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Arb.O.P.(Com.Div.)No.201 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.06.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P.(Com.Div.)No.201 of 2023

Project Director,
Tamil Nadu Road Sector Project II,
(For and behalf of the Governor of State of Tamil Nadu)
Highways Department,
Government of Tamil Nadu

... Petitioner

Vs.

M/s.SPK and Co-KMC (JV),
No.2/67, R.C.Middle Street,
Keelamudimmanarkottai, Kamuthi (Taluk),
Ramanathapuram District 623 603.

... Respondent

Arbitration Original Petition filed under Sections 14 and 15 read with Schedule V of the Arbitration and Conciliation Act, 1996 to terminate the mandate of the Hon'ble Mr. Justice G.M.Akbar Ali and Hon'ble Ms. Justice K.B.K.Vasuki by setting aside the order passed in 2/2022 dated 03.02.2023 and to consequently appoint substitute Arbitrators to proceed further in the Arbitration and to fix the fees for the newly appointed Arbitrators.



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For petitioner : Mr.Ramanlal,
Additional Advocate General,
Assisted by Mr.A.Edwin Prabakar,
Special Government Pleader (CS)

For Respondents : Mr.Vijay Narayan, Senior counsel,
for Mr.Vaibhav R.Venkatesh

ORDER

This Arbitration Original Petition has been filed under Sections 14 and 15 read with Schedule V of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) to terminate the mandate of the Hon'ble Mr. Justice G.M.Akbar Ali and Hon'ble Ms. Justice K.B.K.Vasuki by setting aside the order passed in 2/2022 dated 03.02.2023.

2. Mr.Ramanlal, learned Additional Advocate General appearing for the petitioner would submit that this petition has been filed to terminate the Mandate of the learned Arbitrators as they have become *de jure* unable to perform their functions by virtue of the fact that they fall within the categories 26 and 34 of Schedule V of the Act. Further, he would submit that in the present case, there are two learned Arbitrators



namely Hon'ble Ms. Justice K.B.K.Vasuki and Hon'ble Mr. Justice G.M.Akbar Ali. Both the learned Arbitrators are having office at the same premises and also having professional relationship and therefore, they are *de jure* unable to perform their function as Arbitrators. In this regard, an application was also filed before the learned Arbitrators and the same was rejected vide order dated 03.02.2023. Aggrieved over the same, the present original petition has been filed to set aside the aforesaid order passed by the learned Arbitrators dated 03.02.2023.

3. The learned Additional Advocate General appearing for the petitioner would refer to Category 26 to Schedule V of the Act, which reads as follows:

“26. The Arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same Arbitration.”

4. Further, at the time of arguments, he would refer to Category 34 to Schedule V of the Act, which talks about the affiliate of one of the parties. He would also submit that though these issues were raised before



the learned Arbitrators, they had arrived at the conclusion that they are all independent professionals and they are merely shared their office.

Apart from sharing office, they did not have any professional relationship with each other and they are also not connected with any of the firm jointly. By referring the said conclusion of the learned Arbitrators, the learned Additional Advocate General would submit that the observation of the learned Arbitrators is not correct and in fact, since they are having office in the same premises and having professional relationship, they are not supposed to act as Arbitrators.

5. Further, he would fairly submit that both the learned Arbitrators were appointed in some other cases and they had also decided the matters. However, the professional relationship between the learned Arbitrators came to be known recently, due to which the petitioners had filed an application before the learned Arbitrators and the same was rejected. Further they have also not disclosed their interest in terms of Section 12(1)(b) read with Schedule VI of the Act. Therefore, he would submit that there is a justifiable doubt with regard to the independence



and impartiality of the learned Arbitrators. Hence, he prays that the said appointment has to be terminated in terms of Sections 14 and 15 of the Act.

6. In support of his submission, he had also referred to a judgement of the Hon'ble Apex Court in ***Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited*** reported in ***(2017) 4 SCC 665*** and prays for setting aside the order passed by the learned Arbitrators and also to terminate the Mandate of the learned Arbitrators.

7. Per contra, Mr.Vijay Narayan, learned Senior counsel appearing for the respondent would submit that the maintainability of the petition has to be considered before going into the merits of this case, since the present petition, which was filed against the order passed by the learned Arbitrators in a petition filed under Section 13(3) of the Act, is not maintainable. He would further contends that the recourse available for the aggrieved parties would be not to challenge the said order, but to contest the matter before learned Arbitrators and await for the final



award and thereafter only, they have to challenge the said final Award under Section 34 of the Act. Without waiting for the final Award of the learned Arbitrators, now the petitioner had hurriedly approached this Court under Sections 14 and 15 of the Act.

8. He would further submit that a similar issue had already been decided by the Bombay High Court in ***Hasmukhlal H.Doshi and another vs. M.L.Pendse, Retired Chief Justice, Karnataka High Court and others*** reported in ***2000 (3) Mh.L.J 690***, wherein it was held that once the challenge is made under the ground of justifiable doubt with regard to the independence and impartiality of the decision of the learned Arbitrator, the recourse available for the aggrieved parties is that the aggrieved party had to wait until the passing of final award by the learned Arbitrator in the main case and thereafter, the said final Award only has to be challenged before this Court under Section 34 of the Act. Therefore, the High Court of Bombay had held that the challenge under Section 14 and 15 of the Act is not permissible against the order passed by the Arbitral Tribunal under Section 13 of the Act.



