REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 27/2019

(Arising out of S.L.P.(C) No. 20201 of 2018)

The Government of Haryana
PWD Haryana (B and R) Branch ...Appellant

Versus

M/s. G.F. Toll Road Pvt. Ltd. & Ors. ...Respondents

J U D G M E N T

INDU MALHOTRA, J.

Leave granted.

1. The present Civil Appeal has been filed by the Appellant – State of Haryana to challenge the Order dated 01.03.2018 passed by the High Court of Punjab and Haryana at Chandigarh in C.R. No. 3279/2017.

2. The factual matrix leading to the filing of the present Appeal, briefly stated is, as under:

2.1. On 12.12.2008 the Appellant – State issued a Letter of Acceptance to Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. for execution of a works contract for construction, operation and maintenance of Gurgaon-Faridabad Road and Ballabhgarh-Sohna Road on BOT (Build, Operate and Transfer) basis.

2.2. A Concession Agreement was entered into between the parties on 31.01.2009. The period of construction was 24 months from 31.05.2009. The said agreement contained a dispute resolution clause which is set out hereinbelow:

> "*39.2 Arbitration*
> *39.2.1. Any dispute, which is not resolved amicably as provided in Clause 39.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2. sub-clause (b) below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration Act.*
>
> *39.2.2. <u>There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration</u>*."
>
> (Emphasis supplied)

2.3. During the execution of the Agreement, disputes arose between the parties. The Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. *vide* Letter dated 30.03.2015 to Respondent No. 2 – Indian Council of Arbitration ("ICA") invoked the Arbitration Clause, and requested the ICA to commence arbitration proceedings. On 05.05.2015, Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. appointed a retired Engineer-in-Chief – Mr. Surjeet Singh as their nominee Arbitrator.

The Appellant – State herein also nominated a retired Engineer-in-Chief, Mr. M.K. Aggarwal as their nominee arbitrator *vide* Letter dated 08.06.2015.

2.4. The Respondent No. 2 - ICA *vide* Letter dated 03.08.2015 raised an objection to the arbitrator nominated by the Appellant – State on the ground that he was a retired employee of the State, and there may be justifiable doubts with respect to his integrity and impartiality to act as an arbitrator. The Respondent No. 2 - ICA advised the State to reconsider its nomination.

The Appellant – State refuted the objection raised by Respondent No. 2 – ICA on the ground that there was no

rule which prohibited a former employee from being an arbitrator, and there could not be any justifiable doubt with respect to his impartiality since the nominee arbitrator had retired over 10 years ago.

On 24.09.2015, Respondent No. 1 - M/s. G. F. Toll Road Pvt. Ltd. raised an objection regarding the independence and impartiality of the Appellant's nominee arbitrator – Mr. M.K. Aggarwal. Respondent No. 2 – ICA forwarded the said objection to the Appellant – State.

2.5. The Respondent No. 2 – ICA *vide* its Letter dated 30.10.2015 reiterated that it has been firmly established that Mr. M.K. Aggarwal had a direct relationship with the Appellant – State as its former employee, which may raise justifiable doubts as to his independence and impartiality in adjudicating the dispute. The Respondent No. 2 – ICA stated that it was in the process of appointing an arbitrator in place of Mr. M.K. Aggarwal and its decision shall be communicated to the Appellant.

2.6. In response, the Appellant – State *vide* Letter dated 16.11.2015 requested the Respondent No. 2 – ICA for a period of 30 days to appoint a substitute arbitrator.

In the meanwhile, the Respondent No. 2 – ICA *vide* its Letter dated 23.11.2015 informed the Appellant – State that it had already appointed a nominee arbitrator on behalf of the Appellant, as well as the Presiding Arbitrator.

2.7. Aggrieved by the appointment made by Respondent No. 2 – ICA of the nominee arbitrator, the Appellant – State, filed an application under Section 15 of the Arbitration and Conciliation Act, 1996 ("the Act") before the District Court, Chandigarh on the ground that the constitution of the arbitral tribunal was illegal, arbitrary and against the principles of natural justice.

2.8. The Appellant – State also raised an objection before the Arbitral Tribunal under Section 16 on the issue of jurisdiction.

On 08.12.2016, the arbitral tribunal ordered that it shall not hear the objection under Section 16 of the Act,

and shall await the decision of the District Court, Chandigarh.

2.9. The District Court *vide* its Order dated 27.01.2017 held that the Petition was not maintainable, since the Arbitral Tribunal had been constituted, and an objection under Section 16 should be raised before the Tribunal to rule on its own jurisdiction.

2.10. Aggrieved by the Order dated 27.01.2017, the Appellant – State filed a Civil Revision Petition before the Punjab and Haryana High Court, Chandigarh being C. R. No. 3279 of 2017.

2.11. The learned Single Judge of the Punjab and Haryana High Court *vide* the impugned Order dated 01.03.2018 dismissed the Civil Revision Petition on the ground that the Appellant – State could raise the issue of jurisdiction under Section 16 before the arbitral tribunal.

It was further held that in a situation where an objection is raised regarding the nomination of an arbitrator by one of the parties, and the agreement is silent with regards to the mode of appointment of a substitute arbitrator, the rules applicable would be those

of the Institution under which the arbitration is held. Therefore, in the facts of the present case, Rules 25 and 27 of the ICA Rules would apply.

