

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBP No.19 of 2022

Abhay Trading Pvt. Ltd., Mumbai ***Petitioner***

Mr. Prasanjeet Mohapatra and Mr. Adhiraj Mohanty, Advocates

-versus-

National Aluminium Company Ltd., ***Opposite Party***
NALCO, Bhubaneswar

Mr. A. Gupta, Advocate

**CORAM:
THE CHIEF JUSTICE**

Order No.

ORDER
30.09.2022

04. 1. The challenge in the present petition is to continuance of the Arbitrator presently seized of adjudicating the dispute between the parties in view of declaration made by such Arbitrator on 9th September, 2021 that his younger brother was at that point in time employed in the Opposite Party as an Executive Director-(ED) (Project and Technical).
2. Admittedly, the Petitioner participated in the proceedings thereafter and as it transpired, the said ED superannuated on 30th April, 2022. During the hearing before the learned Arbitrator on 31st March 2022, an objection was raised to his continuation as an Arbitrator in view of the above declaration.
3. The Arbitrator noted in the minutes of the order passed on that date that neither of the parties had raised an objection regarding his appointment and further that his brother was due to retire from service of NALCO in April, 2022.

4. Learned counsel for the Petitioner contends that in terms of proviso to Section 12 (5) of Arbitration and Conciliation Act, 1996 (Act), there could not be a waiver of the applicability of Section 12 (5) of the Act unless it was by an express agreement in writing. According to him, inasmuch as there is no express writing as to the waiver, the prohibitive Clause-9 in the Seventh Schedule to the Act would stand attracted and the Arbitrator would be rendered *de jure* unable to act in terms of Section 14(1)(a) of the Act.

5. Learned counsel for the Opposite Parties, on the other hand, submits that Clause-9 of the Seventh Schedule would not stand attracted at all not only because the younger brother of the Arbitrator has ceased to be an ED in NALCO on 30th April 2022, but also because such person cannot be said to be “in the management and controlling the company” since he is one among several EDs, which would include the ED (Law), ED (Finance), ED (Materials) etc.

6. The Court notes that the arbitration is at a stage where pleadings are complete but no substantive hearings have taken place. Secondly, the Arbitrator did make a disclosure as required under the Act on 9th September, 2021. With the younger brother of the Arbitrator ceasing to be an ED of NALCO since 30th April 2022, there can be no apprehension that this would affect the impartiality of the Arbitrator in the substantive arbitral proceedings that are yet to commence. Further, Clause-9 of the Seventh Schedule requires the Arbitrator to have a close family relationship, in the case of companies, with “the persons in the management and controlling the company”. Therefore, there is a two-fold requirement: not only

has the person to be in management but such person should also be “controlling the company.” Even if, for a moment, it is considered that an ED (Project and Technical) of NALCO would be in the management of NALCO, that by itself cannot mean that such ED is ‘controlling’ NALCO. He would be one among several EDs who are all employees of NALCO. Therefore, there is merit in the contention that Clause-9 of the Seventh Schedule to the Act would not stand attracted in the facts of the present case.

7. Learned counsel for the Petitioner then relies on the decision of the Supreme Court of India in *Ellora Paper Mills Limited v. State of Madhya Pradesh*, (2022) 3 SCC 1.

8. On the facts of that case, it is seen that the entire Stationery Purchase Committee-Arbitral Tribunal consisted of officers of the Respondent. Further, it was not a case arising under Clause-9 of the Seventh Schedule. Consequently, the Court is of the view that the said decision is not of assistance to the Petitioner.

9. For the aforementioned reasons, the Court is not inclined to grant the relief as prayed for. The petition is dismissed.

(Dr. S. Muralidhar)
Chief Justice

M. Panda