

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.301 of 2019

1. M/s Patna Offset Press a registered partnership firm having its Registered Office at Naya Tola, Near Dharahara Kothi, P.S.-Kadam Kuan, P.O.-Bankipore, District-Patna through one of its partners Sri Amit Kumar Singh, S/o Shri Ram Naresh Singh, R/o Mohalla-Naya Tola, Near Dharahara Kothi, P.S. Kadamkuan, P.O.-Bankipore, District-Patna
2. Sri Vinay Singh S/o Shri Ram Naresh Singh R/o Mohalla-Naya Tola, Near Dharahara Kothi, P.S.-Kadam Kuan, P.O.-Bankipore, District-Patna. All are partners of M/s Patna Offset Press, Registered Office at Naya Tola, Near Dharahara Kothi, P.S. Kadam Kuan, P.O.-Bankipore, District-Patna
3. Sri Amit Kumar Singh S/o Shri Ram Naresh Singh R/o Mohalla-Naya Tola, Near Dharahara Kothi, P.S.-Kadam Kuan, P.O.-Bankipore, District-Patna. All are partners of M/s Patna Offset Press, Registered Office at Naya Tola, Near Dharahara Kothi, P.S. Kadam Kuan, P.O.-Bankipore, District-Patna
4. Smt. Supriti Singh W/o Sri Shailesh Kumar Singh R/o Mohalla-Naya Tola, Near Dharahara Kothi, P.S.-Kadam Kuan, P.O.-Bankipore, District-Patna. All are partners of M/s Patna Offset Press, Registered Office at Naya Tola, Near Dharahara Kothi, P.S. Kadam Kuan, P.O.-Bankipore, District-Patna

... .. Appellant/s

Versus

1. The Bihar Text Book Publishing Corporation Ltd. through its Managing Director, Pathya Pustak Bhawan, Budh Marg, Patna-1
2. The Managing Director the Bihar Text Book Publishing Corporation Ltd. Pathya Pustak Bhawan, Budh Marg, Patna-1
3. The Manager (Marketing and Sales) Sarva Shiksha, the Bihar Text Book Publishing Corporation Ltd., Pathya Pustak Bhawan, Budh Marg, Patna-1
4. The Internal Committee the Bihar Text Book Publishing Corporation Ltd., Pathya Pustak Bhawan, Budh Marg, Patna-1
5. The Hon'ble Mr. Justice C.M. Prasad (Retd.) Sole Arbitrator through his Secretary Mr. J.C. Jha, Nyaya Nagar (Judges Colony), Neura Road, P.O.-Khagaul, Patna-801105
6. Mr. B.M. Patel Managing Director, the Bihar Text Book Publishing Corporation Ltd., Pathya Pustak Bhawan, Budh Marg, Patna-1
7. The Bihar Education Project Council through its State Project Director, Rastra Bhasha Parishar, Saidpur, Rajendra Nagar, Patna-800004
8. The State Project Director the Bihar Education Project Council, Rastra Bhasha Parishar, Saidpur, Rajendra Nagar, Patna-800004
9. M/s Puja Printech Pvt. Ltd. Patliputra Industrial Estate, P.O. and P.S.-Patliputra, Patna-13
10. M/s Nav Bihar Media Pvt. Ltd. Patliputra Industrial Estate, P.O. and P.S.-Patliputra, Patna-13

... .. Respondent/s



Appearance :

For Appellant/s : Mr. Binod Kumar Singh, Adv & Mrs. Vagisha
Pragya Vacaknavi, Adv
For Respondent No. 1 to 4: Mr. Rajendra Narain, Sr. Adv and Ms. Anukriti
Jaipuriyar, Adv
For Respondent No. 7 & 8: Girijesh Kumar, Adv

CORAM: HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

Date : 14-02-2020

This miscellaneous appeal has been filed for setting aside the ex parte order dated 27.03.2019 passed in Miscellaneous (Arbitration) Case No. 31 of 2019 passed by learned District Judge cum Principal Civil Court of Original Jurisdiction, Patna by which application dated 27.03.2019 filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “the Act”) has been allowed, by which the Arbitral Tribunal has been restrained to proceed further till final order is passed on the petition filed under Section 14(2) of the Act by the respondents to terminate the mandate of sole Arbitrator.

