

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/923/2024

Hindustan Construction Company Limited
VS.
Kolkata Metropolitan Development Authority

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR

For the petitioner

Mr. Ratnanko Banerji, Sr. Adv.
Mr. Ankan Rai, Adv.
Mr. Ratnesh Kr. Rai, Adv.
Ms. Devanshi Deora, Adv.
Mr. Aakash Mishra, Adv.

For the respondent Mr.

Kishore Dutta, Learned Sr. Adv.,
& Advocate General
Mr. Sirsanya Bandopadhyay, Sr. Standing Counsel.
Mr. Avishek Guha, Adv.
Mr. Ankush Majumdar, Adv.
Ms. Debika Misra, Adv.

Hearing concluded on: 20.01.2025

Judgment on: 26.02.2025

Shampa Sarkar, J.:-

1. This is an application under Sections 11, 14 and 15 of the Arbitration and Conciliation Act, 1996. The claimant in the arbitral proceeding approached this Court for an order, inter alia, that the mandate of the learned Arbitrator had terminated and his appointment was supra void ab initio. The learned Arbitrator was not eligible to take up any arbitration work, in view of a statutory bar. Prayer was also made for appointment of a

substitute Arbitrator. Alternative prayer was for clarification of the order of appointment dated June 24, 2022.

2. A learned former Judge of this court had been appointed as an Arbitrator. The appointment was made on June 24, 2022, in AP/219/2022 by the then Chief Justice.

3. The petitioner had filed the application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). The dispute arose out of a contract entered into between the parties, which contained an arbitration clause. The former Judge was appointed as the learned Arbitrator, to resolve the dispute between the parties. The parties were permitted to raise all legally permissible issues before the learned Arbitrator. It was further directed that the appointment would be subject to submission of a declaration by the Arbitrator in terms of Section 12(1) of the said Act, in the form prescribed in the VIth schedule, before the Registrar Original Side. The Registrar, Original Side, was directed to communicate the order to the learned Arbitrator.

4. Thereafter, the proceedings commenced before the learned Arbitrator. The parties completed their pleadings. Evidence was also adduced. When the arguments were going on, it allegedly came to the knowledge of the petitioner that, the learned Arbitrator was suffering from an inherent

ineligibility at the time of his appointment. The petitioner contended to have participated in the arbitration proceeding on a bona fide belief that, the learned Arbitrator was eligible to function, under all applicable laws. Subsequently, the petitioner came to learn in the midst of the proceedings that, the learned Arbitrator was legally prohibited from undertaking arbitration work, as he was already functioning as the President of the State Consumer Disputes Redressal Commission of Andaman and Nicobar Islands (hereinafter referred to as the State Commission) at the time of his appointment by the Chief Justice.

5. By a letter dated October 18, 2024, the petitioner requested the learned Arbitrator for clarification, recusal and termination of the mandate. The letter was disposed of by the learned Arbitrator, upon inviting the respondent to file an affidavit-in-opposition to the contents of the said letter. Upon hearing the parties, the learned Arbitrator was pleased to pass an order dated October 30, 2024, inter alia, holding that the mandate did not terminate and his appointment was not *supra void ab initio*, as the appointment as the President of the State Commission was part time and the bar operated in respect of a full time President.

6. The petitioner, then, approached this Court with the following prayers:-

“a) Hold the mandate of the previously appointed Learned Arbitrator to be supra void ab initio and set aside the Order Dated 30th October, 2024 as passed by the Learned Sole Arbitrator Hon’ble Justice Debi Prosad Dey, Former Judge of Hon’ble High Court at Calcutta;
 b) To appoint a fresh Sole Arbitrator for adjudicating the disputes and differences by and between the parties arising out of the Arbitration Clause contained in the General Condition of Contract read with the provision of the Arbitration and Conciliation Act, 1996 (as amended);
 c) Alternately clarify the Order dated 24th June, 2022 regarding the appointment of the Learned Sole Arbitrator Justice Debi Prosad Dey, Former Judge, Calcutta High Court;
 d) Costs incidental to this application be paid by the Respondent;
 e) Such further or other order or orders be passed and/or direction or directions be given as to this Hon’ble Court may deem fit and proper.”

