



*ARB-337-2017 (O&M) and
CR -78-2024 (O&M)*

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

112 ARB-337-2017 (O&M)
Reserved on :09.09.2024
Date of Decision:18.11.2024
SP Singla Constructions Pvt. Ltd.
... Petitioner

Vs.

State of Haryana and others
... Respondents

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SP Singla Constructions Pvt. Ltd.
... Petitioner

Vs.

The Chief Engineer, World Bank
Project-II, Haryana and another
... Respondents

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present: Mr. Anirudh Wadhwa, Advocate (through V.C.)
Mr. Gurmohan Singh Bedi, Advocate
Mr.Pawandeep Singh, Advocate
Mr. Anand Vardhan Khanna, Advocate
Mr. Kartik Gupta, Advocate
Mr. Rahul Rohilla, Advocate for the petitioner.

Mr. Aman Bahri, Addl. A.G. Haryana.

Mr. Vicky Chauhan, Advocate for
Mr. Deepak Balyan, Advocate
for respondent No.3 in ARB-337-2017.

SUVIR SEHGAL J.

1. This order shall dispose of both the above noted petitions
as they involve common question of law and facts.



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2. For the sake of convenience, factual position is being taken from ARB-337 of 2017.

3. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') for constitution of an independent and impartial Arbitral Tribunal.

4. Counsel for the petitioner submits that a bid submitted by the petitioner for construction of a four lane railway over bridge at Level Crossing No. 61-A on Delhi Bathinda Railway Line (hereinafter referred to as 'the Project') was awarded to the petitioner vide letter dated 30.07.2006, Annexure P-2, at a contract price of Rs.22.34 crores and the petitioner furnished, Performance Security to the respondents for an amount of Rs.1,11,75,000/-.

5. He submits that although the project was required to be completed within 15 months but there were continuous delays and the petitioner sent a chain of letters appended at Annexure P-3, to the respondents requesting them to increase the contract price and compensate it and by letter dated 04.02.2009, Annexure P-4, respondents were requested to appoint a Conciliator for an amicable settlement. Counsel submits that the project was completed on 31.03.2009 and by letter dated 10.09.2009, Annexure P-7, respondents intimated that the request for conciliation has not been approved and that the petitioners may initiate the process of appointment of Arbitrator as per methodology agreed upon between the parties under Clause 25.3, Annexure P-5, of the General Conditions of the Contract.



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Counsel submits that the petitioner nominated Sh. O. P. Goyal as its Arbitrator and the respondents appointed Sh. H.R. Raheja, a serving officer of the respondents and Sh. R.K. Aggarwal, Engineer-in-Chief (Retd.) PWD (B&R) was appointed as the Presiding Officer. Counsel submits that after expressing doubts about the impartiality of the Tribunal by its communication, Annexure P-11, petitioner approached this Court by filing a petition (ARB-77 of 2010), for appointment of an impartial arbitrator on behalf of the respondents but the petition was dismissed vide order dated 14.07.2011, Annexure P-12. He submits that SLP and review preferred by the petitioner were dismissed vide order dated 07.12.2012 and 13.03.2013, Annexure P-14 and P-17, respectively. By referring to the proceedings, Annexure P-19, counsel submits that the Arbitral Tribunal continued with the proceedings but no effective hearing took place. In the meantime, the Arbitration Act was amended and as Section 12(5) was inserted on 23.10.2015, the petitioner submitted an application before the Arbitral Tribunal requesting the arbitrators to file a certificate of disclosure in terms of the amended provision, but the application was disposed of by the Arbitral Tribunal vide its order dated 15.01.2016, Annexure P-22. Counsel submits that the petitioner filed a petition under Sections 14 and 15 of the Arbitration Act before the learned District Judge, Chandigarh and despite multiple requests by the petitioner, the Arbitral Tribunal continued with the proceedings, which were terminated on 03.10.2017, Annexure P-30, under Section 25(a) and



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32(2)(c) of the Arbitration Act. Counsel asserts that as the claims of the petitioner have not been adjudicated, by communication dated 28.10.2017, Annexure P-31, petitioner nominated a former Judge of this Court as its Arbitrator and requested the respondents to nominate their Arbitrator but the respondents rejected the request by its letter dated 30.11.2017, Annexure P-32, forcing the petitioner to file an instant petition. Counsel submits that during the pendency of the petition, the application filed under Section 14/15 of the Arbitration Act has been rejected by the learned District Judge, Chandigarh, vide order dated 02.08.2023, which has been challenged in the connected case.

