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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 25th September, 2020

+ OMP (T) (COMM) 65/2019 & I.As. 11043/2019, 17504/2019,
6783/2020

HIMACHAL PRADESH POWER
CORPORATION LIMITED

..... Petitioner

Through: Mr.Anand Prakash, Dr.Lalit Sharma
Ms.Varsha Arya, Advocates

versus

HINDUSTAN CONSTRUCTION
COMPANY LIMITED

..... Respondent

Through: Mr.Dayan Krishnan, Senior Advocate
with Mr.Jayant Mehta, Mr.Rishi
Agrawala, Ms.Shruti Arora, Mr.S.
Sethi, Ms.Niharika Kaul, Mr.Srikar,
Advocates

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

1. The petitioner is seeking removal/termination of the mandate of the Presiding Arbitrator under Sections 14 and 15 of the Arbitration and Conciliation Act.
2. The petitioner and the respondent entered into an agreement dated 03rd March, 2009 relating to Kashang Hydroelectric Project in Kinnaur District of Himachal Pradesh (hereinafter referred to as 'Kashang Project') which contains an arbitration clause.

3. Disputes arose between the parties with respect to the respondent's claim for extension of time for delays/disruptions in the project and additional costs/losses for the period 01st July, 2014 to 31st March, 2016 whereupon both the parties appointed one Arbitrator each in terms of arbitration agreement. On 04th March, 2019, the two Arbitrators unanimously appointed the former Chief Justice of Andhra Pradesh High Court as the Presiding Arbitrator.

4. The Presiding Arbitrator gave the declaration in terms of the Sixth Schedule read with Section 12 (1) of the Arbitration and Conciliation Act and the first sitting of the Arbitral Tribunal was held on 05th April, 2019 when the procedure for the arbitral proceedings was finalized; directions were issued to the parties to complete their pleadings and the arbitration proceedings were fixed on 19th July, 2019. The parties have completed the pleadings in terms of the order dated 05th April, 2019.

5. Vide email dated 18th July, 2019, the petitioner requested the Presiding Arbitrator to recuse from the arbitration proceedings on the ground that the Presiding Arbitrator recused himself in another arbitration proceedings between the parties relating to Sainj Hydroelectric Project in Kullu District of Himachal Pradesh (hereinafter referred to as 'Sainj Project') arising out of a separate contract dated 02nd August, 2010.

6. Vide order dated 19th July, 2019, the Presiding Arbitrator rejected the petitioner's request for recusal on the ground that there is no bar under the Arbitration and Conciliation Act for him to continue in the matter. Relevant portion of the order dated 19th July, 2019 is reproduced hereunder:-

"1. On 18.07.2019, an email was received by the Presiding Arbitrator from the Respondent, copy of which was also

marked to the two co-Arbitrators as well as to the Claimant stating that the Presiding Arbitrator vide his email dated 15.07.2019 has already recused himself as Presiding Arbitrator in another matter, namely, "Third Arbitration between M/s. HCC Limited and HPPCL" relating to the Contract Agreement with respect to Sainj Hydro Electric Project located in Kullu District, therefore, the parties being same the Management of HPPCL has concluded that a request be made to the Presiding Arbitrator to withdraw himself from the present proceedings.

2. The Tribunal has asked Ld. Counsel for the Respondent to point out any provision under the Arbitration and Conciliation Act, 1996 under which the Presiding Arbitrator is debarred from continuing to act as the Presiding Arbitrator . He has not been able to point out any provision but states that decision has been taken by the Management of the Respondent in view of the Presiding Arbitrator having recused in another arbitration matter between the parties.
3. Since there is no provision under the Act, there is no bar in the Presiding Arbitrator continuing in this Tribunal. However, in order to keep the record straight, the Presiding Arbitrator by separate order will communicate the circumstances of recusing himself in another matter."
(Emphasis Supplied)