7. Mr. Ratnanko Banerji, learned Senior Advocate for the petitioner submitted that, the learned Arbitrator suffered from an inherent disqualification at the time of his appointment. The appointment as the President of the State Commission was made sometime in 2019. The rules framed under the Consumer Protection Act, 1986 (hereinafter referred to as 1986 Act), did not prohibit the President of the State Consumer from undertaking arbitration work. When the appointment was made on June 24, 2022, in the subject arbitration proceeding, the Andaman and Nicobar Islands, Consumer Protection Rules, 2021 (hereinafter referred to as the 2021 Rules), had come into force. Prior to enforcement of the said rules, the Ministry of Consumer Affairs Food and Public Distribution, by a notification dated July 15, 2020, notified the Consumer Protection (Salary, allowances and conditions of service of President and members of the State Commission and District Commission) Model Rules 2020 (hereinafter referred to as the

Model Rules). Rule 11 (3) of the Model Rules, for the first time, provided that, neither the President nor a member shall not undertake any arbitration work while functioning in such capacities, either in the State Commission or in the District Commission.

8. The Model Rules were made applicable to all State Commissions, until each of the States framed their own rules. The Andaman and Nicobar Administration, Directorate of Civil Supplies and Consumer Affairs framed its own rules, which was notified on August 25, 2021. The Rules were called the Andaman and Nicobar Islands Consumer Protection Rules, 2021. As per Rule 27(4) of the 2021 Rules, the President and members of State Commissions were prohibited from undertaking any arbitration work while functioning full-time, after creation of such posts by the administration.

9. The proviso to Rule 27(4) stated that, the said Rule would not apply to employments under the Central Government or State Government or local authority or any statutory authority or corporation, established by or under a Central, State or Provincial Act or a Government Company, as defined in Clause 45 of Section 2 of the Companies Act.

10. Rule 27 (5) provided that any person appointed as a President or member of the state commission or district commission immediately before the commencement of the Act, shall hold office as such President or

member, till the completion of his full term. Thus, according to Mr. Banerji, the appointment of the learned Arbitrator under the 2019 Rules was saved by Section 45 of the Consumer Protection Act 2019, as also the rules notified on August 25, 2021. As the appointment was saved under the new Act and the 2019 Act did not provide for any part-time President, the learned Arbitrator was discharging functions as a full-time President of the State Commission, since the enforcement of the said Rules.

11. Mr. Banerji urged that, if a person was inherently disqualified to be appointed as an arbitrator, irrespective of whether Section 12(5) and the Vth and VIIth Schedule of the said Act applied or not, such person could not have accepted the appointment at the very first instance. Moreover, the learned Arbitrator did not disclose that he was appointed as the President of the State Commission of the Andaman and Nicobar Islands. Section 14 of the 1996 Act, clearly provided that, any person who was legally incapable of discharging functions as an arbitrator, should be treated to be *de jure* unable to discharge his duties and as such, the mandate of the arbitrator should be terminated by this Court on the refusal of the learned Arbitrator to recuse.

12. Mr. Banerji, relied on following decisions:-

- i) ***Neena Aneja and ors. vs. Jai Prakash Associates Limited***
reported in ***(2002) 2 SCC 161***;
- ii) ***Bharat Broadband Network Limited vs. United Telecoms Limited*** reported in ***(2019) 5 SCC 755***;
- iii) ***HRD Corporation (Marcus Oil and Chemical Division) vs. GAIL (India) Limited (Formerly Gas Authority of India Limited)*** reported in ***(2018) 12 SCC 471***.

13. Learned Advocate General appeared on behalf of the respondent and refuted the submissions of Mr. Banerji. According to the learned Advocate General, the arbitration proceedings had progressed considerably. The petitioner could not have filed the application at such a belated stage, when arguments were near completion. Secondly, the learned Arbitrator was no longer the President of the State Commission. The learned Arbitrator was appointed as the part-time President of the commission under the Andaman and Nicobar Islands Consumer Protection (Appointment, Salary, Allowance and Conditions of Service of President and Members of the State Commission and District Forum) Rules 2019 (hereinafter referred to as the 2019 Rules).