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9. The learned Senior counsel appearing for the respondent also referred to the judgement of Hon'ble Apex Court in ***HRD Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited*** reported in ***(2018) 12 SCC 471*** and submitted that if the challenge under Section 13 of the Act is not successful and the Tribunal decides that there are no justifiable doubts with regard to the independence or impartiality of the learned Arbitrators, then the Tribunal must continue the arbitral proceedings under Section 13(4) of the Act and make the final Award. After the passing of final Award only, the parties has to challenge the appointment of the learned Arbitrators along with final Arbitral Award under Section 34 of the Act.

10. By referring the above, he would submit that on this aspect, the Hon'ble Apex Court had already laid down the law and further, he would contend that without awaiting the final award, the petitioner hurriedly approached this Court to set aside the order passed by the learned Arbitrators under Section 13 of the Act. Hence, he prays for dismissal of the present original petition.



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11. Heard the learned Additional Advocate General appearing for the petitioner and the learned Senior counsel appearing for the respondent and also perused the materials available on record.

12. The main issue that had arisen for consideration is that whether it would be permissible for the aggrieved party to challenge the appointment of Arbitrators on the ground of justifiable doubts with regard to the independence or impartiality of the decision of Arbitrators and to asks this Court to set aside the order passed by the learned Arbitrators under Section 13 of the Act, thereby terminating the Mandate of the Arbitrator.

13. A similar issue came up for hearing before the Bombay High Court in ***Hasmukhlal H.Doshi case*** (referred supra), in which it was held as follows:

“9. We now come to the contention, whether after a decision is rendered under [section 13\(3\)](#), this Court can interfere in a petition under [section 14](#). Let us



therefore look at the provisions. The Arbitrator is bound to disclose circumstances which may give rise to justifiable doubts about his impartiality or independence to the parties under [section 12\(1\)](#) and [12\(2\)](#), to the parties. Under [section 12\(3\)](#) the challenge can be two fold. One if the circumstances give rise to justifiable doubts as to his independence or impartiality and second if he does not possess the qualifications agreed to by the parties. Under [section 13](#) if a challenge is thrown, there are two courses open to the Arbitrator. One to immediately withdraw from the office and the other to decide on the challenge. The importance of a challenge and decision under [sections 12\(3\)](#) and [13\(3\)](#) in the case of bias becomes important as bias can be waived, by a party participating in the proceedings even though aware of the circumstances of possible bias. The second could be that there may be circumstances under which a party in order, to delay or to avoid an arbitration may move the Court under [section 14](#). Under [section 14](#) the Court, on the material before it, may be in a position to examine the real possibility of bias. There could be other situations in which the Court may have to gather material for the purpose of finding out whether in fact there was any real possibility of bias. In these circumstances, a decision under [section 13\(2\)](#) would



throw light on the matter. As an illustration an Arbitrator may not be aware of the material giving rise to a possibility of bias, and may conduct the proceedings. In these circumstances the real possibility of bias may diminish or the possibility itself may disappear. An Arbitrator confronted with material as to circumstances which give rise to justifiable doubt as to independence or impartiality would be the best person if circumstances so warrant to meet the contentions raised or to answer, the same. Reference at this stage may be made to [section 14\(3\)](#). This is only for the purpose of deciding whether the ground of possibility of bias can be decided by this Court, without the Arbitrator first deciding the issue under [section 13\(3\)](#). [Section 14\(3\)](#) is reproduced as under :---

"If, under this section or sub-section (3) of [section 13](#), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an Arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of [section 12](#)."

Will therefore the mere reference to [sections 12\(3\)](#) or [13\(3\)](#) result in this Court coming to a conclusion that such a challenge is also open under [section 14](#) of the Arbitration and Conciliation Act, 1996. The language only indicates that if the Arbitrator withdraws or recuse



himself then that would not mean acceptance of the allegations or ground. It is founded on the principle, that the Arbitrator in order to maintain impartiality of the proceedings and dispel any probability of real bias wants to recuse himself. If the language was otherwise then it may have been difficult for an Arbitrator to recuse himself. Merely because they are found in [section 14](#) cannot lead to the conclusion, that the challenge always be made under [section 14](#). The entire scheme sections of the Act will have to be examined.

There could be no dispute that bias may constitute a ground to hold that de jure the Arbitrator cannot perform his function. However, what happens once there is a specific provision provided by the Act for a challenge to a decision under [section 13\(3\)](#) of the Act and the embargo created by [section 5](#) that no judicial authority shall intervene except as provided under the Act. Will this Court still have jurisdiction to hear and decide the matter. What happens in a case where the Arbitral Tribunal though objections have been raised chooses not to decide on the objection. Would then the provisions of [section 14](#) apply. If [section 14](#) could apply in such excepted cases, than would that make a difference in a case where the Arbitral Tribunal decides the objection. If the Court prima facie can entertain a petition on failure



by the Arbitral Tribunal to decide the objections, will the Court be precluded to decide in a case where the Arbitral Tribunal decides the objections. Presently we are not dealing with a case on the failure of an Arbitral Tribunal to decide an objection in respect of the circumstances that give rise to justifiable doubts about his independence or impartiality. We are dealing with a situation where the Arbitral Tribunal has decided the objections even when a petition was filed for his removal. The petitioners specifically had not called on the Arbitrator to decide the objections.