6. Counsel for the petitioner has argued that after the coming into force of the Amending Act, 2015, a fresh cause of action has arisen with the petitioner as the independence and impartiality of the arbitrators is a mandatory requirement under the amended Act. He submits that the finalization of the litigation up to the Supreme Court prior to the introduction of Section 12(5) of the Arbitration Act, does not debar the petitioner from approaching this Court under Section 11 of the Arbitration Act, for appointment of an independent tribunal. He has placed reliance upon:-

- (i) ***Ellora Paper Mills Limited Versus State of Madhya Pradesh, 2022(3) SCC 1***
- (ii) ***Om 360 Degrees Advertising and Entertainment Pvt. Ltd. Versus Delhi***



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Metro Rail Corporation Limited (DMRC),
2023 SCC Online Delhi 6006.
(iii) Progressive Infotech Private Limited
v. Ircon International Ltd., (2023) SCC
OnLine Del 550 and
(iv) Madhava Hytech-Rani (JB) v. Ircon
International Limited, 2016 SCC OnLine
Del 6326,

in support of the above arguments.

7. Counsel for the petitioner has contended that as the Arbitral Tribunal inherently lacks jurisdiction, the entire arbitral proceedings are *non est* and an objection can be entertained at any stage. Further, he asserts that as the arbitral proceedings have been terminated under Section 25(a) and 32(2)(c) of the Arbitration Act, the termination can only be challenged under Section 14 of the Arbitration Act. Reliance has been placed by him upon

(i) Chennai Metro Rail Limited
Administrative Building Versus M/s
Transtonneltstroy Afcons (JV) and another,
(2024) 6 SCC 211;
(ii) Hindustan Zinc Limited Versus Ajmer
Vidyut Nigam Limited, (2019) 17 SCC 82;
(iii) Lalitkumar V. Sanghavi (dead) & Anr. vs.
Dharamdas V. Sanghavi and Ors. (2014) 7 SCC
255 and
(iv) Prime Interglobe Private Limited Versus
Super Mill Products, 2022 SCC Online Del 1599.

8. Upon being served, written statement has been filed by respondent No.1, contesting the petition wherein the factual position has not been disputed but it has been submitted that the petitioner failed to complete the work within the stipulated period and on grant



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of extension, work was completed on 20.04.2009. A stand has been taken that since the objection regarding the independence and impartiality of the Arbitral Tribunal taken by the petitioner, has been rejected up to the Supreme Court, as also petitioner cannot re-adjudicate the same issue. State counsel submits that in the meanwhile, the arbitral proceeding were continuing and when the petitioner failed to submit the statement of claim an application under Section 25 of the Arbitration Act was moved by the respondents and on 03.10.2017, Annexure P-30, the Arbitral Tribunal terminated the proceedings. An argument has been raised by the State counsel that the remedy for the petitioner is to approach the Tribunal and petition under Section 11 and 14 of Arbitration Act is not maintainable. State counsel asserts that as the arbitral proceedings commenced prior to 23.10.2015, provisions of the amended Act do not apply. He placed reliance upon

- (i) *S rei Infrastructure Finance Limited vs Tuff Drilling Private Limited (2018)11 SCC 470;*
 (ii) *Aravali Power Company Pvt. Ltd. vs M/S. Era Infra Engineering Ltd. 2017(4)RCR (Civil)842;*
 (iii) *S.P. Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh (2019) 2 SCC 488; and*
 (iv) *Union of India Versus Indian Agro Marketing Cooperative Limited, CM(M) 424/2021 decided by Delhi High court on 02.05.2022.*

9. I have heard counsel for the parties and considered their rival submissions besides examining the voluminous documents placed on record.



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10. The following four questions arise for determination in this petition:-

(i) Whether the provisions of the Section 12(5) of the Arbitration Act, would apply to the arbitration proceedings which have commenced prior to coming into force of the amended Act, on 23.10.2015.

(ii) Whether the amended Act would furnish a fresh cause of action to the petitioner more so, after the previous challenge to the independence and impartiality of the Arbitral Tribunal became final up to the Supreme Court.

(iii) Whether the participation of the petitioner in the arbitral proceedings before the Arbitral Tribunal during the pendency of the petition under Section 14 of the Arbitration Act amounts to acquiescence.

(iv) Whether after the termination of the Arbitral proceedings under Section 25(a) and 32(2) (c) of the Arbitral Act, petitioner can seek appointment of a fresh Arbitral Tribunal.