14. The said Rules were framed under the Consumer Protection Act 1986. The Rules provided that the President of the State Commission could either

be appointed on whole-time basis or additional charge to a sitting Judge of the High Court could be conferred for discharging the duties as President. In the instant case, the learned Arbitrator was appointed on a part-time basis and as such, the prohibition in the present Rules, which were notified on August 25, 2021, would not be applicable. The learned Arbitrator would continue to function under the terms and conditions of his initial appointment.

15. According to learned Advocate General, all actions taken under the Rules of 2019 were saved. Learned Advocate General submitted that the prohibition under 2021 Rules would be applicable to those Presidents who were appointed after the promulgation of the Consumer Protection Act, 2019, and after the 2021/or the Model Rules had come into force.

16. According to the learned Advocate General, the disqualification, if at all, was under the Consumer Protection Act, 2019 and not under the Arbitration and Consolidation Act, 1996. The mandate of an arbitrator would terminate only when the learned arbitrator was disqualified under the provisions of the said Act of 1996. The disqualifications would have to fall under the categories mentioned in Section 12(5) read with the Vth and the VIIth Schedule. Apart from those disqualifications, no other prohibition or bar either in the condition of service or in any other statute, would result in

termination of the mandate of the learned Arbitrator. Only the disqualifications prescribed under the 1996 Act, would be relevant, for this Court to hold that the learned Arbitrator was *de jure* unable to perform his duties.

17. The learned Advocate General further submitted that the Model Rules of 2020 applied in the absence of any Rules by the State Governments or the Union Territories. In the instant case, when the Model Rules were published, the Rules of 2019 were still in force. The Rules of 2019 were saved under Section 107 of the Act of 2019. The learned Arbitrator was under no obligation to disclose his role as a part-time President of the State Commission of the Andaman and Nicobar Islands. The prescribed form under the VIth Schedule did not require such disclosure. The appointment of the learned Arbitrator was only subject to disclosure as per the VIth Schedule of the 1996 Act, and not beyond.

18. In the instant case, the petitioner had not been able to display that, the learned Arbitrator either had any interest in the subject-matter of the dispute or was remotely connected to any of the parties. Under such circumstances, the learned Arbitrator should be allowed to conclude the proceeding and publish the award.

19. The issue before this court was whether the mandate of the learned Arbitrator terminated in view of the bar under the 2021 Rules as also the model rules. Both the Rules prohibited acceptance of arbitration work by the full time President of the State Commission. Admittedly, the learned Arbitrator was appointed as a part-time President, when the 2019 Rules were in operation, Rule 9 of the said 2019 Rules, dealt with the composition and mode of appointment in the State Commission. The Rule did not specifically provide for appointment of a part-time President. Members could be appointed on part-time basis and they were required to function on such number of days as the President of the Commission, in consultation with the administration, deemed fit and proper upon taking note of the workload of the forum. The Rule is quoted bellow:-

“9. Composition and Mode of appointment in the State Commission. -

(1) President of the State Commission may be appointed on whole time basis or by assigning additional charge to a sitting judge of the High Court.

Provided that appointment of a sitting High Court Judge, either on whole time basis or on additional charge basis, shall not be made without the concurrence of the Chief Justice of the High Court.

(2) There shall be two members of the state Commission appointed as per Sec 16 of the Act.

Provided that a serving judicial officer shall not be appointed without concurrence of the Chief Justice of the High Court.

Provided further that where the pendency of complaints and appeals at the starting of the year before the State Commission does not exceed five hundred or the average number of complaints and appeals filed in the last three years does not exceed five hundred, the appointment may be made on part-time basis.

(3) Members appointed on part-time basis shall function for such number of days in a week as may be decided by the President of the

State Commission in consultation with the A&N Administration, taking into consideration the work load of the District Forum.

Provided that, the number of working days shall not be less than two in a week and the Members appointed on part-time basis will observe regular office hours on their working days.

(4) Presidents and Members while acting or purporting to act in pursuance of any of the provisions of this Act, shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.”

20. Yet, Rule 13 of the said 2019 Rules had a provision, namely, “Salary and remuneration of part-time President and members of the State Commission”. The same is quoted below:-

“13. Salaries/Remuneration of the part-time President and Members of the State Commission. -

(1) The President State Commission shall receive a consolidated honorarium of Rs. 7,500/- for each day of holding office at Port Blair viz. for sitting, for attending Circuit Bench/Awareness Camp and other programme for generating awareness among different section of the people in the Andaman & Nicobar Islands and other headquarters for attending seminars, if appointed on part-time basis.

