

224

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**ARB No.257 of 2017 (O&M)
Date of Decision: 29.10.2022**

M/S V.K. KAPOOR & CO

.....Petitioner

Vs

BHARAT SANCHAR NIGAM LTD AND ANOTHER

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Ms. Ritam Aggarwal, Advocate
for the petitioner.

Mr. Anil Rathee, Advocate
for respondent No.1.

RAJ MOHAN SINGH, J.(Oral)

[1]. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act') for appointment of an independent/change of Arbitrator

[2]. A tender was floated by respondent No.1 and the petitioner applied for the same. Subsequent to the acceptance of the said tender, an agreement was entered into between the parties on 05.03.2004. Estimated cost of the total work to be carried out by the petitioner was Rs.68,50,000/-. The entire work

was to be executed from 05.03.2004 to 04.03.2005 i.e. within a period of one year. The petitioner deposited an amount of Rs.1,71,250/- as security and thereafter proceeded to carry out the work assignment.

[3]. The petitioner started work in accordance with the work order and also received some part payment, but surprisingly, the respondent No.1 without assigning any reason and without issuing any notice rescinded the contract agreement and stopped issuing further orders to the petitioner. The dispute arose between the parties and the petitioner claimed the amount which was due on account of part of the work done. An Arbitrator was appointed to settle the dispute, who passed an award on 01.09.2008, dismissing the claim of the petitioner.

[4]. Feeling aggrieved against the award dated 01.09.2008, the petitioner filed objections under Section 34 of the Arbitration and Conciliation Act, 1996. The objections were dismissed by the District Judge, Rohtak vide order dated 18.11.2011. Against the said order, petitioner filed FAO No.4243 of 2012. The said appeal was allowed vide order dated 08.12.2015 and the matter was remitted back to the objecting Court to decide the objections afresh by examining record of the arbitration proceedings in accordance with law and decide the same preferably within a time bound manner.

[5]. On remand, the District Judge, Rohtak vide order dated 05.05.2016 set aside the award and the case was remanded back to the Arbitrator for deciding the case afresh in the light of observations made by the High Court as well by the District Judge under issue No.1. The Arbitrator was directed to pass well reasoned and speaking order within a specified period.

[6]. Thereafter, the respondent No.1 appointed the same Arbitrator, who had recorded the proceedings earlier. The sole Arbitrator invited the petitioner to submit its claim. The petitioner filed its statement of claim along with issues. The respondent instead of filing reply to the statement of claim of the petitioner, filed an application for striking off the claim petition. Owing to the nature of the proceedings conducted the sole Arbitrator, the petitioner raised justifiable doubts regarding independence and impartiality of the Arbitrator and moved an application under Section 12 of the Act on the ground that the Arbitrator, who was conducting the proceedings was the employee of the respondent-BSNL and was working as DGM (Vig.) Punjab. He was the same person, who had earlier unilaterally dismissed the claim petition on frivolous grounds. Reply to the application filed by the respondent was also filed by the petitioner. The sole Arbitrator allowed the application filed by the respondent No.1 and rejected the statement of claim filed by the petitioner in a

very perfunctory manner vide order dated 23.03.2017.

[7]. Aggrieved of the order dated 23.03.2017 passed by the Sole Arbitrator, the petitioner preferred CR No.3847 of 2017 in the High Court. On 26.05.2017, this Court was pleased to issue notice of motion with interim relief of staying further proceedings before the Arbitrator. The aforesaid revision petition was ultimately got dismissed as withdrawn on 09.01.2019 with liberty to avail any other remedy in accordance with law. The present petition was pending at that time when the aforesaid revision petition was ordered to be dismissed with liberty to the petitioner to avail any other remedy in accordance with law.

[8]. Learned counsel for the respondent No.1 submitted that the High Court vide order dated 08.12.2015 passed in FAO No.4243 of 2012 had observed that on perusal of the record of the arbitration proceedings, it was found that measurement of the extent of work had been done by the Department and this fact was not noticed by the Arbitrator, much less by the objecting Court. In essence, the duty of the objecting Court was to see validity that the award of the Arbitrator was within the procedure prescribed for the arbitration or not. The objections filed by the petitioner were found to be within the parameters of the provisions of Section 34 of the Act and thereafter the case was remanded back to the objecting Court.

[9]. The dispute between the parties is in respect of extent of work done. The tentative value of the claim made by the petitioner is of Rs.21,95,134/-. The observation made by the High Court in FAO No.4243 of 2012 is also in respect of measurement of the extent of work done by the Department. The actual measurement done by the Department and objected to by the petitioner would give rise to arbitral issue for which the sole Arbitrator would give his attention.

[10]. The objections of the respondent No.1 as regards the finality of order dated 23.03.2017 passed by the Arbitrator, rejecting the claim has been specifically pleaded by the petitioner in the present petition and this Court can take judicial notice of the fact that the said order came to be passed without considering the application filed by the petitioner under Section 12 of the Act in respect of justifiable doubts shown *qua* independence and impartiality of the Arbitrator.

[11]. In my considered opinion, the facts and circumstances of the case show that a *bona fide* dispute exists between the parties. After the amendment of 2015, the departmental person cannot be appointed as Arbitrator. Reference can be made to **TRF Limited vs. Energo Engineering Projects Limited, (2017) 8 SCC 377; Bharat Broadband Network Limited vs. United Telecoms Limited, (2019) 5 SCC 755; Perkins**

Eastman Architects DPC and another vs. HSCC (India) Limited, (2020) 20 SCC 760 and **Ellora Paper Mills Limited vs. State of Madhya Pradesh, (2022) 3 SCC 1**. Para No.54 of **TRF Limited's** case (supra) reads as under:-

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

[12]. In my considered opinion, the plea of respondent No.1 can very well be considered on merits by the Arbitrator in accordance with law. The authority of the official Arbitrator stands negated in view of ineligibility of such Arbitrator arising

out of Section 12(5) of the Amended Act, 2015. Even Managing Director is statutorily ineligible to nominate any person as an Arbitrator in view of ratio of the aforecited case laws.

[13]. Keeping in view the facts and circumstances of the case, I hereby appoint Sh. Surinder Kumar, Addl. District & Sessions Judge (Retd.) # 2256, Sector 7, Karnal, Mobile No.989677555 as the sole Arbitrator, to resolve the dispute/difference between the parties. The appointment of the Arbitrator shall be subject to the declaration to be made by him as required under Section 12 of Arbitration and Conciliation Act, 1996 in respect of his independence and impartiality to settle the dispute between the parties.

[14]. The Arbitrator would complete the proceedings within the specified time in terms of Section 29-A of the said Act. The Arbitrator shall be paid fee in accordance with the IVth Schedule of the Act as amended from time to time. The fee shall be borne by the petitioner and respondent No.1 in equal proportion.

[15]. Venue of the Arbitration shall be the place to be disclosed by the Arbitrator according to his convenience.

[16]. A copy of this order be dispatched to the Arbitrator at the following address:-

Sh. Surinder Kumar, Addl. Distt. & Sessions Judge (Retd.)

R/o # 2256, Sector 7, Karnal,

Mobile No.989677555

[17]. Petition stands disposed of accordingly.

October 29, 2022

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No