

**Serial No.01**  
**Regular List**

**HIGH COURT OF MEGHALAYA**  
**AT SHILLONG**

Arb.P.No.1/2022

Date of Order: 18.04.2022

Jaguar Overseas Limited Vs. Union of India & anr

**Coram:**

**Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice**

**Appearance:**

For the Petitioner : Mr. P Chauhan, Adv. with  
Ms. P. Biswakarma, Adv  
For the Respondents : Dr. N. Mozika, ASG with  
Ms. S. Rumthao, Adv.

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

**JUDGMENT: (Oral)**

There is consensus between the parties as to the existence of an arbitration agreement that covers the disputes that have arisen between them and that there are live claims to be carried to an arbitral reference.

2. The arbitration agreement is found in Clause 70 of the general conditions governing contracts pertaining to the Military Engineering Services. The clause is set out:

“70. Arbitration—All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration

of a Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub-Division II of Institution of Surveyor (India) recognised by the Govt. of India to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the Contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, *exparte*, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute. The arbitrator

shall give reason for the award in each and every case irrespective of the value of claims or counter claims.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract.”

3. Though the relevant clause provides for the arbitral reference to be taken up by a sole arbitrator who would be a serving officer having a degree in engineering or equivalent and would be appointed by the authority mentioned in such regard in the tender documents, the Union concedes that in view of the Arbitration and Conciliation Act, 1996 as it now stands after the amendment effected in October, 2015, a serving officer of the MES can no longer take up the reference. The petitioner has suggested that any retired Judge or active counsel may be appointed as arbitrator and a particular name has also been indicated. However, the Union submits that the Ministry of Defence has prepared a panel of arbitrators who are not serving officers and have no relationship with the Ministry of Defence. The Union suggests that any of the independent persons named in the Ministry's panel be appointed as sole arbitrator, subject to the other terms and conditions of the arbitration agreement embodied in Clause 70 of the general conditions.

4. Section 12(1)(a) of the Act, as amended, obliges a person upon being approached to be an arbitrator to disclose the circumstances which

may give rise to justifiable doubts as to his independence or impartiality. More importantly, Section 12(5) of the Act prohibits the appointment of a person as an arbitrator who falls under any of the categories specified in the Seventh Schedule to the Act which has been inserted by the 2015 Amendment.

5. It may do well to notice sub-section (5) of Section 12 of the Act in its entirety:

“(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.”

6. The first of the several categories under the heading “Arbitrator’s relationship with the parties or counsel” set out in the Seventh Schedule is as follows:

“The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.”

7. In the context of the degree of impartiality that the amended provisions of the said Act seek to put in place, a person empanelled as an arbitrator by any party has, per force, to be seen as having a business relationship with such party within the meaning of the category quoted above from the Seventh Schedule.

8. Partiality or bias is a state of mind and it is well-nigh impossible to prove or establish latent or patent bias just as it is to demonstrate active or underlying partiality. As a consequence, the experience that is law lays down the test in such regard to be: whether the circumstances exist that may give rise to a justifiable doubt as to the independence or impartiality of the person concerned. As a consequence, reasonable possibility of bias or likelihood of partiality would suffice. Obvious bias or apparent partiality need not be demonstrated; and, it is of no relevance in the present context, particularly since the prohibition operates at the inception.

9. It is only human that a person, who stands to obtain monetary benefits by taking up an arbitral reference, may be favourably inclined towards the party that has empanelled him so that his name continues to appear in the panel and there are possibilities of future appointment. There is no doubt that it will play at the back of the mind of an empanelled arbitrator that if a punitive or heavy award is made against the party that has empanelled him, even if the party which has empanelled him is deserving of the same, the arbitrator's name may not figure in the panel in future. Similarly, at the other end of the spectrum, an empanelled arbitrator may subconsciously award more heavily in favour of the party that has empanelled him to stand a better chance to be

retained on the panel. Once such reasonable possibility arises, it amounts to a justifiable doubt as to the independence or impartiality of the person concerned.

10. The creation of a panel of arbitrators by a government employer for the contractor to choose therefrom cannot, by itself, be said to be useless altogether. However, in the light of the Proviso to Section 12(5) of the Act that speaks of a post-dispute waiver of the applicability of the Seventh Schedule by the other party, the panel can only be of relevance if the other party to the arbitration agreement accepts one of the persons named in the panel to take up the reference.

11. It is significant that the relevant Proviso specifically refers to the waiver being at a stage when the disputes have already arisen. This will preclude the appointment of an arbitrator named in the arbitration agreement whose appointment would otherwise fall foul of the Seventh Schedule. Pre-dispute concurrence as to the personnel of the arbitrator will not prevent a party to an arbitration agreement objecting to the agreed arbitrator taking up the reference if any of the conditions enumerated in the Seventh Schedule fastens to such named arbitrator. Further, since the word used in the relevant proviso is “waive”, such waiver has to be a conscious relinquishment of a known right; in the

sense that it must be an overt act of relinquishment rather than a passive act as in acquiescence.

12. Once the contractor, as in this case, does not accept the names on the panel, the panel can no longer be enforced; as there will always be a justifiable doubt as to the independence or impartiality of a person whose name has been included in such panel of possible arbitrators. In the present case, however, the Union does not object to any retired Judge of a High Court being appointed as arbitrator.

13. Since the petitioner has suggested the name of Justice B.D. Agarwal (retired), a former Judge of the Gauhati High Court, and no express objection regarding such choice has been indicated by the Union, the disputes and differences that have been arisen between the parties and that are covered by the arbitration agreement between them are referred to the sole arbitration of Justice B.D. Agarwal (retired) in accordance with the arbitration agreement and subject to the conditions indicated therein.

14. Nothing in this order will prevent the parties from raising objections as to the arbitrability of any claim or the extent thereof and it will be open to the arbitrator to decide all legal and factual issues that arise in accordance with law and guided by the arbitration agreement between the parties.

15. Arb.P.No.1 of 2022 is disposed of.
16. There will be no order as to costs.

**(Sanjib Banerjee)**  
**Chief Justice**

Meghalaya  
18.04.2022  
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