

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
Appellate Side**

Present :- Hon'ble Mr. Justice I. P. Mukerji

C.O. 66 of 2022

**M/S Amazing India Contractors Pvt. Ltd.
Vs.
The Airport Authority of India and Ors.**

For the petitioner	:- Mr. Arun Kumar Sarkar, Mr. Abhijit Sarkar, Mr. Satyam Lama, Adv.
For the respondents	:- Mr. Sudipto Kr. Mazumdar, Additional Solicitor General. Mr. Ajoy Kr. Singhania, Adv.
Judgment on	:- 28.06.2023.

I. P. Mukerji, J.:-

This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 asking the court to appoint an arbitrator to adjudicate upon the claims made therein by the petitioner.

The application is by a body corporate, Amazing India Contractors Pvt. Ltd. having its registered office at Bhagalpur in Bihar. Reliefs are sought against the Airport Authority of India, the respondent No. 1 (the respondent).

The respondent, on 11th January, 2017 entered into an agreement with the petitioner. It was for running of a restaurant on the first floor of the Terminal Building at Bagdogra Airport. On 27th March, 2017 a licence agreement was executed between the parties for a period of seven years from the date of execution till 26th March, 2024. The petitioner was to pay a licence fee of Rs.21,55,001/- per month plus service tax as applicable for the first year and gradually increasing at more or less 10% per annum till the end of the term for use of the airport space to run this business. It also had to deposit Rs.1,29,30,006/- as security money with the respondent. It

was terminable by either side by giving 180 days' notice. Under Clause 33(iii) of the special terms and conditions any dispute between the parties except those covered by the Eviction of Unauthorized Occupants Act was to be referred to a Dispute Resolution Committee (DRC). If not resolved within 45 days of reference, then the dispute would be referred to the sole arbitrator of a person to be appointed by the Chairman/member of the authority. Clause 33 (iii) is set out below:-

“33(iii). All disputes and differences arising out of or in any way touching or concerning this Agreement (except those the decision whereof is otherwise herein before expressly provided for or to which the public premises [Eviction of Unauthorized Occupants] Act and the rules framed there under which are now enforced or which may hereafter come into force are applicable), shall, in the first instance, be referred to a Dispute Resolution Committee (DRC) setup at the airports, for which a written application should be obtained from the party and the points clearly spelt out. In case the dispute is not resolved within 45 days of reference, then the case shall be referred to sole arbitration of a person to be appointed by the Chairman/Member of the Authority. The award of the arbitrator so appointed shall be final and binding on the parties. The Arbitration & Conciliation Act, 1996 shall be applicable. Once the arbitration clause has been invoked, the DRC process will cease to be operative. It will be no bar that the Arbitrator appointed as aforesaid is or has been an employee of the Authority and the appointment of the Arbitrator will not be challenged; or be open to Question in any Court of Law, on this account.”

A reference to the Dispute Resolution Committee could only be made if an application requesting for it was made by the licensee. The licensee would have to first deposit the “disputed amount” with the respondent.

Citing fall in passenger traffic, restrictions in arrival of passengers into the restaurant, fall in passenger traffic due to the Covid-19 pandemic, the petitioner by their email dated 8th April, 2020, followed by a letter dated 5th June, 2020 and an email dated 10th August, 2020 requested the respondent to altogether waive the license fee or to grant concession in

respect of it. This was refused by the respondent by their letter dated 19th August, 2020. Instead in that letter, the respondent was prepared to give some concessions to the petitioner if they cleared the outstanding rental for the airport space till March, 2020. Between 27th September, 2020 and 28th September, 2020 the petitioner sent two emails to the respondent asking them to refer the dispute to the Dispute Resolution Committee. The respondent in their reply dated 6th November, 2020 relying on Clause 33(iii)(c) of the agreement between the parties asked the petitioner to deposit the disputed amount before such reference could be made to the Committee. On 16th November, 2020 the respondent terminated the agreement and asked the petitioner to handover vacant possession of the restaurant space to them by 1st December, 2020.

On 28th November, 2020 the petitioner lodged with the respondent a claim for Rs.10,85,15,315/-, against the respondent.

According to the instruction of the respondent, the petitioner vacated the airport space by 1st December, 2020.

On 1st November, 2021 through the letter of an advocate the petitioner invoked the arbitration clause and referred the disputes mentioned in that letter to arbitration. The petitioner requested the respondent to appoint a sole arbitrator in terms of the arbitration clause within 30 days from the date of receipt of the notice. The claims mentioned in the letter are as follows:-

“Claim No. 1 :-

On account of compensation and damage suffered for 1st year in period between 27.03.2017 to 26.03.2018.

₹64,63,785.00

Claim No. 2 :-

₹1,28,76,395.00

On account of compensation and damages suffered for 2nd year w.e.f 27.03.2018 to 26.03.2019.

