

End to the Custom of Appointment of In-house Arbitrators

A REVIEW OF AMENDMENTS MADE TO THE ARBITRATION AND CONCILIATION ACT, 1996 WITH REGARD TO APPOINTMENT OF ARBITRATORS

I. INTRODUCTION

Arbitration, these days, has become the most preferred way for resolution of commercial disputes in India. The Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') contains provisions with respect to settlement of disputes through arbitration in India. Taking into consideration some issues such as pendency of cases and to achieve the objective of strengthening and having a sound legal framework, the Government of India proposed certain amendment to the Act in 2015 which was assented by the President on 23rd October, 2015 known as the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 'Amendment Act'). Among other changes brought in by the Amendment Act, pertinent changes were proposed with respect to appointment of Arbitrators and the grounds of their ineligibility.

For ensuring the impartiality of arbitrators, section 12 of the Act has been amended according to which the person needs to disclose the existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts as to his impartiality. Apart from this a new sub-section (5) has been added to section 12 that enlists certain persons as detailed in Schedule VII of the Act to be ineligible for being appointed as Arbitrator.¹ The Schedule VII of the Act lists down the situations where in the Arbitrator might have a relationship with any of the parties or counsel, or dispute, or have any direct or indirect interest in the dispute such as in case of arbitrator being employee, consultant, advisor of any of the parties to the arbitration or arbitrator being manager, director, or a part of management having influence in any of the parties to the arbitration, etc.² In this regard, Delhi High Court in one of its recent judgments in *Assignia-Vil v. Rail Vikas Nigam*

¹ Section 12(5): Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel, or 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.

² Schedule Seven, Arbitration and Conciliation Act, 1996.

³ Ltd. took cognizance of the amendment made to section 12 with the insertion of sub-section 5 to it.

II. FACTS OF THE CASE

By way of a Letter of Acceptance the Petitioner was awarded a Contract for Construction of Roadbed, Major and Minor Bridges, Track Lining (excluding supply of Rails and PSC Line Sleepers), General Electrical Work and S&T Works in connection with doubling between Utrahtia junction and Rae Bareli junction (65.6 Km.) on Lucknow Division of Northern Railway in Uttar Pradesh State, India' (hereinafter referred to as the 'work').

The said work was to be completed by 15th February 2015. But due to certain lapses in execution of work, the petitioner sought an extension of time for completion of the work. The respondent extended the time for completion upto 14th August, 2016 without levy of liquidated damages. However, by a letter dated 17 March 2015, the respondent sent a termination notice to the petitioner citing faulty execution of the work. The petitioner protested the said termination notice and called upon the respondent to revoke the same amicably. Receiving no response from the respondents for the request of amicable settlement of the dispute, the petitioner sent a notice of dissatisfaction dated 31st August 2015

stating its intention to commence arbitration on all the disputes.

Thereafter, the petitioner sent a letter to the respondent calling up to a panel of five independent names to the petitioner so that an independent Arbitral Tribunal could be constituted. Petitioner also stated that they will have to resort to option of approaching the Court of Law if no action is being taken by the respondent in this regard. Present petition was filed by the petitioner due to the failure of respondent to respond to the invocation of arbitration by the petitioner for the termination of the contract.

It is pertinent to mention here that before the petitioner sent a request to constitute an Arbitral Tribunal for resolving the issue of termination of Contract, certain issues were already pending before a prior Arbitral Tribunal (hereinafter referred to as "First Tribunal) constituted for resolving the same.

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When the petitioner approached the Hon'ble High Court, the disputes were still pending before the First Tribunal.

III. ISSUES INVOLVED IN THE CASE

1. The first issue before the Hon'ble Court was whether a fresh dispute can be referred to the First tribunal or should a new Arbitral Tribunal be constituted for resolving the issue;
2. The second issue was can the Respondent appoint its own employees, existing and or retired, as arbitrators in the new Arbitral Tribunal.

IV. ARGUMENTS BY THE PARTIES

Petitioners' main contentions were that the termination of the contract should be dealt by the newly constituted tribunal for the reasons, firstly, that termination of Contract constituted all together a distinct issue. Secondly, that in the view of the amendment to the Act, nomination and appointment of serving or retired employees would not constitute an independent and unbiased tribunal. Thirdly, since the arbitration for the second dispute with regard to the termination of the contract was invoked after the amendment came into force, i.e., October 23, 2015; the provisions of Amendment Act, 2015 would be applicable making the current or retired employees of any of the parties ineligible for becoming an arbitrator as provided by section 12(5) read with seventh schedule of the Act.

