

ORDER SHEET

IA No.GA 1 of 2020
(Old GA No.1235 of 2020)

In
AP 155 of 2020

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL Jurisdiction
ORIGINAL SIDE

SURENDRA INFRASTRUCTURE Pvt. Ltd.

Versus

CHIEF ENGINEER, KOLKATA ZONE, MILITARY ENGINEERING SERVICES

BEFORE:

The Hon'ble JUSTICE SHIVAKANT PRASAD

Date : 25th September, 2020.

Appearance:

Mr. Sankarsan Sarkar, Adv.

Mr. Ratul Das, Adv.

Mr. Pran Gopal Das, Adv.

Mr. Rabi Prasad Mukherjee, Adv.

The Court : This is an application under Section 11 of the Arbitration & Conciliation Act, 1996, whereby and where under, the the petitioner has prayed for appointment of sole Arbitrator pursuant to an arbitration agreement contained in the contract executed on August 30, 2014 by and between the petitioner and the respondent.

The brief facts of the case is that the petitioner is a company engaged in the business of carrying out civil engineering, electrical, structural and architectural work.

The respondent Military Engineering Services and the largest Defence infrastructure Development Agencies in India responsible for engineering and construction related activities which floated a tender for completion of incomplete work for provision of deficient OTM/Accommodation no.1 at Kolkata on July 4, 2014. The said tender was awarded to the petitioner being the successful bidder in the e-tender and the same was accepted by the respondent for value at Rs.41,98,40,819.97p. and a formal agreement dated 30th August, 2014 was executed by and between the petitioner and respondent by a letter dated September 25, 2014 to complete the work under the said agreement dated August 30, 2014. The project could not be completed within the stipulated time because the respondent had various deviations from the drawings provided by them. The petitioner submitted a final bill relating to work completed by the petitioner in respect of such project.

The disputes and differences arose between the parties which are referable to nominated sole Arbitrator in terms of Clause 70 of the General Conditions of Contract contained in IAFW-2249 being an integral part of the agreement dated August 30, 2014 and suggested to the petitioner to sign the mutual agreement for waiver under the said provision but the petitioner has time and again refused by several letters to submit before the jurisdiction of the sole name Arbitrator who is in the service of the respondent.

In the meantime, the petitioner has received a letter dated August 7, 2020 from the respondent disputing the final bill submitted by the petitioner where under the petitioner has been requested to reconcile the disputed part of the final bill so submitted by the petitioner and to withdraw the same at the earliest.

Hence, this application under Section 11 of the Act of 1996 for appointment of a sole Arbitrator for adjudication of the disputes between the parties.

It would appear from the letter dated 19th March, 2020 addressed to the petitioner by the Chief Engineer, IDSE that the names of the Arbitrator for appointment presently placed on the panel of the Arbitrators have been initiated and sought for consent for appointment of Arbitrator to adjudicate the disputes against the subject work.

By another letter dated 15th July, 2020 the Chief Engineer, Lieutenant Col. SSW has informed the petitioner that appointing authority has already suggested two names of Shri S.S. Bansal, ADG (Arbitrator) SPA Pune and Shri Sanjeev Gahlot, CE, SPA Lucknow and their names have been suggested to the petitioner to render the petitioner's consent for appointment of the Arbitrator to adjudicate the disputes against the subject work and, accordingly, requested the petitioner to render mutual agreement for waiver of the applicability of Section 12(5) of the Arbitration &

Conciliation Act, 1996 as amended by Arbitration & Conciliation (Amendment) Act, 2015.

Mr. Sarkar, learned advocate appearing for the petitioner submits that the petitioner has replied to the said communication on 15th July, 2020 contending that the provision for appointment of serving officer as sole Arbitrator as encapsulated under Condition 70 has become incongruous in view the provision of Section 12(5) Of the Arbitration & Conciliation (Amendment) Act, 2015 which amended Act puts emphasis for independent and impartiality of Arbitrator as defined under 5th Schedule., accordingly, the petitioner has not conceded to the said request of the respondent.

To buttress his contention, Mr. Sarkar placed reliance on latest decision in case of **Bharat Broadband Network Limited - versus- United Telecoms Limited reported in (2019) 5 Supreme Court Cases 755** by adverting to the observation made in paragraph 12 of the decision to argue that if the Arbitrator falls in any of the categories specified in the Seventh Schedule, he becomes ineligible to act as an Arbitrator. Once he becomes ineligible, it is clear that under Section 14(1)(a), he then becomes de jure unable to function inasmuch as in law he is regarded as ineligible. This is what, in substance, is the observation of the Hon'ble Supreme Court. It would be apt to reproduce the observation of the Hon'ble Supreme Court made in paragraph 12 of the cited decision thus:

“12. *In HRD Corporation v. GAIL (India) Ltd.*, (2018) 12 SCC 471, this Court, after setting out the amendments made in [Section 12](#) and the Fifth, Sixth, and Seventh Schedules to the Act, held as follows:

“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.”

“14. The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers situations which are “more serious” and “serious”, the “more serious” objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator’s impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure. These Guidelines were first introduced in the year 2004 and have thereafter been amended, after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set out.”

17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule.”

Reference is also made to a decision in **Perkins Eastman Architects DPC V. HSCC (India) Ltd.** reported in **2019 SCC Online Sc 1517** to contend that independence and impartiality of the arbitrator are the hallmark of an arbitration proceeding as the rule against bias is one of the fundamental principles of natural justice. My attention is invited to observation in paragraph 24 of the cited decision which reads thus—

In Voestalpine³, this Court dealt with independence and impartiality of the arbitrator as under:

“24. 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*¹⁵ in the following words: (WLR p. 1889, para

45) “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.” ¹⁵ (2011) 1 WLR 1872; 2011 UKSC 40 Arbitration Application No.32 of 2019 [*Perkins Eastman Architects DPC & Anr. v. HSCC \(India\) Ltd.*](#)

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury, 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.”

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

.....

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today.”

Mr. Sarkar further relies on the case of **TRF Ltd. Vs. Energo Engineering Projects Limited reported in (2017) 8 SCC 377** to submit that under Section 11 of the Act, read with Fifth and Seventh Schedule (post Amendment Act, 2015), any appointing authority who is disqualified by virtue of the 2015 Amendment to act as an arbitrator, is also ineligible to nominate an arbitrator.

Having gone through the above cited judgments and upon considering submission made on behalf of the petitioner, I am in full agreement that an independent and impartial arbitrator needs to be appointed by this Court to obviate any possibility of biasness on the part of the arbitrator . Mr. Mukherjee, learned advocate appearing for the Respondent does not dispute such

propositions and submits that the Court may appoint an arbitrator as this Hon'ble Court deems fit.

In the context above, Hon'ble Justice Jyotirmoy Bhattacharya, Former Chief Justice of this Hon'ble High Court is appointed as the sole arbitrator to adjudicate the disputes and differences between the parties as per the arbitration clause who shall be entitled to fix his fees in accordance with law and to engage stenographer and clerk to the arbitration proceeding. The fees of the learned arbitrator and the stenographer and clerk shall be borne by the parties in equal share.

Accordingly, the application being AP No. 155 of 2020 is disposed of.

(SHIVAKANT PRASAD, J.)