



\$~14

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 1745/2018 & CM APPL. 7237/2018**

JOGINDER SINGH GILL

..... Petitioner

Through: Mr. Ashok Kumar Panigrahi,
Advocate

versus

UNION OF INDIA

..... Respondent

Through: Mr. Vikrant N. Goyal, Advocate with
Mr. Anshuman and Mr. Piyush
Ahluwalia, Advocates

%

Date of Decision: 15th April, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. Present writ petition has been filed as a public interest litigation ('PIL') challenging the appointment of Central Public Works Department ('CPWD') employee(s) as Standing Arbitrator in Respondent i.e., Ministry of Housing and Urban Affairs vide Office Memorandum dated 30th May 2016 ('Impugned OM') and Office Order dated 03rd March, 2017 ('Impugned Order').

2. Learned counsel for the Petitioner states that the Petitioner himself is an Arbitrator and the present petition has been filed seeking declaration of law regarding appointment of Arbitrators post amendment of the Arbitration and Conciliation Act, 1996 ('Act of 1996') in the year 2015. He states that the newly inserted Section 12(5) of the Act of 1996 read with its 5th and 7th Schedule puts restrictions on the party to a dispute, to appoint its serving/retired employees as an Arbitrator in an Arbitral Tribunal. He states that the



Standing Arbitrator(s) of CPWD, as on the date of the filing of the writ petition, were serving as an employee of CPWD and this is in contravention of Section 12(5) of the Act of 1996.

3. In reply, learned counsel for the Respondent, on instructions, states that the impugned Order dated 03rd March, 2017 and Impugned OM dated 30th May, 2016 have been superseded by the department. He states that however, Respondent maintains a panel of Arbitrators which enlists the ex-employees of CPWD and railways. He states that no serving employee of CPWD is enlisted on this panel. He states that further with respect to appointment of Sole Arbitrator from the said panel, the appointment is made subject to the opposite party consenting to the said appointment in writing in terms of the proviso to Section 12(5) of the Act of 1996.

4. In response, learned counsel for the Petitioner also relies upon the judgment of Supreme Court in *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited*¹ to contend that even an ex-employee of CPWD cannot act as an Arbitrator in arbitral proceedings to which CPWD is a party.

5. Having heard learned counsel for the parties, we are of the considered opinion that the issue raised in the present petition, which was filed on 08th February, 2018, does not survive for consideration in view of the subsequent judgments of the Supreme Court which have authoritatively settled the issue.

6. The Supreme Court in *Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others*² while considering the issue of appointment/nomination of a retired employee of a party to the agreement (the State) as an Arbitrator, considered the Entry 1 to

¹ (2017) 4 SCC 665, Para 26



Schedule V and categorically held that a former employee of the party to the dispute is not disqualified. The relevant paras read as under:

“21. The 1996 Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. The fact that the arbitrator was in the employment of the State of Haryana over 10 years ago, would make the allegation of bias clearly untenable.

22. The present case is governed by the pre-amended 1996 Act. Even as per the 2015 Amendment Act which has inserted the Fifth Schedule to the 1996 Act which contains grounds to determine whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The first entry to the Fifth Schedule reads as under:

“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. ”

(emphasis supplied)

Entry 1 of the Fifth Schedule and the Seventh Schedule are identical. The entry indicates that a person, who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator. The words “is an” indicate that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties.

23. An arbitrator who has “any other” past or present “business relationship” with the party is also disqualified. The word “other” used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word “other” cannot be used to widen the scope of the entry to include past/former employees.”

(Emphasis Supplied)

7. The judgments in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited*** (supra) and ***Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Private Limited and Others*** (supra) were considered by Supreme Court in ***Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company***³ and it was held that there is no bar under Section 12(5) of the Act of 1996

² (2019) 3 SCC 505



for appointment of a retired employee to act as an Arbitrator. The relevant paras of the aforesaid judgment read as under:

“25. Contending that the appointment of retired employees as arbitrators cannot be assailed merely because an arbitrator is a retired employee of one of the parties, the learned ASG has placed reliance upon Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd. [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] After referring to various judgments and also the scope of amended provision of Section 12 of the Amendment Act, 2015 and the entries in the Seventh Schedule, the Supreme Court observed that merely because the panel of arbitrators drawn by the respondent, Delhi Metro Rail Corporation are the government employees or ex-government employees, that by itself may not make such persons ineligible to act as arbitrators of the respondent DMRC. It was observed that the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings cannot be treated as employee or consultant or advisor of the respondent DMRC. In para 26 of Voestalpine Schienen GmbH [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , the Supreme Court held as under : (SCC p. 689, para 26)

“26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide ‘to determine whether circumstances exist which give rise to such justifiable doubts’. Such persons do not get covered by red or orange list of IBA guidelines either.”

(emphasis supplied)

³ (2020) 14 SCC 712



26. The same view was reiterated in State of Haryana v. G.F. Toll Road (P) Ltd. [State of Haryana v. G.F. Toll Road (P) Ltd., (2019) 3 SCC 505 : (2019) 2 SCC (Civ) 170] wherein, the Supreme Court held that the appointment of a retired employee of a party to the agreement cannot be assailed on the ground that he is a retired/former employee of one of the parties to the agreement. Absolutely, there is no bar under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of a retired employee to act as an arbitrator.

27. By the letter dated 25-10-2018, the appellant has forwarded a list of four retired railway officers on its panel thereby giving a wide choice to the respondent to suggest any two names to be nominated as arbitrators out of which, one will be nominated as the arbitrator representing the respondent Contractor. As held in Voestalpine Schienen GmbH [Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators."

(Emphasis Supplied)

8. In addition, as noted above, learned counsel for the Respondent states that nonetheless the appointment of a retired employee as a Sole Arbitrator is made in consonance with proviso to Section 12(5) of Act of 1996 i.e. only after the opposite party consents in writing to the same and therefore, we find no reasons to interfere in the existing panel of Respondent which comprises of its retired employees.

9. With the aforesaid observations, the present petition along with pending applications is disposed of.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

APRIL 15, 2024/hp/msh/ms