Claim No. 3 :-

On account of compensation/ damages suffered for 3rd year w.e.f 27.03.2019 to 24.03.2020.

₹89,46,874.00

Claim No. 4 :-

On account of compensation/ damages suffered for 4th year w.e.f 25.03.2020 to 18.11.2020.

₹89,46,874.00

Claim No. 5 :-

Refund/Release/Payment Bank guarantee and Security Deposit.

₹1,30,30,006.00

Total:- ₹10,85,15,345.00

(Ten Crore Eighty Five Lakh Fifteen Thousand Three Hundred forty five only).

(The break up of the claims are mentioned in letter dated 28.11.2020 and necessary vouchers will be submitted in due course.)

Claim No. 6 :-

Interest @ 18% p.a; from the date of final claim i.e 28.11.2020 till realisation of full amount.

Claim No. 7 :-

Cost of Arbitration

To be calculated.”

Clauses 32 and 33 of the agreement relates to constitution of the Dispute Resolution Committee and its functions. An application has to be made to the commercial department which would put up the gist of the case to the Committee. The petitioner would have to deposit the disputed amount. The petitioner would be given an opportunity to present his case before the Committee together with a written statement. The recommendations of the Committee would have to be put up to the tender acceptance authority for a decision. This decision was required to be made within 30 days of the reference. If the dispute was not resolved within 45 days, the arbitration clause could be invoked. Once the arbitration clause was invoked, the dispute resolution process would be deemed to have come to an end. If the Dispute Resolution Committee was able to arrive at a decision settling the disputes between the parties, then under Clause 33(iii)(c) that would have to be acceptable to the petitioner.

One of the grounds of defence taken by the respondent was that in terms of the agreement, when an application was made by the petitioner for reference of the dispute to the Dispute Resolution Committee, the disputed amount had to be deposited with the respondent under Clause 33(ii)(c). Since the disputed amount was not deposited, the Committee was in no position to consider the case. According to the terms of the agreement unless the dispute was first routed through the Dispute Resolution Committee, an arbitrator could not be appointed.

Learned counsel for the petitioner made submissions with regard to this defence taken by the respondent to justify not referring the matter to arbitration.

First, learned counsel for the petitioner attacked the dispute resolution clause which stipulated the disputed amount to be deposited as a condition precedent to the committee taking up the matter for consideration. He submitted that the very stipulation of depositing an amount with the respondent before resolution of the dispute was attempted was invalid.

Even before start of the arbitration an amount had to be deposited by the other contracting party with the authority. This necessarily affected the right given by the legislature for resolution of disputes through arbitration. Learned counsel cited **ICOMM Tele Ltd. Vs. Punjab State Water Supply & Sewerage Board & Anr.** reported in **(2019) 4 SCC 401**. In this case, the court ruled that the stipulation regarding pre-deposit had no connection with the genuineness of the claim as it applies to all claims. There was no provision for return of the disputed amount after conclusion of arbitration. Mr. Justice Nariman delivering the judgment of the court opined that this kind of a clause “would certainly amount to a clog on this process” (arbitration). The particular clause being severable from the rest of the contract was struck down by the court.

Next, learned counsel also relied on Section 12(5) of the said Act. It is in the following terms:-

“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.”

The 7th Schedule is set out hereunder:-

“THE SEVENTH SCHEDULE

[See Section 12(5)]

Arbitrator’s relationship with the parties or counsel

- 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
- 2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
- 3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
- 4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.*

5. *The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.*
6. *The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.*
7. *The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.*
8. *The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
9. *The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.*
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.*
11. *The arbitrator is a legal representative of an entity that is a party in the arbitration.*
12. *The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.*
13. *The arbitrator has a significant financial interest in one of the parties or the outcome of the case.*
14. *The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.*

Relationship of the arbitrator to the dispute

15. *The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.*
16. *The arbitrator has previous involvement in the case.*

Arbitrator's direct or indirect interest in the dispute

17. *The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.*
18. *A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.*
19. *The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.*

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

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.”

He contended that the arbitration clause providing for appointment of a sole arbitrator by the Chairman/member of the authority was violative of the above provision. He said that the appointee of the Chairman was bound to be a present employee or past employee of the respondent, thus being ineligible to be appointed as an arbitrator.