11. This Court will now proceed to answer the questions.

Question No. (i)

In so far as the first question is concerned, the dissension revolves around the applicability of sub Section (5) of Section 12 of the Arbitration Act, which has been introduced by virtue of the



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amendment brought about in the Arbitration Act w.e.f. 23.10.2015.

This provision is reproduced as under:-

“(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.”

12. When this provision is read with Seventh Schedule to the Arbitration Act, it makes it clear that any person, who falls within any of the categories specified therein, is ineligible to be appointed as an Arbitrator except where the parties by a written agreement agree to waive the applicability of Section 12(5) *ibid*. The question that arises for determination in the instant petition is as to whether this provision would apply to the arbitral proceedings pending on the date of the incorporation of the statutory provision. This precise question came up for consideration before the Supreme Court in **Ellora Paper Mills Limited's** case (supra) and it was held as under:-

*“16. As observed hereinabove, the Arbitral Tribunal – Stationery Purchase Committee consisted of officers of the respondent-State. Therefore, as per Amendment Act, 2015 – Sub-section (5) of **Section 12** read with Seventh Schedule, all of them have become ineligible to become arbitrators and to continue as arbitrators. **Section 12** has been amended by*



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Amendment Act, 2015 based on the recommendations of the Law Commission, which specifically dealt with the issue of “neutrality of arbitrators”. To achieve the main purpose for amending the provision, namely, to provide for “neutrality of arbitrators”, sub-section (5) of [Section 12](#) lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration clause is found to be foul with the amended provision, the appointment of the arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such an arbitrator as may be permissible. That would be the effect of the non obstante clause contained in sub-section (5) of [Section 12](#) and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement.

17. *It cannot be disputed that in the present case, the Stationery Purchase Committee -Arbitral Tribunal comprising of officers of the respondent-State are all ineligible to become and/or to continue as arbitrators in view of the mandate of sub-section (5) of [Section 12](#) read with Seventh Schedule. Therefore, by operation of law and by amending [Section 12](#) and bringing on statute sub-section (5) of [Section 12](#) read with Seventh Schedule, the earlier Arbitral Tribunal – Stationery Purchase Committee comprising of Additional Secretary, Department of Revenue as President and (i) Deputy Secretary, Department of*



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Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate and such an Arbitral Tribunal cannot be permitted to continue and therefore a fresh arbitrator has to be appointed as per [Arbitration Act, 1996](#).”

13. Setting aside the judgment of the High Court of Madhya Pradesh, in para 20, Supreme Court came to the conclusion that the earlier Arbitral Tribunal-Stationary purchase committee, which comprised of the officials of the State Government, had lost its mandate by operation of law in view of Section 12(5) read with the Seventh Schedule. Supreme Court held that a fresh arbitrator has to be appointed under the provisions of the Arbitration Act.

14. The factual position in **Ellora Paper Mills Limited's** deserves to be noticed. After the Arbitral tribunal-Stationary purchase committee comprising of the officers of the Government was constituted, M/s Ellora Paper Mills Limited filed its objections to the constitution of the Arbitral Tribunal on 12.09.2000 and challenged its jurisdiction by filing an application under Section 13 of the Arbitration Act. The Arbitral Tribunal rejected the challenge vide order dated 02.02.2001, which was impugned by M/s Ellora Paper Mills Limited by filing a writ petition before the High Court, which came to be dismissed on 24.01.2017 and a liberty was granted to the appellants to raise objections before the appropriate forum. Thereafter,



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M/s Ellora Paper Mills Limited filed petition under Section 14 read with Section 11 and 15 of the Arbitration Act seeking termination of the mandate of the originally constituted Arbitral Tribunal by placing reliance upon Section 12(5) of the Arbitration Act, which had been introduced in the meanwhile. Matter reached the Supreme Court and the above reproduced observations were made. The judgment in **Ellora Paper Mills Limited's** case therefore, squarely applies to the facts of the present case.

15. It may be mentioned that the judgments of the Supreme Court in **Aravali Power Company Pvt. Ltd's** case (supra) and **SP Singla Constructions Pvt. Ltd.'s** case (supra), upon which reliance has been placed by the State counsel, were relied upon by the Madhya Pradesh High Court in **Ellora Paper Mills Limited's** case, while deciding the matter but as observed above the judgment of the Madhya Pradesh High Court has been set aside by the Supreme Court. Therefore, the first question that has arisen for consideration in the present case is squarely covered by **Ellora Paper Mills Limited's** case (supra). The provision of Section 12(5) of the Arbitration Act would apply to arbitral proceedings which were initiated prior to 23.10.2015 and continued thereafter.