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11.....Considering the above and considering the object of the Legislation which is to restrict judicial interference, can it be said that this Court in a case decided under [section 13\(3\)](#) can entertain and maintain a petition under [section 14](#). In my opinion, as discussed above and after considering the language of the sections, when a specific challenge is provided and the forum which has to decide the challenges is also provided, it would not be open to this Court to decide and consider that the mandate of the Arbitrator has been terminated under [section 14](#). That challenge in a case where the Arbitrator decides the



objections will have to be taken as a ground in a challenge to the Award under [section 34](#). The object seems to be to allow the Arbitral proceedings to be concluded at the earliest. If the challenge is successful finally, the remedy is not lost as time is saved by virtue of [section 43\(4\)](#) of the Act.”

14. Further, the Hon'ble Apex Court in the judgement of **HRD Corporation case** (referred supra), held as follows:

“12. After the 2016 [Amendment Act](#), a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, [Section 12\(5\)](#) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under [Section 14\(1\)\(a\)](#), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under [Section](#)



13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may



challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.”

15. A perusal of the judgments of the Hon'ble Apex Court and Bombay High Court makes it clear that when a challenge for appointment of Arbitrator was made under Section 13(3) of the Act under the ground that the circumstances exist that give rise to justifiable doubts as to the independence or impartiality of the Arbitrator and if any order passed by the Arbitral Tribunal under Section 13 of the Act, the same can be challenged only along with the final award. Therefore, the parties concerned have to wait until the final award and thereafter, they have to challenge the appointment of Arbitrator along with the award under Section 34 of the Act.

16. In the present case also, the challenge was made under Section 13 of the Act in the Categories 26 and 34 of Schedule V of the Act to terminate the Arbitration under the ground that since the circumstances exist that giving rise justifiable doubt as to the independence or



impartiality of the Arbitrator. However, the Tribunal had rejected the contentions and held that except sharing office, they are not having professional relationship and also they are not a part of any firm. When such order was passed, the said order of the learned Arbitrator can be challenged along with the final award as per the law laid down by the Hon'ble Apex Court in the above judgment.

17. No doubt an ineligibility goes to the root of the appointment. [Section 12\(5\)](#) read with the Schedule VII of the Act makes it clear that if the arbitrator so appointed falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under [Section 14\(1\)\(a\) of the Act](#), he then becomes *de jure* unable to perform his functions in as much as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is *de jure* unable to perform his functions, since he/she would lack inherent jurisdiction to proceed any further, an application can be filed under Section 14(2) of the Act for termination of Mandate of the said Arbitrator.



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18. However, in a challenge under the grounds stated in the Schedule V (except the categories mentioned in Schedule VII of the Act) of the Act, which gives rise to justifiable doubt with regard to the independence or impartiality of the Arbitrators, the same has to be determined **as a matter of facts** of the particular challenge under Section 13 of the Act, **but not as a matter of law**. If the said challenge is not successful and the Tribunal had decided that there are no justifiable doubts as to the independence or impartiality of the Tribunal, the Tribunal must continue with the arbitral proceedings under Section 13(4) of the Act and make the final award. Thereafter only, the parties shall challenge the appointment of the Arbitrator along with final award under Section 34 of the Act.

19. Therefore, having made a challenge about the appointment of Arbitrator under the ground that the circumstances exist that gives rise to justifiable doubts as to the independence or impartiality of the Arbitrator under Section 13 of the Act before the Arbitrator and having obtained an



order, now it is not proper for the petitioner to challenge the said order of the learned Arbitrator once again before this Court under Sections 14 and 15 of the Act since this is not the stage and proper course for the petitioner to approach this Court.

20. This Court is of the considered view that challenging the order, passed by the Arbitral Tribunal under Section 13 of the Act, before this Court under Sections 14 and 15 of the Act against the appointment of Hon'ble Mr. Justice G.M.Akbar Ali and Hon'ble Ms. Justice K.B.K.Vasuki cannot be go into at this stage but the same will be gone into only after the passing of final award by the Tribunal, if any challenge is made under Section 34 of the Act. Therefore, this Court is not inclined to express any opinion on the grounds under which the petitioner made challenge for appointment of either Arbitrators and the same is free to do only when the final award is rendered by the Tribunal under Section 34 of the Act. Therefore, the present Original Petition is not maintainable.



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21. Since I hold that the present original petition is not maintainable, insofar as merits of the challenge is concerned, I refraining myself from expressing my opinion.

22. Accordingly, this Arbitration Original Petition is dismissed.

27.06.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
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KRISHNAN RAMASAMY.J.,
nsa

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