2. Briefly stated, the facts of the case is that dispute and differences had arisen between the parties, during execution of contract, this Court by order dated 27.07.2018 passed in CWJC NO. 9143 of 2016 appointed Justice (Rtd.) Shyam Kishore Sharma, as sole Arbitrator by consent of the parties, however, during pendency of arbitral proceeding the sole



Arbitrator was appointed Lokayukta, Bihar, and accordingly, he was substituted by Justice (Rtd.) C.M. Prasad, as the sole Arbitrator by consent of the parties, by order dated 06.09.2018 passed in MJC No. 1593 of 2018.

3. According to respondents, during arbitral proceeding some observation was made by sole Arbitrator against the respondents which raised doubts regarding independence, impartiality and neutrality of the sole Arbitrator and as such respondents filed application dated 25.01.2019 under Section 13(2) of the Act in Arbitration Case No. 2 of 2016, seeking recusal of sole Arbitrator from hearing the arbitration case on the ground of justifiable doubts about his independence, impartiality and neutrality to adjudicate as envisaged under Section 12(3)(a) of the Act.

4. In their application, filed under Section 13(2) of the Act they have stated that respondents have lost complete faith and confidence in sole Arbitrator and has serious apprehension that the dispute before him would not be adjudicated in a fair, impartial and neutral manner. Petition is based upon actual events and remarks which transpired during course of arbitral proceeding. Respondents stated that from day one sole Arbitrator has shown biased approach which raises



strong doubts with regard to his impartiality to adjudicate in a fair and impartial manner. Even without hearing the case of the respondent-Corporation, the sole Arbitrator observed in open court that Corporation is at fault and has illegally and arbitrarily terminated the contract and they are liable to pay. Similar, type of observation was made by sole Arbitrator a number of times which raised serious doubt about his neutrality and as such sole Arbitrator has become *de jure* as well as *de facto* and has lost complete trust of the respondent-Corporation.

5. Section 12 and 13 of the Act reads as follows:-

“Section 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.

Section 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.”

5. The sole Arbitrator thereafter, in terms of Section 13(3) of the Act, heard both the parties on said petition and by order dated 09.03.2019 rejected said petition and decided to continue with the arbitral proceeding as contemplated under section 13(4) of the Act.



6. Respondents thereafter filed an application before this Court being M.J.C. No. 636 of 2019 for modification of order dated 6.9.2018 passed in M.J.C. No.1953 of 2018 for change of the Arbitrator appointed by this Court as respondent had lost faith in the sole arbitrator and said petition was disposed of by order dated 13.3.2019 by which this Court refused to interfere with the order dated 6.9.2018 passed in M.J.C. No.1953 of 2018 by which the sole arbitrator was appointed with an observation that such objections with respect to impartiality of the arbitrator could be taken at the time of making an application to set aside award under Section 34 of the Act. An observation was also made that respondents were at liberty to take recourse to such other remedies as are permissible including filing of an application under Section 14 of the Act before the Principal Civil Court of original jurisdiction and thereafter respondents filed an application under Section 14 of the Act before the District Judge, Patna which is also Principal Civil Court of original jurisdiction under the Arbitration Act giving rise to Misc. (Arbitration) Case No.31 of 2019 in which, the case was posted on 01.05.2019, however, two petitions were filed on 27.3.2019, one to recall of next hearing date fixed on 1.5.2019 and same was allowed and another petition was filed



under Section 9 of the Act seeking issuance of an order of temporary injunction restraining the sole arbitrator from proceeding with the Arbitration Case No. 2 of 2016 till final adjudication of the petition filed under Section 14 of the Act and even without issuing notice to the appellants, arbitral proceeding before the sole arbitrator was stayed by the impugned order till final disposal of petition filed under Section 14 of the Act and thereafter notices were issued to the present appellants on the petition filed under Section 14 of the Act which has been impugned in this appeal.

