

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

AP/598/2023

KAMLESH KUMAR SINGH

Vs

STEEL AUTHORITY OF INDIA LIMITED

For the Petitioner	:	Ms. Amrita Pandey, Adv. Mr. Ghanshyam Pandey, Adv.
For the Respondent	:	Mr. Arijit Basu, Adv. Ms. Ajeya Choudhury, Adv.
Last Heard on	:	30.08.2023 & 31.08.2023
Judgment dictated in Court on	:	31.08.2023
Signed on	:	01.09.2023

Moushumi Bhattacharya, J.

1. The present application is for termination of the Arbitrator's mandate under Section 14 of the 1996 Act.

2. The ground taken for termination is the first item of the Seventh Schedule to the 1996 Act which lays down certain criteria whereby an Arbitrator would be rendered ineligible to act as the Arbitrator in terms of independence requirement under Section 12(5) of the 1996 Act.

3. The petitioner's contention, through learned counsel, is that the Arbitrator has indeed been rendered ineligible by dint of being an employee of the respondent. Counsel further submits that the petitioner selecting the Arbitrator would not have any bearing on the Arbitrator's ineligibility since the petitioner was given the option to choose one of the three names given by the respondent to the petitioner. Counsel relies on the oft-quoted decisions of the Supreme Court with regard to unilateral appointment of Arbitrators as well as a recent decision of the Delhi High Court on the same issue.

4. Learned counsel appearing for the respondent submits that the Arbitrator does not fall foul of the neutrality test since the Seventh Schedule would not apply to the facts of the case.

5. Upon considering the submissions made on behalf of the parties and the documents placed before the Court, the first item of the Seventh Schedule provides for a situation where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

6. The Seventh Schedule explains Section 12(5) of The Arbitration and Conciliation Act, 1996 and relates to the essential criteria of neutrality and independence of Arbitrators.

7. The Arbitrator's relationship with the parties or counsel which forms the first of the three divisions in the Seventh Schedule is restricted to a specific case where the Arbitrator is an employee or has any other past or present business relationship with a party. In the present case, the learned Arbitrator admittedly retired from the service of the respondent in October, 2017. The appointment was made on and from 27th May, 2021 which is about five years from the Arbitrator's retirement.

8. On a careful consideration of the Entry No. 1 to the Seventh Schedule, it is arguable whether the entry contains two disjunctive parts.

9. Considering the contemplation of the Seventh Schedule, this Court is of the view that even if the arbitrator is caught within the bar of the Seventh Schedule by reason of his being an employee of the respondent, the next issue which is discussed in the following paragraphs would relax the prohibition.

10. The related question would thus be whether the Arbitrator's appointment would in any event come within the contours of Section 12(5) of the 1996 Act. Section 12(5) makes neutrality non-negotiable and declares that notwithstanding any such agreement between the parties, a person who has a relationship with the parties, counsel or subject matter of the dispute will

instantaneously become ineligible to be appointed as the Arbitrator. The proviso to Section 12(5) carves out an exception to what precedes it in a case where the parties subsequent to disputes having arisen between them, waives the applicability of Section 12(5) by an express agreement in writing. The proviso to Section 12(5), in essence, is an exit route from the applicability of the Seventh Schedule where parties have agreed to discount any objection to the eligibility of the Arbitrator on any of the grounds under the Seventh Schedule to the Act.

11. In the present case, the respondent invoked the arbitration clause in the agreement mentioned in the said letter and gave a choice of three Arbitrators to the petitioner. The letter mentions the designations of three Arbitrators with regard to the posts held by the three Arbitrators in the respondent. The petitioner replied by a mail on 27th May, 2021 to the respondent's invocation and selected the present Arbitrator. The name has been placed before the Court and reflects that the petitioner made a specific statement to the effect *"According to your proposal I selected Sri Alok Shrivastava, Ex-ED I/C, RMD As the Arbitrator"*.

12. The petitioner's reply to the respondent's invocation letter and specifically to the three names given shows that the petitioner took a conscious decision to appoint the Arbitrator. The petitioner's reply also includes the designation of the Arbitrator, namely, that the Arbitrator was Ex-ED I/C, RMD which means that the petitioner knew at the relevant point of time i.e., on 10th

May, 2021 and on 27th May, 2021 that the Arbitrator was very much an employee of the respondent. The petitioner's written acceptance of the Arbitrator with full knowledge of the Arbitrator's previous association with the respondent satisfies the threshold test of the proviso to Section 12(5) of the Act. The proviso, as stated above, mentions four tests; (i) that parties may subsequent to disputes having arisen, (ii) waive the applicability of Section 12(5), (iii) by express agreement, (iv) in writing. The express agreement in writing waiving the applicability of Section 12(5) including the first item of the Seventh Schedule would be clear from the petitioner's mail where the petitioner chose the present Arbitrator and agreed to appoint him in terms of the arbitration agreement. There is nothing on record to show that the petitioner was coerced or misled into making the choice or taken unawares of the arbitrator's previous association with the respondent.

13. There is thus no doubt that the petitioner has not been able to establish a case where Section 12(5) and the Seventh Schedule would be applicable and the proviso to Section 12(5) would not. Unilateral appointments will only be nullified provided they fall within the strictures of section 12(5) read with the Fifth and the Seventh Schedules and remain outside the exception in the proviso to section 12(5) of the Act. The Court must assess each situation and not use the same brush stroke for all such appointments.

14. The Delhi High Court decision in *Overnite Express Limited vs. Delhi Metro Rail Corporation* reported in 2022 SCC OnLine Del 2488 was premised on the

lack of manoeuvring space of a party where the party had to choose an Arbitrator from a panel of five District Judges. The Delhi High Court accordingly held that the petitioner being forced to choose one of the five, amounts to unilateral appointment of an Arbitrator which may lead to a presumption of partiality. The present case is different on the factual score.

15. This Court hence finds no reason to terminate the mandate of the learned Arbitrator.

16. AP/598/2023 is accordingly dismissed. There shall be no order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)