THE HONOURABLE SRI JUSTICE SANJAY KUMAR

ARBITRATION APPLICATION NOS.112 AND 126 OF 2017

COMMON ORDER

M/s. Quality Care India Limited, Hyderabad, filed these two applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), seeking resolution of its claims against M/s. ESI Corporation, Hyderabad. In Arbitration Application No.112 of 2017, its claim is for Rs.1,11,26,521/- while its claim in Arbitration Application No.126 of 2017 is for a sum of Rs.64,67,493/-.

In Arbitration Application No.112 of 2017, the applicant company asserted that it had entered into an agreement on 03.05.2013 with the respondent corporation, whereby it was to provide treatment/diagnostic facilities to ESI beneficiaries at its hospitals at Banjara Hills, Nampally and Musheerabad in Hyderabad. Alleging that payments due to it in terms of this agreement had not been cleared by the respondent corporation, the applicant company invoked the arbitration agreement in Clause 21 of the agreement, *vide* its legal notice dated 27.02.2016. Therein, the applicant company pointed out that in terms of the arbitration agreement, the State Medical Commissioner of the respondent corporation, the signatory thereto, was himself nominated as the Arbitrator but the same would be impermissible in law as one could not be a Judge in one's own cause. The applicant company therefore expressed its willingness to go in for arbitration for resolution of the dispute through an impartial third party Arbitrator and called upon the respondent corporation to effect such an appointment, failing which it reserved liberty to take further steps as warranted by law. By legal notice dated 18.04.2016, the respondent corporation informed the applicant company's Advocate that a committee had been constituted to examine these contentious issues and on submission of the report by the committee, suitable action would be taken. However, the respondent corporation did not advert to the request of the applicant company for appointment of a third party Arbitrator. It is in these circumstances, the present application came to be filed.

In so far as the Arbitration Application No.126 of 2017 is concerned, the substratum thereof is the Agreement dated 19.06.2014, entered into by the respondent corporation with Visakha Hospitals and Diagnostics Private Limited, which thereafter merged into the applicant company. Under the said agreement, Visakha Hospitals and Diagnostics Private Limited was to provide treatment/diagnostic facilities to ESI beneficiaries at Visakhapatnam, in the present State of Andhra Pradesh. Disputes having arisen with regard to the amounts due and payable to Visakha Hospitals and Diagnostics Private Limited, it got issued legal notice dated 29.02.2016 to the respondent corporation invoking the arbitration agreement in Clause 21 of the Agreement dated 19.06.2014. Therein, it pointed out that in terms of the arbitration agreement, the State Medical Commissioner of the respondent corporation was himself nominated as the Arbitrator, which would be impermissible in law, and called upon the respondent corporation to appoint an impartial third party Arbitrator for resolution of the dispute within a time frame, failing which it reserved liberty to take further steps as warranted by law. As in the earlier case, the respondent corporation got issued letter dated 18.04.2016 to the applicant company's Advocate stating that a committee had been constituted to examine the issues and that suitable action would be taken upon submission of the report by the committee. As the respondent corporation did not advert to its plea for appointment of an independent third party Arbitrator, the applicant company came before this Court.

Notice having been ordered in both these arbitration applications, Sri William Burra, learned counsel, entered appearance for the respondent corporation. He filed counter-affidavits in both the applications on identical lines. Therein, the Deputy Director of the respondent corporation at it's Regional Office at Hyderabad stated that in terms of the arbitration clause in both the agreements, the sole Arbitrator was to be its State Medical Commissioner, whose decision was to be final and binding, and therefore, it was not open to the applicant company to seek appointment of an independent Arbitrator. Reference was made to the constitution of a committee with five members for addressing the grievance of tie-up hospitals and to the report dated 29.04.2016 submitted by the said committee. The senior State Medical Commissioner of the respondent corporation was stated to have considered the said report to the extent of 100% disallowance of hospital bills but not partially disallowed bills. The Deputy Director concluded by stating that it was open to the applicant company to file a petition before the named Arbitrator, as per the arbitration clause, instead of seeking appointment of an Arbitrator under Section 11 of the Act of 1996.

The arbitration agreement in both these cases is set out in Clause 21 of the respective Agreements dated 03.05.2013 and 19.06.2014. The arbitration clause in both agreements is identical and reads as under:

> '21. ARBITRATION
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> If any dispute or difference of any kind whatsoever (the decision whereof is not herein otherwise provided for) shall arise between the ESIC and the Hospital upon or in relation to or in connection with or arising out of the Agreement, shall be referred to for arbitration by the SMC who will give written award of his decision to the Parties. The decision of the Arbitration will be final and binding. The provisions of the Arbitration and Conciliation Act, 1996 shall apply to the arbitration proceedings. The venue of the arbitration proceedings shall be at Hyderabad.'