16. **Question No. (ii)**

The answer to the second question is inter-linked with the first question. Though in the first round of litigation, the petitioner had challenged the constitution of the Arbitral Tribunal on the ground that



it lacks independence and impartiality and lost upto the Supreme Court, but the introduction of Section 12(5) of the Arbitration Act has provided the petitioner with a fresh ground of challenge. Petitioner sought to take the benefit of the newly incorporated provision by moving an application before the Arbitral Tribunal, upon rejection, filed a petition under Section 14 before the District Judge, Chandigarh, which culminated in the passing of order dated 02.08.2023. This order has been impugned by the petitioner in the connected revision petition. The answer to this question is also therefore, in favour of the petitioner.

17. **Question No. (iii)**

In order to answer the third question, this Court has minutely examined the proceedings, Annexure P-19, held before the Arbitral Tribunal. A total of six hearings were held before the Tribunal prior to the introduction of Section 12(5) *ibid*. An examination of the proceedings, Annexure P-19, shows that the Arbitral Tribunal entered upon the reference on 26.05.2010, the first hearing took place. The tribunal was informed that the petitioner has filed a petition under Section 11 of the Arbitration Act, which is pending and notice has been issued to the respondent. The respondent raised an objection that the reference is not maintainable unless the claimant furnishes security as per the arbitration clause. The Arbitral Tribunal fixed the fee and expenses and deferred the hearing. The second hearing was held on 27.09.2013 when time was sought to file a curative petition before



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the Supreme Court. On request, the Tribunal adjourned the proceedings and granted time to the petitioner to file a reply to the application filed by the respondent regarding security deposit. The third hearing held on 15.07.2014 was adjourned on the request of the petitioner, who filed its response to the application. Subsequently in the 4th hearing, respondents filed their rejoinder. Proceedings of the fifth hearing are not on the record. During the sixth hearing on 22.08.2015, the petitioner requested that the proceedings be adjourned *sine die* in order to await the outcome of the curative petition. The Arbitral Tribunal noticed that both the parties had not paid their share of fee and expenses and requested them to do the needful before the next date. After this, the proceedings were held on 18.11.2015, but by that time Section 12(5) *ibid* had been introduced.

18. An analysis of the proceedings clearly shows that the proceedings were being primarily adjourned on the request of the petitioner. No effective hearing took place before the Arbitral Tribunal. Some applications had been moved by the parties and their responses were filed. It is apparent that the proceedings were at their very nascent stage as it was yet to be determined as to whether the petitioner is liable to make the security deposit. Mere participation in the proceedings at such a preliminary stage could not lead to the conclusion that the petitioner had acquiesced to the proceedings more so when it repeatedly sought adjournment on account of pendency of



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proceedings before the courts. It cannot be said that petitioner had joined the proceedings and is debarred from questioning the impartiality of the Tribunal. This court is therefore of the firm view that the participation in the arbitral proceedings and raising an objection by the petitioner does not amount to acquiescence.

19. **Question No. (iv)**

As noted above, during the next sitting held on 15.01.2016, an application filed by the petitioner seeking declaration from the learned Arbitrators was rejected. On 15.07.2016, Annexure P-20, the Arbitral Tribunal gave another opportunity to the petitioner to submit its statement of claim along with documents and the parties were requested to pay their share of fee and expenses. During the next three sittings, the petitioner requested the Arbitral Tribunal to adjourn the proceedings as petition under Section 14 of the Arbitration Act was pending. The Arbitral Tribunal also held some internal meetings and by its order dated 03.10.2017, Annexure P-30, Arbitral Tribunal terminated the proceedings under Section 25(a) and Section 32(2)(c) of the Arbitration Act.

20. Now the question that needs determination is as to whether after the termination of the arbitral proceedings under Section 25(a) and 32(2)(c) of the Arbitration Act, a petition under Section 11 *ibid*, be filed and is maintainable. In *Lalit Kumar V. Sanghavi's* case (Supra), the arbitral proceedings were terminated as the claimant showed lack of interest and even the arbitrators' fee was not paid. An



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application was filed before the Arbitral Tribunal for modification of the order passed by the Arbitral Tribunal and a separate application was filed invoking Section 11 of the Arbitration Act which was dismissed by the High Court. On a cumulative reading of Section 14 and 32(2) of the Arbitration Act, Supreme Court held that Tribunal's order fell within the scope of Section 32(2)(c) i.e. the continuation of proceedings had become impossible and by virtue of Section 32(3), the mandate of the Tribunal came to an end. Supreme Court came to the conclusion that the question whether the mandate of the arbitrator stood legally terminated or not, can only be examined by the Court as provided under Section 14(2) of the Arbitration Act.