To this, Mr. Majumdar, learned Additional Solicitor General, appearing for the said respondent argued that the arbitration clause did not nominate any arbitrator who was ineligible under the 7th schedule. Only power had been given to the Chairman or member of the Airport Authority to nominate an arbitrator. Before such nomination was made, it was premature on the part of the petitioner to assume that such nomination would be made of a person who was ineligible under Section 12(5) read with the 7th schedule. Learned counsel for the petitioner had an answer to this. He cited **Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Ltd.** reported in **(2020) 20 SCC 760**. Here the arbitration clause was identical to the one in our case. Here the Managing Director of the company had the power to appoint an arbitrator, Mr. Justice Lalit opined that where the appointing authority named in the agreement was ineligible to be appointed as an arbitrator, he could not nominate another as an arbitrator. The decision relied on earlier decisions of the court in **Walter BAU AG, Legal Successor, of The Original Contractor, Dyckerhoff and Widmann A.G vs. Municipal Corporation of Greater Mumbai and Anr.** reported in **(2015) 3 SCC 800** and **TRF Ltd. vs. Energo Engineering Projects Ltd.** reported in **(2017) 8 SCC 377**. In the Perkin's case there was a dispute resolution clause as in ours. The Supreme Court had held in TRF Ltd. that the Managing Director

of the company was a person having a direct interest in the dispute and he being an interested party and disqualified, could not appoint an arbitrator. The situation was different where each party could appoint an arbitrator. Where in the agreement there is one sole arbitrator or appointing authority who is disqualified, he does not enjoy the power to appoint another arbitrator. Mr. Justice Lalit was of the view that if suspicion of bias could exist with regard to the impartiality of the Chairman, then that suspicion would continue to exist regarding his nominee also. That has to be taken as the essence of the intention of the legislature in the amendments brought in by (the Arbitration and Amendment) Act, 2015.

Learned counsel for the petitioner also cited **Uttarakhand Purv Sainik Kalyan Nigam Ltd. vs. Northern Coal Field Ltd.** reported in **(2020) 2 SCC 455** where the Supreme Court on consideration of the insertion of Section 11 (6A) in the said Act with effect from 23rd October, 2015 to the effect that the Supreme Court or the High Court in considering an application under Section 11 of the said Act could examine the existence of the arbitration agreement.

Learned counsel for the respondent cited **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company** reported in **(2020) 14 SCC 712**. This is a very interesting case. It was concerned with Clause 64 of the general clauses of contract of the Railways which provided for appointment of three arbitrators. Out of the panel of names of the Railways, the other party was required to suggest two names out of which the Railways were to select one to be the other party's nominee arbitrator. The other two arbitrators were to be appointed by the General Manager of the Railways. The Supreme Court after consideration of the above decisions made a distinction between this case and the others. It said that here the contractor enjoyed the power of appointing an arbitrator counter balancing the power of the Railways to appoint an arbitrator. Hence, the arbitration clause was valid and the High Court was

in error in appointing an arbitrator other than one through the machinery provided in the arbitration agreement.

In **Aravali Power Company Pvt. Ltd. vs. Era Infra Engineering Ltd.** reported in **(2017) 15 SCC 32** cited by learned counsel for the respondent, the Supreme Court ruled that the fact that the arbitrator is an employee of one of the parties was not a ground for disqualification on the ground of bias or partiality but it was a disqualification only if such person was the controlling or dealing authority.

Another decision by one of us (I.P. Mukerji, J.) also cited by him in **BCL Secure Premises (P) Ltd. vs. Metro Railway, Kolkata** reported in **2017 SCC Online Cal 9449= (2017) 5 WBLR 612** was cited on behalf of the respondents in support of the proposition that a retired officer of a government or statutory corporation did not automatically become ineligible to be appointed as an arbitrator.

In my opinion, the decision of the Supreme Court in **Aravali Power Company Pvt. Ltd. vs. Era Infra Engineering Ltd.** reported in **(2017) 15 SCC 32** and of this court in **BCL Secure Premises (P) Ltd. vs. Metro Railway, Kolkata** reported in **2017 SCC Online Cal 9449 = (2017) 5 WBLR 612** are to be taken as those which justify appointment of a retired officer of a government or statutory corporation as an arbitrator who did not have a direct or controlling authority over the transaction in question. As far as **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company** reported in **(2020) 14 SCC 712** is concerned, it is in divergence with the ratio laid down by the other recent decisions of the Supreme Court discussed above.

I do not understand the relevance of the decision **Swadesh Kr. Agarwal vs. Dinesh Kr. Agarwal and Ors.** reported in **(2022) 10 SCC 235** cited by Mr. Majumdar which only lays down the general law for invocation of Section 11 of the said Act. It inter alia says that only if there is default in appointment of an arbitrator by a party required to appoint one, could the

jurisdiction of the court under Section 11 be invoked. Alleging default this application has been taken out by the petitioner.