(2) The President, State Commission shall be entitle to travelling allowances including D.A. as admissible to the High Court Judges on duty, and the members of the State Commission shall be eligible for such travelling allowance and daily allowance on official tour including circuit bench and participating in consumer awareness camp/seminar at different Islands and other headquarters as are admissible to the officer's Pay Matrix Level-10 (7th CPC) of the Government. The President shall also be entitled to free air travel between Kolkata and Port Blair for her/his spouse once in a year.

(3) The President, State Commission shall be paid telephone allowance of Rs.3000/- per month for Kolkata Office as that President can keep the communication channel open.

(4) A part-time Member of the State Commission shall be paid a consolidated remuneration of rupees five thousand in X class cities, rupees four thousand in Y class cities and rupees three thousand in other places, per day of sitting

(5) Remuneration of the part-time appointees shall be reviewed every three years taking into consideration the consumer price index.

(6) Remuneration in the case of appointments made on additional charge basis shall be governed by the relevant provisions in the Financial Rules as amended.

(7) The salary, remuneration, TA/DA and other allowances shall be defrayed out of the Consolidated Fund of India.”

21. Thus, both the Rules, construed harmoniously, leads this Court to hold that appointment as the part-time President was permissible under the 2019 Rules. The learned Arbitrator was of the view that his appointment under the 2019 Rules was on part-time basis and such part-time appointment was saved by the 2021 Rules. The disqualification under Rule 27 (4) was in respect of a full time President and not a part-time President, and the question of inherent lack of jurisdiction at the time of his appointment as an Arbitrator in 2022, did not arise. All actions taken under the earlier rules were also saved.

22. The decisions cited by Mr. Banerjee were on the issue of ineligibility to perform on account of disqualifications under Section 12 (5) read with VIIth Schedule. **HRD Corporation** (supra) and **Bharat Broad-brand Network Ltd.** (supra) are not squarely applicable in the facts of the case. They deal with the proposition that, any inherent disqualification goes to the very root of the appointment. In the decision of **Niha Anecha (supra)**, the Hon'ble Apex Court held that, the transitional provisions of Sections 31, 45 and 56 of the Consumer Protection Act, 2019, indicated that the adjudicatory personnel, who were functioning as members of the commission, would continue to hold office under the new legislation.

23. Rule 27(4) of the 2021 Rules, is quoted below:-

“27(4) The President or Members shall not undertake any arbitration work while functioning full time after creation of such posts by the Administration in these capacities in the State Commission or the District Commission, as the case may be:

Provided that nothing contained in this rule shall apply to any employment under the Central Government, a State Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government Company as defined in clause (45) of section 2 of the Companies Act. 2013 (18 of 2013).”

24. Rule 27(5) protects the appointment of the learned Arbitrator who was already a President of the State Commission before the commencement of the Act. The learned Arbitrator was entitled by law to continue his office as such President till the completion of his term. Thus, the learned Arbitrator, in the opinion of this Court, continued to discharge his functions as the President of the State Commission under the new rules, but the relevant provision of Rule 27(4) would only be applicable to a President who was functioning full time, after creation of such posts by the administration.

25. At the time of appointment as a part-time President, the learned arbitrator was already a retired high court judge. The petitioner has not been able to establish that after the 2021 Rules had come into force, the learned Arbitrator was discharging his duties as a full time President, after the administration created such full time post. The learned Arbitrator also held as follows:-

“No full time post for the President, State Commission, Consumer Disputes Redressal Forum was ever created in Andaman and Nicobar

Islands during the tenure of the undersigned and the undersigned never acted/worked as full time President of State Commission, Consumer Disputes Redressal Forum, Andaman and Nicobar Islands. Even, the practicing Advocates of Andaman and Nicobar Islands courts have been appointed as Part time member of the State Commission.”

