

Court No. - 4

Case :- CIVIL MISC. ARBITRATION APPLICATION No. - 91 of 2023

Applicant :- Gepdec Infratech Limited Thru Authorized Representative

Opposite Party :- U.P. Power Transmission Corporation Ltd. Thru Superintending Engineer Lucknow

Counsel for Applicant :- Vishnu Pratap Singh, Awaneesh Yadav

Counsel for Opposite Party :- Puneet Chandra

Hon'ble Rajnish Kumar, J.

1. Heard Sri Syed Tamjeed Ahmad, learned counsel for the applicant and Sri Puneet Chandra, learned counsel for the respondent.

2. This Court, by means of the order dated 07.02.2023, proposed the name of Hon'ble Mr. Justice V.C.Gupta (Former Judge of this Court) as Arbitrator to settle the dispute between the parties. The order dated 07.02.2023, on reproduction, reads as under:-

"Heard Sri Awaneesh Yadav learned counsel for the applicant and Sri Puneet Chandra learned counsel for the respondent.

This Court has passed following order on 12.12.2023:-

"Heard Shri Syed Tamjeet Ahmad, learned counsel for the petitioner. Shri Puneet Chandra, learned counsel has accepted notice on behalf of the respondent.

The instant petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 for seeking appointment of a sole Arbitrator.

The submission of the learned counsel for the petitioner is that three separate agreements were entered between the parties. All the three agreements between the parties are dated 30.06.2017. Each of the agreement has an identical arbitration clause.

It is further urged that the first agreement relates to supply of equipment and material for construction of 400kV Sub Station at Jaunpur. The second agreement of the same date relates to the erection, testing, commissioning, operation and maintenance for two years of 400kV Sub Station at Jaunpur whereas the third agreement relates to civil works for construction of 400kV Sub Station at Jaunpur. Accordingly, it is submitted that all the three contracts

are part of one composite project which was to be completed by the petitioner under the three separate heads.

It is further urged that during the course of subsistence of the agreements, certain disputes arose between the parties and the petitioner by means of its notice dated 27.09.2023 by making a reference to all the three contracts invoked the arbitration clause.

It is further submitted that as per Clause 38 of the agreement which contained an arbitration clause it provided that any dispute arose between the parties was to be referred to the Chairman of the respondent Corporation, however, in light of the provisions contained in Section 12(5) of the Act of 1996 duly amended in the year 2015 it is now not open for the respondent to either arbitrate or nominate an arbitrator.

In the given circumstances, the petitioner had requested the respondent to cooperate in an early constitution of Arbitral Tribunal, however, despite the notice dated 27.09.2023 having been served on the respondent, there was no response, hence, the petition.

Shri Puneet Chandra, learned counsel for the respondent on the other hand submitted that though he requires time to file his response as he wishes to raise a preliminary objection to the effect that since there are three separate agreements which have given rise to three separate cause of action, hence, one single petition raising the disputes as well as one composite notice dated 27.09.2023 both are not valid, apart from the fact that the agreements also provide for the jurisdiction at Allahabad.

Let the response be filed by the respondent within two weeks from today with an advance copy to the learned counsel for the petitioner, who if may so choose, may file his response within one week thereafter.

Since, the respondent Corporation is represented through its counsel, hence, no fresh notice is required.

List this matter on 12.01.2024. "

Learned counsel for the respondent, on the basis of instructions submits that respondent does not want to file any objection and since there is dispute, therefore, Arbitrator may be appointed.

Having considered the submissions of the learned counsel for the parties there appears to be some arbitral dispute between the parties and if the same is resolved through Arbitrator appointed by this Court in terms of Clause 25 of Section 8 of the agreement none of the parties are going to be prejudiced.

Accordingly the Court proposes to appoint Hon'ble Mr.Justice V.C.Gupta, House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897 as Arbitrator to settle the dispute between the parties.

Let a copy of the pleadings on record alongwith the relevant provisions of the amending Act 2015 be sent to Hon'ble Mr.Justice V.C.Gupta, House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897 for eliciting his disclosure in terms of Section 11(8) read with Section 12(1) of the Act, 1996 and Schedule VI and VII as amended by Act 2015, appended thereto, as also his consent for appointment as an Arbitrator for resolving the dispute.

Learned counsel for the applicant shall supply an additional copy of the application to the office for the said purpose within a week.

List after receipt of reply/consent."

3. In deference to the aforesaid order, Hon'ble Mr. Justice V.C.Gupta(Former Judge of this Court) has sent his consent through letter dated 19.02.2024 in accordance with law.

4. Learned counsel for the respondent submits that since Hon'ble Mr. Justice V.C. Gupta(Former Judge of this Court) is conducting an arbitration between the respondent-U.P. Power Transmission Corporation Ltd. and SEW Infrastructure Ltd. after being appointed as an arbitrator by means of the order dated 27.09.2023 by this Court in Civil Misc. Arbitration Application No.40 of 2023 and he has also issued notices on 11.10.2023,therefore, as per Item 24 of the Fifth Schedule of the Arbitration and Conciliation Act,1996(here-in-after referred to as the Act of 1996), he may not be appointed as an arbitrator as it gives rise to justifiable doubts as to his independence or impartiality. He relies on **HRD Corporation (Marcus Oil and Chemical Division) Versus GAIL(India) Limited; (2018)12 SCC 471.**

5. Per contra, learned counsel for the applicant submits that contention of learned counsel for the respondent is mis-conceived and not tenable for the reason that he has failed to indicate that the proposed arbitrator was or is related in any manner with one of the parties on the issue involved in this case in the other arbitration or he is affiliate of one of the parties. He further submits that he has no objection in appointment of the proposed arbitrator.

