

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.06.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.255 of 2019

Nellai Concrete Products & Construction
Co. Pvt. Ltd., rep. by its Managing
Director Dr.K.Jacob,
New No.398, Old No.766,
Poonamallee High Road,
Kilpauk, Chennai-600 010.

.. Petitioner

Vs.

Southern Railway Administration
represented by the Principal Chief Engineer,
Park Town, Chennai-600 003.

.. Respondent

* * *

Prayer : Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to decide the disputes that have arisen between the petitioner and the respondent under the terms of the Agreement No.CE/1/CS of 2017 dated 17.03.2017.

* * *

For Petitioner : Mr.Abishek Jenasenar

For Respondent : Mr.P.T.Ramkumar

ORDER

This Original Petition is filed seeking appointment of an Arbitrator to decide the disputes between the petitioner and the

respondent under the terms of the Agreement No.CE/1/CS/2017 dated 17.03.2017.

2. The petitioner was issued with the LOA dated 17.10.2013, being the successful bidder in Tender No.CS 166/2016 issued by the respondent and there was agreement between the parties in CE/1/CS of 2014 dated 25.02.2014. The delivery period for the product, which was originally fixed on 29.10.2015, was extended periodically till 30.06.2017, and the petitioner complied the supply requirement by 22.05.2017. The change of delivery schedule was subsequent to the letter of the respondent. The petitioner was successful in another bid in Tender No.CS-169/2016 and was issued the LOA dated 06.10.2016, which was to be completed by 08.10.2018. The petitioner sought for extension of time to deliver the goods covered under the second LOA dated 06.10.2016, which was rejected by the respondent. A further request was made by the petitioner on 28.03.2018 was responded to on 06.09.2018 with directions. Complying with the directions, the petitioner submitted its request to extend time till 30.04.2019, which was replied to by respondent with a rider agreement. As the same is not acceptable for the petitioner, it sought for appointment of an Arbitrator as per Clause 2900 of the Indian Railway Standard Conditions of Contract. Since there was no reply forthcoming from the

respondent, the petitioner is before this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, "1996 Act").

3. Heard the learned counsel appearing on behalf of the parties.

4. Learned counsel for the respondent produced a letter dated 16.04.2019 in No.G.16/DGM/ARB/OL- appointing one ShriK.Mastan Rao, CE/Works/MAS as the Sole Arbitrator.

5. Learned counsel for the petitioner raised objection for such appointment relying upon Section 12(5) of the 1996 Act, which was inserted via amendment Act, 2015 and sought for appointment of an Arbitrator by this Court, as prayed for.

6. Admittedly, Section 12(5) was inserted by Act 3 of 2016 in the 1996 Act with effect from 23.10.2015 and the same reads as follows :

(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.

7. The Seventh Schedule to the 1996 Act, though in its entirety is not relevant for the purpose of this Court, for better understanding, reproduced as follows :

"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.”

8. At this juncture, it is apt to quote the following paragraphs from the judgment of the Hon'ble Apex Court in **Voestalpine Schienan GMBH V. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665 :**

“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties.

Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in ***Hashwani v. Jivraj* (2011) 1 WLR 1872** in the following words:

"45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury* [*Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}], underlined that:

"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."

* * *

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."

9. The Hon'ble Apex Court also referred to the above judgment in the recent judgment **Bharat Broadband Network Limited V. United Telecoms Limited, (2019) 5 SCC 755** and held in paragraph 17 as hereafter :

17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case

which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become *de jure* unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being *de jure* unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them."

10. If the appointment of the sole arbitrator made by the respondent is weighed with the touchstone of the principal laid down by the Hon'ble Apex Court in the above decisions, it definitely requires interference from this Court.

11. In view of the foregoing reasons and following the aforesaid judgment of the Hon'ble Apex Court, this Court appoints Dr.SSP.Darwesh, a retired District Judge, residing at No.15/33, Sreenivasa Street, Perambur, Chennai-600 011, (Phone No.72997 67186), as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The learned Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings may be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

12. The Original Petition is ordered accordingly, leaving the parties to bear their own costs.

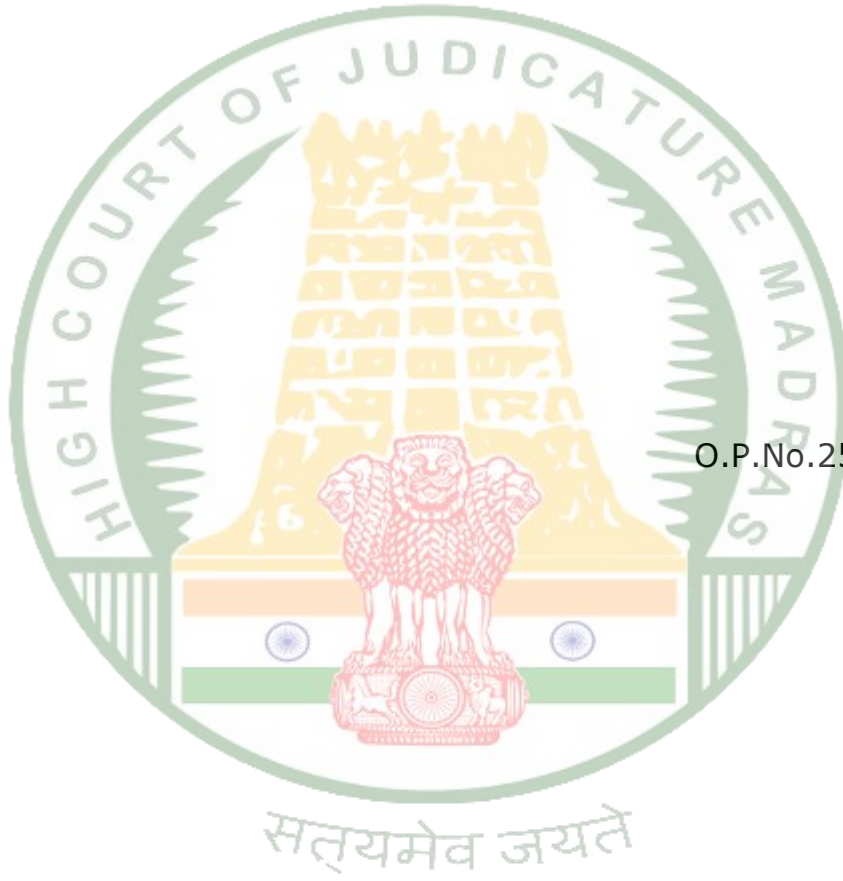
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