered by any of the items in the said list.*

26. *It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the 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.”

9. Relying upon the distinction between the Entry 31 of the Fifth Schedule and Entry 1 of the Seventh Schedule, the High Court of Punjab and Haryana in its decision dated 27.10.2016 in Arbitration Case No.166/2016 (O&M), ***Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd.***, has held as under:

“21. I have already indicated the distinction between sub-section (1) and (2) of section 12 on the one hand and sub-section (5) of section 12 and held that a past employment by itself does not render a person ineligible from being appointed an arbitrator. The mere existence of a doubt justifiable, as it may be, does not render him ineligible either. That is only for the purpose of sub-sections (1) and (2) of section 12 to ascertain further if the arbitrator also had any connection with the contract in question.

22. There is no bar, therefore, to a former employee, consultant or advisor of a party being appointed as an arbitrator merely by virtue of his/her past engagement.”

10. This was followed by the High Court of Madras in ***Offshore Infrastructure Limited v. Bharat Heavy Electricals Limited & Anr.***, 2016

SCC OnLine Mad 31837 as under:

“25. The crucial fact, in my view, is that the attention of the learned Judges in both these cases was not drawn to Clause (31) of the Fifth Schedule.

26. I find myself in agreement with the opinion of the Chief Justice, S.J.Vazifdar of the Punjab and Haryana High Court and more so in the context of Clause (31) of the Fifth Schedule. It is common cause that while sub-section (1) of Section 12 of the said Act read with Explanation (1) sets out the circumstances in which there can be justifiable doubts as to the independence or impartiality of an arbitrator, sub-section (5) of Section 12 of the said Act read with the Seventh Schedule prescribes an absolute bar. In a sense, it is presumed that on the existence of the said relationships, it would be not permissible for a person to act as an arbitrator.

27. There are two expressions used in the Fifth and Seventh Schedule. The Fifth Schedule in Clause (31) uses the expression “former employee”. The natural corollary is there is a difference between an employee and ex-employee. Thus, while being an employee is sufficient for justifiable doubts, such justifiable doubts would arise in case of an ex-employee only if he is within the window of three years from the date of ceasing to be an employee.

28. The Seventh Schedule does not have any clause for an ex-employee. Clause (1) of Seventh Schedule is identically worded to Clause (1) of the Fifth Schedule. Thus, the expression “employee” has to be understood similarly at both the places. The absence of any clause for ex-employee in the Seventh Schedule itself implies that there is no prohibition in the appointment of an ex-employee as an arbitrator per se. However, the use of expression “former employee” in Clause (31) of the Fifth Schedule would show that if the proposed arbitrator has ceased to be an employee within the window of three years, there would be justifiable doubts to the independence or impartiality of the arbitrator, though there is no absolute bar as under the Seventh Schedule.

29. It is not as if being an employee implies that the said equation continues for all times to come and as observed in the judgment in Reliance Infrastructure Ltd., case, supra, the equations between the parties itself changes, i.e., an employer and an employee and an employer and an ex-employee.”

11. In view of the above, merely because the Arbitrator appointed by the respondent is an ex-employee of the respondent, who, as submitted by the learned counsel for the respondent, had retired around 12 years before his appointment, would not make him ineligible under Entry 1 of the Seventh Schedule to the Act.

12. Learned counsel for the petitioner has placed reliance on the judgment dated 29.04.2016 of this Court in Arb.P.677/2015 ***Assignia-VIL JV v. Rail Vikas Nigam Limited*** to contend that in the said judgment even an ex-employee has been held to be ineligible to be appointed as an Arbitrator. In my opinion, the said judgment would have no application to the facts of the present case inasmuch as the said judgment was passed on a petition under Section 11 of the Act, wherein the respondent had forfeited its right to appoint an Arbitrator but was still insisting on appointing an Arbitral Tribunal consisting of ex-employees. The Court held that as the respondent had forfeited its right, it could no longer insist on the appointment of an Arbitral Tribunal comprised of its serving or ex-employees.

13. Learned counsel for the petitioner submits that in this case also the respondent has forfeited its right to appoint an Arbitrator inasmuch as the petitioner had sent the notice invoking the arbitration to the respondent on 08.03.2018 while the Arbitrator has been appointed by order dated 03.05.2018, that is after the expiry of the period of 30 days. This submission

of the learned counsel for the petitioner cannot be accepted in light of the judgment of the Supreme Court in ***Datar Switchgears Ltd. v. Tata Finance Ltd and Anr.***, (2000) 8 SCC 151, wherein it was held that:

“19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.”

14. Learned counsel for the petitioner submits that the said judgment would not have any application after coming into force of the Arbitration

and Conciliation (Amendment) Act, 2015 and specially Section 11(6A) read with Section 11(4) of the Act. The submission of the learned counsel for the petitioner cannot be accepted. Section 11(6A) of the Act confines the scope of examination by a Court exercising its power under Section 11 of the Act, to the existence of an Arbitration Agreement. For the maintainability of the petition under Section 11 of the Act, the judgment of the Supreme Court in ***Datar Switchgear Ltd.***(Supra) would remain applicable and binding on this Court.

15. In ***HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited***, (2018) 12 SCC 471 the Supreme Court had considered the provision of Section 12 and 13 of the Act as also the Fifth and the Seventh Schedule(s) to the Act and held as under:

“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator’s independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal

under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

16. The Supreme Court further rejected the submission that the items in the Fifth and Seventh Schedules should be construed in the most expansive manner, so that the remotest likelihood of bias gets removed. The principle for the construction of these entries laid down by the Supreme Court is as under:

"20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein – that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items

stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.”

17. Section 12(1) of the Act provides for disclosure by the proposed Arbitrator of circumstances that are likely to give rise to justifiable doubt as to his independence or impartiality. Fifth Schedule to the Act illustrates such grounds which give rise to justifiable doubt as to the independence or impartiality of the Arbitrator. Section 13 of the Act further states that a challenge to the Arbitrator would have to be made in accordance with the procedure agreed between the parties failing which, a party, intending to challenge the Arbitrator shall, within 15 days after coming to know about the constitution of the Arbitral Tribunal or after becoming aware of any such circumstances which give rise to justifiable doubt as to the independence or impartiality of such Arbitrator, shall send a written statement of the reason for challenge to the Arbitral Tribunal. If the challenge is not successful, in terms of Section 13(4) of the Act, the Arbitral Tribunal shall continue the arbitral proceedings and make the Arbitral Award. Such an award, in terms of Section 13(5) of the Act, can be challenged in accordance with Section 34 of the Act. Therefore, as the challenge made by the petitioner would fall under Entry 31 of the Fifth Schedule to the Act, the petitioner may raise the same before the Arbitrator in accordance with procedure prescribed in Section 13 of the Act and the present petition would not be maintainable.

18. In view of the above, I find no merits in the present petition and the same is accordingly dismissed. The petitioner shall however, be at liberty to raise all its contentions on the alleged impartiality of the Arbitrator in

accordance with Section 13 read with Section 12 of the Act. I may clarify that this Court has not gone into the allegations made in the petition in this regard.

NAVIN CHAWLA, J

JULY 05, 2018/Arya