6. I considered the submissions of learned counsel for the parties and gone through the records.

7. Section 11 of the Act of 1996 provides the appointment of arbitrators. Sub-section (6) of Section 11 of the Act of 1996 provides the appointment of the arbitrator by the High Court, in

case the parties fails to act as required under the procedure of appointment agreed upon by the parties. Sub-section (8) of Section 11 provides that the arbitral institution referred to in sub-sections (4), (5) and (6) before appointing the arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12. Sub-section (8) of Section 11 is extracted hereinbelow:-

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.]”

8. Section 12 of the Act of 1996 provides that the proposed arbitrator shall disclose in writing any circumstances as disclosed therein with reference to Fifth Schedule of the Act of 1996 in regard to his independence and impartiality etc. Section 12 is extracted herein-below:-

12. Grounds for challenge.

[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality;

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(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.]

9. The Fifth Schedule of the Act of 1996 provides the grounds which give rise to justifiable doubts as to the independence or impartiality of arbitrators.

10. Item No.24 of the Fifth Schedule of the Act of 1996, on the basis of which, objection has been raised by learned counsel for the respondent for appointment of the proposed arbitrator is extracted herein-below;

"24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties."

11. In view of the aforesaid Item 24 of Fifth Schedule, doubt in regard to the independence or impartiality of an arbitrator can be raised if an arbitrator currently serves or has served within the past three years, as arbitrator in another arbitration on a related issued involving one of the parties or he is an affiliate of one of the parties. Therefore if an arbitrator is currently serving or has served in the past three years as an arbitrator on the related issue involving one of the parties, on which the arbitration is to be held in the

present case or if he is affiliate to one of the parties, it may be a ground to give rise to his independence or impartiality. Thus it cannot be conclusive ground of doubt of his independence or impartiality.

12. Item No.1 to14 and 30 and 31 of the Fifth Schedule of the Act of 1996 provides the grounds which may give rise to justifiable doubts of independence or impartiality of arbitrator on the ground of his relationship with the parties or counsel. Item No.15 and 16 of the Fifth Schedule provides that the arbitrator can be said to be related to the dispute if he has given legal advise or provided an expert opinion on the dispute to a party or an affiliate of one of the parties or he has previous involvement in the case. The circumstances have been given in Item No.1 to 14 and 30 and 31 of the Fifth Schedule in which the arbitrator can be said to be affiliate to one of the parties, such as, if he is an employee, consultant, advisor or has any other past or present business relationship with a party or currently he represents or advises one of the parties or an affiliate of one of the parties etc.

13. Learned counsel for the respondent has failed to indicate any such circumstance, in terms of the aforesaid provisions, on account of which it may be said that the proposed arbitrator is serving as an arbitrator on a related issue with one of the parties i.e. the respondent Corporation in the other arbitration or he is his affiliate. It is also very strange that objection has been raised by learned counsel for the respondent on the basis of Item No.24 without disclosing relationship of respondent corporation with the proposed arbitrator except that he is arbitrator in the other

arbitration, which may be a disqualification for appointment of the proposed arbitrator in the present matter.

14. In view of above, without disclosing as to how he can say that the arbitrator is related to the issue with one of the parties in the other arbitration, in which the respondent corporation itself is a party, when he fairly admits, on a query being put to him, that the other arbitration is on separate issue or as to how the proposed arbitrator is an affiliate of the respondent-corporation, without disclosing the relationship, in terms of the Fifth Schedule of the Act of 1996, the contention of learned counsel for the respondent is misconceived and not tenable.

15. The Hon'ble Supreme Court, in the case of **HRD Corporation (Marcus Oil and Chemical Division) versus GAIL(India) Limited**(supra), has held that the disqualification contained in Items 22 and 24 is not absolute. The relevant paragraph 24 is extracted hereinbelow:-

"24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the

parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression "the arbitrator" in Item 16 cannot possibly mean "the arbitrator" acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as "the arbitrator" refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served "as arbitrator" before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It 32 was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a "business relationship" with the respondent under Item 1. Nor is the delivery of an award providing an expert "opinion" i.e. advice to a party covered by Item 15".

16. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that the objection raised by learned counsel for the respondent is totally misconceived and not tenable and liable to be repelled, which is accordingly repelled.

17. At this stage, learned counsel for the respondent submits that he may be granted liberty to raise the issue before the arbitrator, for which no liberty is required and if he is entitled to raise objection in accordance with law and advised so, he may raise and the same may be considered by the arbitrator in accordance with law.

18. In view of above, Hon'ble Mr.Justice V.C.Gupta(Former Judge of this Court), House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897, is hereby appointed as an Arbitrator to decide the dispute between the parties herein.

19. The application is, accordingly, **disposed of**.

20. Let a copy of this order be communicated forthwith to Hon'ble Mr.Justice V.C.Gupta, House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897.

Order Date :- 28.2.2024
Akanksha