7. On 19th July, 2019, the Presiding Arbitrator passed a separate order relating to the circumstances for recusing in the arbitration proceedings relating to Sainj Project. The learned Presiding Arbitrator recorded that his younger brother had appeared as a senior counsel on behalf of the respondent before Himachal Pradesh High Court in proceedings under Section 9 of the Arbitration and Conciliation Act. Although there was no bar

in the continuation of the Presiding Arbitrator but as a matter of propriety, the Presiding Arbitrator sought the consent of the parties before proceeding further and upon the petitioner raising an objection, the Presiding Arbitrator voluntarily recused from the arbitration proceedings. Learned Presiding Arbitrator further observed that these proceedings are separate arbitration proceedings arising under a separate contract and there are no circumstances as were there in the previous case. The learned Presiding Officer further observed that no provision under the Arbitration and Conciliation Act prohibits the Presiding Arbitrator from continuing as part of the Arbitral Tribunal.

8. Learned counsel for the petitioner urged at the time of the hearing that the Presiding Arbitrator is *de jure* ineligible under Section 14 (1) (a) of the Arbitration and Conciliation Act. It was further submitted that the Presiding Arbitrator is ineligible to act as a Presiding Arbitrator on the ground that his younger brother and nephew have significant financial interest in the respondent. Reliance is placed on Category 10 of Seventh Schedule read with Section 12 (5) of the Arbitration and Conciliation Act. It was further submitted that the brother and nephew of the Presiding Arbitrator are close family members of the Presiding Arbitrator and the petitioner had justifiable grounds to doubt the impartiality and independence of the Presiding Arbitrator.

9. Learned counsel for the petitioner further submitted that the Presiding Arbitrator vide order dated 28th June, 2019 in the arbitration proceedings between the parties relating to Sainj Project intimated the parties that his younger brother along with his son had appeared before Himachal Pradesh High Court in proceedings under Section 9 of the Arbitration and

Conciliation Act whereupon the petitioner objected to the continuation of the Presiding Arbitrator on the ground that it gave justifiable doubt to his continuing as Presiding Arbitrator. Vide email dated 15th July, 2019, the learned Arbitrator recused himself from the arbitration proceedings relating to Sainj Project. It is submitted that the learned Arbitrator recused himself in another arbitration proceedings relating to Sainj Project after satisfying that the circumstances gave justifiable doubt to his continuation as Presiding Arbitrator. It was further submitted that if there was no bar under the Arbitration and Conciliation Act, the learned Presiding Arbitrator would not have recused himself in the arbitration proceedings relating to Sainj Project. Reliance is placed on *West Haryana Highways Projects Pvt. Ltd. v. National Highways Authority of India*, 2017 (164) DRJ 489, *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755, *Dream Valley Farms Pvt. Ltd. v. Religare Finvest Ltd.*, MANU/DE/2898/2016 and *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd.*, (2017) 4 SCC 665.

10. Learned senior counsel for the respondents urged at the time of the hearing that no provision of Arbitration and Conciliation Act bars the Presiding Arbitrator from continuing in the arbitration proceedings. It was further submitted that these arbitration proceedings relate to Kashang Project which has no connection with the other arbitration proceedings relating to Sainj Project at Kullu. It was further submitted that the Presiding Arbitrator recused himself in arbitration proceedings relating to Sainj Project because his brother had appeared for the claimant in proceedings under Section 9 of the Arbitration and Conciliation Act before Himachal Pradesh High Court. Reliance is placed on *Indore Development Authority v. Manoharlal*, 2019

SCC OnLine SC 1392, *Manish S. Pardasani v. Inspector State Excise*, (2019) 2 SCC 660, *Subrata Roy Sahara v. Union of India*, (2014) 8 SCC 470, *Jiwan Kumar Lohia v. Durga Dutt Lohia*, (1992) 1 SCC 56, *International Airports Authority of India v. K. D. Bali*, (1988) 2 SCC 360, *Progressive Career Academy Pvt. Ltd. v. FIITJEE Ltd.*, ILR (2011) IV DELHI 286.