7. Appellants have raised two points for its determination in this appeal:-

(I) Application under section 14 of the Act for termination of mandate of Arbitrator was not maintainable during pendency of arbitral proceeding.

(II) Application under section 9 of the Act filed for restraining arbitral proceeding was not maintainable and even if maintainable, impugned order is fit to be quashed as same was passed without any notice to appellant after pre-poning the date of hearing

8. It is submitted on behalf of counsel for the appellant that the application filed on 27.3.2019 under Section 9



of the Act was not maintainable in view of sub-Section (3) of Section 9 of the Act and exercise of power under Section 9 of the Act was wholly without jurisdiction. It has further been submitted that order under Section 9 of the Act has been passed without giving any opportunity or notice to the appellant and as such there has been flagrant violation of principal of natural justice. The application under Section 14 of the Act itself was not maintainable for removal of arbitrator on ground of loss of faith in the Arbitrator.

9. It was contended on behalf of appellant that once Arbitrator has been appointed by consent of the parties the mandate of arbitration can be challenged before the Arbitrator himself as per procedure provided under Section 13 of the Act and if that fails, same can be challenged under Section 34 of the Act after preparation of Award as stipulated under section 13(5) of the Act. Observation made by the sole Arbitrator during pendency of arbitral proceeding does not constitute a ground for termination of mandate of the arbitrator by the court nor it constitute *de jure* or *de facto* inability to perform the functions of an Arbitrator. The legislature has consciously prescribed the aforesaid procedure to minimize interference by the courts during arbitral proceeding at intermediate stages so that arbitral



proceedings are concluded expeditiously. Section 5 of the Act prohibits judicial authorities/civil courts from intervening in the arbitration matter.

10. The respondents have appeared and have submitted that the petition under Section 14 of the Act was maintainable before the District Judge being the Principal Civil Court of original jurisdiction and respondents having lost faith in the impartiality, fairness and neutrality of the Arbitrator as such, application under Section 14 is maintainable. Although respondents have challenged the continuance of Arbitrator under Section 13 of the Act on the grounds as stipulated under Section 12(3) of the Act, they are not precluded to file an application under Section 14 of the Act to terminate the mandate of Arbitrator on the ground of lack of independence, impartiality and neutrality shown by his conduct during arbitration proceeding as a result of which respondents have lost faith and trust in sole Arbitrator.

11. Section 14 of the Act reads as follows:-

“14. Failure or impossibility to act.- (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-

(a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) He withdraws from his office or the parties



agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12."

12. Learned counsel for the respondents have relied upon a judgment of the Gauhati High Court rendered in **State of Arunachal Pradesh Vs. Subhash Projects and Marketing Ltd.** since reported in **2006(4) GLT 165**, relevant para whereof reads as follows:-

"While there is a conceivable logic to permit continuance of the arbitral proceedings following an unsuccessful challenge to the arbitrator, there is no apparent rationale to exclude the invocation of any other provision of the Act for redress to a party in default in a fact situation justifying the same. In other words/if circumstances envisaged in Section 12(3) of the Act exist, a party failing to raise the challenge based thereon under Section 13(2), in our considered opinion, cannot be debarred from availing a remedy otherwise available to him under the Act. To put it differently, failure of such a party to file an application under Section 13(2) on the grounds under Section 12(3) of the Act would not act as an estoppel against him. We are fortified in our view by the fact that the grounds specified in Section 34 only on which an arbitral award is assailable do not contemplate possible bias or partiality of the arbitrator as a ground of impeachment of the award. To shut out such a party in the above premise from resorting to any other legally permissible remedy would connote that the malaise of bias would not only remain unresolved during the arbitration process but also remain unimpugned at the post



award stage as well.”