2.12. Subsequent to the impugned Judgment being passed, the Application under Section 16 filed by the Appellant – State was dismissed by a non-speaking Order of the Arbitral Tribunal dated 12.05.2018.

2.13. Aggrieved by the Order dated 01.03.2018 and 12.05.2018, the Appellant – State has filed the present Petition.

3. We have heard the learned Counsel for both the parties, and perused the pleadings.

3.1. The High Court while considering the application under Section 15 failed to take note of the provisions of Section 15(2) of the Act.

Section 15(2) provides that a substitute arbitrator must be appointed according to the rules that are applicable for the appointment of the arbitrator being replaced. This would imply that the appointment of a substitute arbitrator must be according to the same

procedure adopted in the original agreement at the initial stage.

Section 15(2) of the Act reads as under :

> ***"15. Termination of mandate and substitution of arbitrator.—***
> *(1) …*
> *(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced."*
>
> *(Emphasis supplied)*

3.2. The provisions of Section 15(2) require that when the mandate of an arbitrator terminates either by his withdrawal from office, or pursuant to an agreement by the parties, or for any reason, a substitute arbitrator shall be appointed according to the rules applicable to the appointment of the arbitrator being replaced.

This Court in *ACC Ltd.* v. *Global Cements Ltd.*[1] held that the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically provide so.

[1] (2012) 7 SCC 71

3.3. In the present case, Clause 39.2.2. of the agreement expressly provided that each party shall nominate one arbitrator, and the third arbitrator shall be appointed in accordance with the Rules of the ICA.

3.4. The Appellant – State had *vide* Letter dated 16.11.2015 requested for 30 days' time to appoint another nominee arbitrator, after objections were raised by the ICA to the first nomination. The ICA declined to grant the period of 30 days, and instead appointed the arbitrator on behalf of the Appellant – State. The ICA could have filled up the vacancy only if the Appellant – State had no intention of filling up the vacancy. The ICA could not have usurped the jurisdiction over appointment of the nominee arbitrator on behalf of the State prior to the expiry of the 30 days' period requested by the Petitioner.

3.5. The appointment of the nominee arbitrator on behalf of the Appellant – State by the ICA was unjustified and contrary to the Rules of the ICA itself.

3.6. The objection raised by the ICA with respect to the appointment of Mr. M.K. Aggarwal as the nominee of the

State was wholly unjustified and contrary to the provisions of the 1996 Act.

3.7. The objection raised by Respondent No. 2 – ICA to the arbitrator nominated by the Appellant – State, was that the nominee arbitrator was a retired employee of the Appellant – State, and as such there may be justifiable doubts to his independence and impartiality to act as an arbitrator.

3.8. The said objection was refuted by the Appellant – State on the ground that the nominee arbitrator was a Chief Engineer who retired over 10 years ago from the services of the State. The apprehension of the Respondents was hence unjustified since the test to be applied for bias is whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the arbitrator was infact biased.

In *Locabail Ltd.* v. *Bayfield Properties*[2], the House of Lords held that :

> *"The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is*

[2] 2000 (1) All ER 65

raised, the weaker (other things being equal) the objection will be."

The Court of Appeal in *Re Medicaments and related Classes of Goods (No.2)* [3] while propounding the 'real danger' test for bias held that *:*

"The question is whether the fairminded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

3.9. 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.

3.10. 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

[3] 2002 (1) All ER 465

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" indicates that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties.

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.

3.11. The ICA made only a bald assertion that the nominee arbitrator – Mr. M. K. Aggarwal would not be independent and impartial.

The objection of reasonable apprehension of bias raised was wholly unjustified and unsubstantiated, particularly since the nominee arbitrator was a former employee of the State over 10 years ago. This would not disqualify him from act as an arbitrator. Mere allegations of bias are not a ground for removal of an arbitrator.

It is also relevant to state that the appointment had been made prior to the 2015 Amendment Act when the Fifth Schedule was not inserted. Hence, the objection raised by the ICA was untenable on that ground also.

3.12. In this view of the matter, the impugned judgment dated 01.03.2018 passed by the Punjab & Haryana High Court in C.R. No. 3279.2017 is set aside.

4. During the conclusion of arguments, the counsel for both parties mutually agreed to the arbitration being conducted by a Sole Arbitrator in supersession of the arbitration clause in the agreement which provided for a three-member arbitration panel.

The Counsel for both parties mutually agreed to the appointment of Justice S.S. Nijjar (Retd.) as the Sole Arbitrator to adjudicate the disputes arising out of the Concession Agreement dated 31.01.2009.

Accordingly, the mandate of the three-member arbitral tribunal constituted under the ICA Rules on 05.12.2015 stands terminated. The Sole Arbitrator shall proceed in continuation of the previously constituted arbitral tribunal. The material already on record shall be deemed to have been received by the Sole Arbitrator.

The Appeal is disposed of accordingly.

.....J.
(ABHAY MANOHAR SAPRE)

.....J.
(INDU MALHOTRA)

New Delhi
January 3, 2019.