26. The proviso to Section 102 of the Consumer Protection Act, 2019, permitted the Central Government to frame Rules in respect of all or any of the matters regarding which the State Government could make rules under the said Section. Thus, the Model Rules of 2020 was framed. The Model Rules were to apply until the State Government framed their own rules. While making such rules, insofar as practicable, the State Governments were required to conform to the model rules. Rule 14 of the Model Rules provided that the terms and conditions of service of the president and members of the District Commission and State Commission should not be varied to their disadvantage during their tenure in office.

27. Under the proviso to Section 102 of the 2019 Act, the State Governments were required to conform as far as practicable, to the Model Rules. The 2021 Rules with regard to conditions of service are quoted below for convenience.

13. Composition of the State Commission: The State Commission shall consist of-

- a. The President; and
- b. four Members

14. Venue of sittings of State Commission: (1) The State Commission shall ordinarily function at the State Capital. The State

Commission shall also perform its functions by holding Circuit Courts in the District Head Quarters of North & Middle Andaman District and Nicobar District in consideration of good number of institution of cases and/or appeals arising out of the territorial jurisdiction of the respective district.

The State Commission shall have supervisory power over the District Commissions and may issue necessary directions for proper functioning and management of District Commissions.

15. Hearing Hours of State Commission and District Commission:

Subject to the provisions of any rules made in this behalf, the normal working hours of the State Commission and District Commission shall be on all working days of the Andaman and Nicobar Administration.

16. Procedure of Appointment: The Presidents and Members of the State Commission and District Commission shall be appointed by the Lieutenant Governor, Andaman and Nicobar Islands on the recommendation of the Selection Committee as per rule 6 of the Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission and District Commission) Rules, 2020.

17. Salaries and Allowances Payable to President and Members of State Commission:

(1) The President of the State Commission shall receive the salary and other allowances as are admissible to a sitting Judge of the High Court at Calcutta.

(2) A Member of the State Commission shall receive a pay equivalent to the pay at minimum of the scale of pay of an Additional Secretary of the Andaman and Nicobar Administration and other allowances as are admissible to such officers.

(3) There shall be an annual upward revision of the pay of the President and Member at the rate of 3%.

(4) Pending creation or sanction of regular posts, the President of State Commission shall receive a consolidated salary of Rs. 3,00,000/- per month and a Member of State

Commission shall receive a consolidated salary of Rs. 50,000/- per month or the amount mentioned in

sub-rules (1) and (2) of this rule, whichever is lower, as a stopgap arrangement.

(5) The pay of a person appointed as President or Member, who is in receipt of any Government Pension, shall be reduced by the gross amount of pension drawn by him.

24. Term of Office of President or Member: The President and every Member of the State Commission and the District Commission shall hold office for a term of four years or upto the age of sixty-five years, whichever is earlier and shall be eligible for reappointment for another term of four years subject to the age limit of sixty five years, and such reappointment is made on the basis of the recommendation of the Selection Committee.

...

28. The salary, remuneration and other allowances of the Presidents and Members of the State Commission, District Commission, officers and staff and other administrative and office expenses, shall be defrayed out of the consolidated fund of India.”

28. The petitioner has not been able to demonstrate that the terms and conditions of Rules, 15 and 17 of the 2021 Rules had been made applicable to the learned Arbitrator, while he was discharging his duties as the President of the State Commission.

29. Thus, for this Court to hold that the appointment of the President of the State Commission on part-time basis would automatically be converted to a full time appointment, in the absence of any order in writing by the competent authority of the Andaman Administration, will be amount to the referral court under Section 11 of the 1996 Act, writing the terms and conditions of service of the President of the State Commission. The learned Arbitrator was the best person who was in knowledge of the terms and conditions of his appointment. It is his categorical statement that the post of full time President was not created by the Administration, during his tenure. This court does not have any reason to hold otherwise.

30. Rule 27(4) of the 2021 Rules, prohibited the President from accepting any arbitration work, but what has not been demonstrated by the petitioner is that, the administration had made the appointment of the learned

Arbitrator, a full time one, upon creation of such posts in accordance with the 2021 Rules.

31. Thus, mandate of the learned Arbitrator does not terminate. The learned Arbitrator shall proceed accordingly. Interim order stands vacated. Parties may also take steps for extension of mandate, in view of the delay caused on account of pendency of this matter.

32. There will be no order as to cost.

33. The application is dismissed.

34. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)