13. Learned counsel for the respondents have further relied upon a judgment of the Delhi High Court rendered in the case of **Alcove Industries Ltd. Vs. Oriental Structural Engineers Ltd.** since reported in **ILR (2008)1 Del 1113**, relevant para whereof reads as follows:-

“Applying the aforesaid guidelines in the present case, I am of the view that there is no inconsistency between the remedies available to a party under Sections 12 and 13 on the one hand and Section 14 on the other and the invocation of one remedy by a party does not restrict that party from invoking the other remedy as well. In fact these remedies appear to be constitute a single scheme, wherein the aggrieved party would first be expected to challenge the arbitrator under Sections 12 and 13, and if that fails, and the party is still aggrieved, and can make out a case of de jure or de facto inability of the Arbitrator to act, to move the Court under Section 14.”

14. Learned counsel for the respondents have also relied upon the judgment/order passed by Delhi High Court in the case of **Delhi Chemical & Pharmaceuticals Works Vs. Hingiri Realtors Pvt. Ltd** since reported in **181 (2011) DLT 504** and **Doshion Private Limited Vs. Hindustan Zinc Ltd** since reported in **AIR 2019 Raj 54**.

15. Having heard learned counsel for the parties, this Court is of the view that either of the parties, who have consented for appointment of Arbitrator can challenge such appointment on the grounds of having justifiable doubts about



independence and impartiality of the Arbitrator as envisaged under Section 12(3) of the Act and procedure for such challenge is prescribed under section 13 of the Act which confers exclusive jurisdiction on the Arbitrator to decide on the challenge pertaining to grounds under section 12(3) of the Act. However, having failed, the aggrieved party can challenge the same under Section 34 of the Act while assailing the Award and same grounds are not available to the aggrieved party to file petition under Section 14 of the Act to terminate the mandate of the Arbitrator and remedy under Section 14 of the Act is not available for eventualities as contemplated under Section 12 of the Act.

16. The instances rendering an Arbitrator *de jure* or *de facto* and his inability as contemplated under Section 14 of the Act would cover instances other than his inability occasioned due to reasons enumerated in Sections 12 and 13 of the Act. The termination of the mandate of the Arbitrator upon the occurrence of any of the contingencies as enumerated under Section 14(1) of the Act is automatic by force of law. A petition under Section 14(2) of the Act to determine whether the mandate of Arbitrator stands terminated on the occurrence of one or more of the contingencies contained in clause (a) of



Section 14 of the Act is maintainable. In such proceeding, the court is to declare whether the termination of the mandate of Arbitrator *ipso jure* has taken place or not. It is declaratory and summary in nature for which no evidence or lengthy proceeding is required. The *de jure* impossibility under clause(a) of sub Section 1 of Section 14 is the impossibility which occurs due to factor personal to arbitrator and *de facto* occurs due to factors beyond the control of arbitrator. The judicial intervention is provided under Sub-section (2) only if a controversy remains concerning with respect to any of the grounds referred to in clause(a) of sub section (1) of Section 14 of the Act.

17. The Apex Court in case of **HRD Corporation (Marcus Oil and Chemical Division) Vs. GAIL (India) Limited (Formerly Gas Authority of India Limited)** since reported in **(2018) 12 SCC 471** has held in paragraph no.12 which is reproduced hereinbelow:-

“ 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."

18. For the reasons as stated above, the order dated 27.03.2019 passed in Miscellaneous (Arbitration) Case No. 31 of 2019 passed by learned District Judge cum Principal Civil Court of Original Jurisdiction, Patna, is not sustainable in the eye of law, as the same has been passed in violation of principles of natural justice, accordingly, same is quashed and



learned court below is directed to pass fresh order on petition filed on behalf of respondents under Section 9 of the Act after hearing and giving reasonable opportunity to both the parties.

19. The petition filed under Section 14 of the Act giving rise to Arbitration Case No. 31 of 2019 is maintainable and learned court below is directed to decide the Arbitration Case No. 31 of 2019, within three months from the date of receipt/production of a copy of the order passed by this Court in light of judgment and order of the Hon'ble Apex Court as referred above.

The miscellaneous appeal is disposed of.

(S. Kumar, J)

Sanjay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	15.03.2020
Transmission Date	NA