21. Noticing the judgment of the Supreme Court in **Srei Infrastructure Finance Limited's** case (Supra), (cited by the State counsel in the present case), and following the dictum in **Lalit Kumar V. Sanghavi's** case (Supra), High Court of Delhi in **Prime Interglobe Private Limited's** case (Supra) held as under:-

“39. At this juncture, it must also be noted that SMPPL had argued that in light of the judgment of the Supreme Court in SREI Infrastructure (supra), the remedy, if any, is only to seek review/recall of the Termination Order. This is not the correct reading of the judgment. In the said judgment, the Supreme Court held that an application seeking recall of termination under Section 25(a) of the Act is maintainable, however, that cannot be interpreted to mean that the proceedings under Section 14 of the



Act cannot lie. The Court finds no ground to relegate PIPL to the Arbitral Tribunal to seek recall of the Termination Order. In any event, as already discussed above, the order passed by the Tribunal, terminating the proceedings is not under Section 25(a) of the Act and therefore, the objection of SMPPL regarding maintainability of this petition, by placing reliance upon the decision in SREI Infrastructure (supra) is misconceived. On the contrary, even if the Termination Order is construed to be passed under Section 25 (a), yet the instant petition, under Section 14 of the Act is maintainable.

Whether PIPL should be redirected to the erstwhile Arbitrator and whether the Arbitrator has the power to recall the Termination Order?

40. Next, question arises as to whether the same Arbitral Tribunal can be requested to adjudicate the counter-claims which the PIPL intends to file. The Court finds merit in the contention of PIPL that all throughout the proceedings, PIPL had reserved its right to file counter-claim and did not give up this right. This is apparent from the communication dated 17th August, 2019 wherein PIPL categorically reserved its right to raise counter-claims against the SMPPL. In the said communication, PIPL was not absolutely clear as to whether it intended to file its claim before the Arbitrator, as it only stated that "Respondent has the right to pursue its claims under the said communication, in accordance with law, at the appropriate stage". In any event, before terminating the proceedings qua counter-claims of PIPL, the Tribunal ought to have put PIPL to show cause. Now,



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with that termination, the entire proceedings altogether have been closed and the entire record of the arbitral proceedings have been returned to SMPPL. In view of the judgment of the Supreme Court in Perkins Eastman (supra), the erstwhile Arbitrator is de jure ineligible to resume her office as her appointment was made unilaterally by SMPPL, in violation of Section 12(5) of the Act. Therefore, the Court is now empowered to appoint a substitute Arbitrator.”

22. While examining the facts of the instant case in light of the above reproduced judgments, it is evident that the petitioner had never lost interest in the proceedings. It had been merely requesting for deferment in order to get the decision of the Court on the eligibility of the Arbitrators, moreso, after the introduction of Section 12(5) in the Arbitration Act. As has been held by the Delhi High Court, with the termination of the proceedings by the Arbitral Tribunal, everything has come to a close. In view of the mandate of Section 12(5) read with Seventh Schedule of the Arbitration Act, two of the Arbitrators are ineligible to resume office as Arbitrators, therefore, sending the petitioner back to the Arbitral Tribunal to file an application for review/recall of its order would amount to putting the clock back, which is not permissible in view of the amendment in the statute. This Court is therefore, has the power to appoint a substitute Arbitrator(s) in place of the Arbitral Tribunal, proceedings before whom have been terminated.



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23. For the foregoing reasons, while disposing both the petitions, this Court nominates Hon’ble Mr. Justice (Retd.) H.S. Sidhu, House No.15, Sector 2-A, Chandigarh-160001, 0172-2740139, a former Judge of this Court, as the sole Arbitrator to adjudicate the dispute between the parties subject to compliance of statutory requirements.

24. Parties are directed to appear before the learned Arbitrator on date, time and place fixed by the Arbitrator at his convenience.

25. Needless to mention, parties will be at liberty to raise all the claims/defences/counter claims/pleas before the Arbitrator. Any observation made hereinabove will not be binding on the learned Arbitrator.

26. A request letter along with a copy of this order be sent to Mr. Justice (Retd.) H.S. Sidhu.

27. As the main petitions have been decided, all pending applications shall also stands disposed of.

18.11.2024
pooja saini

(SUVIR SEHGAL)
JUDGE

Whether Speaking/Reasoned : Yes/No

Whether Reportable : Yes/No