Findings

11. Section 12 (5) of the Arbitration and Conciliation Act provides that any person whose relationship with the parties/counsel or subject matter of the dispute falls in any of the 19 categories of the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. Section 12 (5) of the Arbitration and Conciliation Act is reproduced hereunder:

*“**Section 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:*

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

12. Category 10 of the Seventh Schedule read with Section 12 (5) of the Arbitration and Conciliation Act provides that an Arbitrator shall be ineligible if his *close family member* has significant financial interest in one of the parties or an affiliate of one of the parties. Category 10 of Seventh Schedule is reproduced hereunder:

“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.”

13. Explanation 1 of the Seventh Schedule defines the term “*close family members*” as a spouse/sibling/child/parent or life partner. Explanation 1 of the Seventh Schedule is reproduced hereunder:

“Explanation 1 - *The term “close family member” refers to a spouse, sibling, child, parent or life partner.”*

14. According to the petitioner, the younger brother of the Presiding Arbitrator is a “*close family member*” of the Presiding Arbitrator whereas according to the respondent, the younger brother of the Presiding Arbitrator is not a close family member as defined in Explanation - I of the Seventh Schedule of the Arbitration and Conciliation Act.

15. The stand of the petitioner in para VII at page 37 of this petition is that there is no bar to the Presiding Officer from continuing to act as Presiding Arbitrator but he should recuse because he had recused in the earlier arbitration proceedings relating to Sainj Project. Relevant portion of para VII at page 37 of the petition is reproduced hereunder:

“.....It may be observed that under the provisions of the Act, there is no bar in such like situation which might debar the Presiding Arbitrator from continuing to act as the Presiding Arbitrator but as a matter of propriety since after constitution of the Tribunal the Claimant had instructed the brother of the Presiding Arbitrator, therefore, the Presiding Arbitrator thought it fit to seek consent of the parties. Resultantly, the Management of the Respondent on 15th July, 2019 communicated to the Presiding Arbitrator that there exist circumstances which might give rise to justifiable doubts for continuation of the Presiding Arbitrator. In these circumstances, the Presiding Arbitrator thought it fit that it will not be appropriate for him to continue as the Presiding Arbitrator and recused himself.”

16. The petitioner’s brother who appeared as a Senior Advocate on behalf

of the respondent before the Himachal Pradesh High Court in a separate unconnected matter is not “*close family member*” as defined in Category 10 of the Seventh Schedule and therefore, the learned Presiding Officer is not ineligible to act as an Presiding Officer under Section 12 (5) of the Arbitration and Conciliation Act.

17. The present case does not fall in any of the 19 categories mentioned in Seventh Schedule of the Arbitration and Conciliation Act and therefore, Section 12 (5) of the Arbitration and Conciliation Act does not bar his eligibility to act as Presiding Arbitrator.

18. This Court is of the view that the voluntary recusal of the Presiding Arbitrator in another arbitration proceeding is not a ground for terminating the mandate of a Presiding Arbitrator under the Arbitration and Conciliation Act.

19. The judgments cited by learned counsel for both the parties do not deal with any of the two issues involved in this petition namely (i) Whether the brother of an Arbitrator is a “*close family member*” as defined in Category 10 read with Explanation 1 of the Seventh Schedule and Section 12 (5) of the Arbitration and Conciliation Act; and (ii) Whether the voluntary recusal of the Arbitrator in another proceedings is a sufficient ground to seek recusal in the present arbitration proceedings between the parties.

Conclusion

20. The petition is dismissed. I.A. 11043/2019 seeking stay of the arbitration proceedings is also dismissed.

21. The Arbitral Tribunal which has kept the arbitration proceedings in abeyance due to the pendency of this petition, shall commence the

arbitration proceedings forthwith and shall complete the same within a period of 12 months from today. I.A. 6783/2020 is disposed of in the above terms.

22. I.A. 17504/2019 seeking condonation of delay in filing the written submissions by respondent is allowed.

SEPTEMBER 25, 2020
ds/ak

J.R. MIDHA, J.



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