The respondents' opposed the contentions and argued that the existing arbitral tribunal can take into consideration the subsequent dispute and add it up to the pending disputes. Relying on various case laws, the respondent argued that the additional claims could be added to the earlier claim and can be raised before the First Tribunal as the aim of the procedure is to avoid litigation and resolve disputes speedily. Therefore there is no legal justification in limiting the scope of arbitration by restricting the addition of the claims.

V. JUDGMENT BY THE COURT

Placing reliance on Section 21 of the Act, the Court held that "There is no legal impediment for the petitioner to seek appointment of a second arbitrator to go into a dispute which is not considered in the earlier arbitration proceedings."

The Court further observed that "No doubt, the respondent has relied on certain case laws to the effect that the petitioner can refer the issue of termination of the contract to the existing Arbitral Tribunal. The petitioner cannot be forced to approach the existing Arbitral Tribunal in view of change of law as it is the prerogative of the petitioner to seek constitution of a distinct Arbitral Tribunal for adjudicating the issue of termination of the contract, once it is found that the disputes would be decided by the employee of the respondent."

Delhi High Court placed reliance on the decision of the Supreme Court in the case of Dolphin Drilling Limited v Oil and Natural Gas Corporation Limited⁴ which dealt with the same issue. However, the High Court thereafter noted the fact that the second arbitration was invoked by the petitioner subsequent to the amendment of the Act in 2015 and so the Amendment Act, 2015 shall apply to the said arbitration.

With regard to applicability of the provisions of the Act (as amended in 2015), in the present case as the arbitration clause between the parties is crystal clear that disputes would be settled in accordance with the Indian Arbitration Act, 1996 "and any statutory modification or reenactment thereof." which would encompass the amendment of 2015. Thus, the earlier pendency of the separate pre-existing disputes has no bearing on the maintainability of the present petition in as much as the present petition is concerned with the distinct and separate dispute arising out of the illegal termination of the contract by the respondent.

With respect to the Second Issue, the Court made the following observations:

"In the present case, the suggestion of the respondent to appoint its own employee who is either present employee or retired employee, the request cannot be accepted as the arbitration is invoked after amended Act has come into operation. In case the said request is allowed, the very purpose of amending the Act would be defeated."

VI. CONCLUSION

It would not be wrong to say that the appointment of arbitrators for any disputes through arbitration was done from the in-house people has become a common practice. And such

⁴ Dolphin Drilling Limited v Oil and Natural Gas Corporation Limited; (2010) 3 SCC 26.

practices can be said to have been undoubtedly giving unfair advantage to one party or the other. The Amendment Act, 2015 was a very much needed change in the common procedure of arbitration in India. And the Assignia-vil⁵ case is one of the very first few judgments that are helping the arbitration regime in India to expand and bring in the practices that would be fair to the parties involving in the arbitration.

In the judgment, the Delhi High Court has also dealt with other aspects such as the appointment of the arbitrator post the forfeiture of the right of appointing arbitrator by any of the parties. In this case the respondent forfeited its right of appointing an arbitrator by not responding to any of the procedures followed by the plaintiff. Section 11(6) of the Act is invoked when in such circumstances which provides for the appointment of arbitrator by Supreme Court or High Court as the case may be, or any person designated by such courts. Another thing to be noted here is that prior to the amendment, the power to appoint arbitrator in such circumstances were with the Chief Justice or any person designated by him. In this case, the High Court then appointed the panel of independent arbitration for the disposal of the case in accordance with section 11(8) of the Act that provides, the disclosures have to be made by such arbitrators in

accordance with section 12(1) of the Act.

Section 12(1) of the Act provides that any person who is approached to arbitrator in any case must disclose all the information that would have any implication on the proceedings of arbitration resulting in undue favor of any of the parties such as any direct or indirect relationship of the arbitrator, past or present, with any of the parties to the arbitration. In furtherance of that schedule five and schedule seven have been inserted in the Act to determine the circumstances which can give rise to justifiable doubt with respect to the independence and impartiality of the arbitrator.

The amendments made under the Act through the ordinance with respect to section 11 and 12 are substantially similar to the recommendations provided by the Law Commission in 246th Law Commission Report.⁶ It can be inferred from this judgment that Delhi High Court in accordance with section 12(5) read with the schedule seven of the Amendment Act has marked an end to the appointment of any in-house arbitrators. The sole purpose behind the amendment is to

5 Assignia-Vil v. Rail Vikas Nigam Ltd; Arbitration Petition No. 677 of 2015.

6 246th Law Commission Report on Amendments to the Arbitration and Conciliation Act, 1996; at pg 40

maintain independence and neutrality of the arbitrator. The amendment made in the Act with regard to the appointment of arbitrators is a positive step in ensuring the speedy disposal of the matters as none of the parties would get undue advantages by having in-house arbitrators.

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