In the light of the above clause fixing the seat of the arbitration at Hyderabad, this Court would have territorial jurisdiction to deal with both these applications notwithstanding the fact that the Agreement dated 19.06.2014, which is the subject-matter of Arbitration Application No.126 of 2017, was executed at Visakhapatnam in relation to medical facilities to be provided at Visakhapatnam. It may also be noted that both these agreements were executed on behalf of the respondent corporation by its State Medical Commissioner and he, himself, is the named Arbitrator in terms of the arbitration clause.

Sri William Burra, learned counsel, would contend that it is not open to the applicant company to deviate from the agreed procedure and seek appointment of an independent arbitrator through Court. However, Sri A.Srinath, learned counsel for the applicant company, would draw the attention of this Court to the judgment of the Supreme Court in ARAVALI POWER COMPANY PRIVATE LIMITED V/s. ERA INFRA ENGINEERING LIMITED[1], wherein the Supreme Court had occasion to consider the changes brought about in the Act of 1996 by the Arbitration and Conciliation (Amendment) Act, 2015 (Act No.3 of 2016), with effect from 23.10.2015. By the said Amendment Act, Section 12(5) was substituted and now reads as under:

> '12(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:
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> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.'

[1] (2017) 15 SCC 32

In turn, the Seventh Schedule to the Act of 1996, which was inserted therein by Act 3 of 2016, lists the barred categories of relationship. Clause 1 in the Seventh Schedule states to the effect that the arbitrator should not be an employee, consultant, advisor or have any other past or present business relationship with a party and Clause 12 states to the effect that the arbitrator should not be a manager, director or part of the management or have a similar controlling influence in one of the parties.

Sri William Burra, learned counsel, would however assert that the amended provisions of the Act of 1996 would not be attracted to the cases on hand as both the agreements were executed long prior to the coming into force of Act 3 of 2016 on 23.10.2015. However, it is significant to note that in terms of Section 21 of the Act of 1996, arbitral proceedings in respect of a particular dispute would commence only on the date on which a request for that dispute to be referred to arbitration is received by the respondent. It is not in dispute that in both these cases, the invocation of the arbitration clause by the applicant company and the receipt of the arbitration notices by the respondent corporation were long after the coming into force of the amended provisions of the Act of 1996 on 23.10.2015. Therefore, the amended provisions of the Act of 1996, as set out *supra*, would squarely apply.

At this stage, it would be apposite to refer to the observations of the Supreme Court in ARAVALI POWER COMPANY PRIVATE LIMITED[1], set out in para 22 of the judgment, to the extent relevant:

> '22. The principles which emerge from the decisions referred to above are:
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> 22.1. In cases governed by 1996 Act as it stood before the Amendment Act came into force:

22.1.1. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

22.1.2. …..

22.1.3. …..

22.1.4. …..

22.2. In cases governed by 1996 Act after the Amendment Act has come into force: if the arbitration clause finds foul with the amended provisions, the appointment of the arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the court would be within its powers to appointment such arbitrator(s) as may be permissible.'

As already noted *supra*, the State Medical Commissioner of the respondent corporation was himself the signatory to the agreements on behalf of the respondent corporation. Further, there can be no doubt that he is actively involved with the affairs of the respondent corporation. He would therefore come within the prohibited categories of relationship set out in Clause 1 and Clause 12 in the Seventh Schedule to the Act of 1996. In the light of the observation made by the Supreme Court in para 22.2, even if the arbitration clauses in the subject agreements provided for an in-house arbitrator being appointed, once the said clauses fell foul of the amended provisions of the Act of 1996, appointment of the Arbitrator as contemplated thereunder would be illegal and the Court would be within its power to appoint such Arbitrator(s) as may be permissible. The contention to the contrary of Sri William Burra, learned counsel, is accordingly rejected.

The existence of the arbitration agreements between the parties in both these cases is not in dispute. In terms of Section 11(6A) of the amended Act of 1996, this Court is required only to examine the existence of such an arbitration agreement and no more. In that view of the matter and keeping in mind the quantum of the claims of the applicant company in these two cases, which would aggregate to over Rs.1.75 crores, it would be appropriate to appoint a retired High Court Judge as the sole Arbitrator.

The Arbitration Applications are accordingly ordered appointing Sri Justice K.C.Bhanu, Retired Judge, High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, residing at Villa No.43, Aditya Royal Palms, Gated Community, Road Opp. to 7 Tombs Gate, Shaikpet, Hyderabad, as the sole Arbitrator for resolution of the disputes between the applicant company and the respondent corporation arising out of the Agreements dated 03.05.2013 and 19.06.2014, in accordance with the provisions and mandate of the Act of 1996. The learned Arbitrator shall be entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal measure. No order as to costs.

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SANJAY KUMAR, J

20th JUNE, 2019

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