By insertion of Section 12(5) in the said Act with effect from 23rd October, 2015 great emphasis has been laid on the principle that anyone who in the opinion of a reasonable person is likely to be biased in favour of a party to the arbitration is made ineligible to be appointed as an arbitrator. Now if an ineligible person is appointed as an arbitrator it goes to the root of the matter. An ineligible person's appointment as arbitrator is a nullity. He has no jurisdiction to enter upon the reference. In such a case, he cannot be called upon to adjudicate upon his neutrality or impartiality because his appointment is non-est. It is for the court to decide the question. This has been emphasized by the legislature in successive amendments to sub-section 6A of Section 11 of the said Act between 2015 and 2019. The Supreme Court has gone to the extent of saying that when a person is ineligible by virtue of the seventh schedule to act as an arbitrator on the ground of bias, he could not be called upon to nominate another arbitrator. This is an extension of the principle of bias to a very high degree so as to ensure that the arbitral proceedings are freely and fairly conducted in accordance with law.

FINAL CONCLUSIONS

My conclusions are as follows:-

That part of Clause 33 of the agreement between the parties providing for constitution of a Dispute Resolution Committee with a stipulation that before availing of dispute resolution, the disputed amount has to be deposited, is invalid and contrary to law for more than one reason. The first and foremost is that it fetters the right of the petitioner, a party to the arbitration agreement to avail of arbitration which is a statutory right. **[ICOMM Tele Ltd. vs. Punjab State Water Supply and Sewerage Board and Anr.** reported in **(2019) 4 SCC 401]**. Secondly, it is most ambiguous.

If the petitioner is making a claim which is then and there disputed by the respondent, why should the petitioner, being the claimant be asked to deposit the disputed amount? When the petitioner is making a claim against the respondent, it is unable, at that point of time, to know whether the whole claim or part of it would be admitted, or the whole of it denied by the latter. Hence, it is unable to gauge the disputed amount. Even if it were possible for the respondent to notify the disputed amount immediately, the clause would only be operative if the respondent was simultaneously making a counter claim more than the petitioner's claim which was being denied by the petitioner, by seeking reference of the dispute to arbitration. If the respondent was first making the claim which was disputed by the petitioner, still the matter could not be referred to the Committee in as much as the clause suggests an application for dispute resolution by the petitioner only. For all these reasons, this clause itself is vague for uncertainty and invalid.

If you read Section 12(5) of the said Act along with its 7th schedule, the General Manager or any other employee of the respondent past or present, is disqualified from being an arbitrator on the likelihood of bias. Nevertheless, the Supreme Court in **Aravali Power Company Pvt. Ltd. vs. Era Infra Engineering Ltd.** reported in (2017) 15 SCC 32 and this court in **BCL Secure Premises (P) Ltd. vs. Metro Railway, Kolkata** reported in 2017 SCC Online Cal 9449= (2017) 5 WBLR 612 ruled that being an employee of a party did not by itself disqualify a person from becoming an arbitrator unless he was biased in favour of a party or there was an apprehension about the arbitrator's independence or impartiality.

The Supreme Court in **Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Ltd.** reported in (2020) 20 SCC 760 following **Walter Bau AG, Legal Successor, of The Original Contractor, Dyckerhoff and Widmann A.G vs. Municipal Corporation of Greater Mumbai and Anr.** reported in (2015) 3 SCC 800 and **TRF Ltd. vs. Energo Engineering**

Projects Ltd. reported in **(2017) 8 SCC 377** has taken a stricter view of bias to obviate the remote possibility of its presence in the arbitrator. It ruled that if the General Manager, being an employee of an organization is disqualified, then, if the General Manager is the appointing authority to appoint a sole arbitrator, then the likelihood of his being biased, is also transferred to his nominee or appointee. Such nominee of a disqualified person is also similarly disqualified to be arbitrator. In those circumstances, Clause 33 providing for appointment of a sole arbitrator as a General Manager is violative of Section 12(5) read with the seventh schedule and the above Supreme Court decisions.

Any arbitrator appointed by the General Manager of the respondent under this clause would be disqualified.

The arbitration clause provides for appointment of a sole arbitrator by the Chairman of the respondent. If the petitioner also had a right to nominate an arbitrator, then it could have been argued that the General Manager's power to appoint an arbitrator of his choice was counter balanced by the petitioner's similar right and the clause adjudged to be valid in terms of **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company** reported in **(2020) 14 SCC 712**.

Under Section 11 sub-section 6A of the said Act, the court exercising power under Section 11 of the said Act has the power to go into the question of validity of an arbitration agreement. Having gone into that question, I rule that the part of the arbitration clause providing for appointment of an arbitrator is non-est. Therefore, the arbitration clause between the parties does not contain any valid provision for appointment of an arbitrator. The court has to exercise the power.

In those circumstances, I dispose of this application by referring the disputes between the parties as raised in this Section 11 petition and the claim and counter claim that may be filed by the parties in terms thereof to be adjudicated by a learned arbitrator.

I appoint the Hon'ble Mr. Justice Pinaki Chandra Ghose, a former Judge of the Supreme Court of India as the sole arbitrator to decide the above disputes between the parties and make and publish his award.

This application is thus disposed of.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I. P. MUKERJI, J.)