

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Arbitration Application No.26 of 2020

National Club Cooperative Society Ltd., through its Chairman, Sri Pawan Kumar, aged about 47 years, having its Office at Shashi Palace, Ramkrishna Nagar, Hemra Road, Ward No.20, P.O. – Begusarai, P.S. Town Police Station, District – Begusarai (Bihar), local office at Flat No.302, Baidyanath Residency Block-C, Kusum Vihar, P.O. – Ranchi University, P.S.-Lalpur, District – Ranchi.

.... ... **Applicant**

Versus

The Managing Director, the Jharkhand State Adivasi Cooperative Marketing Federation Ltd., having its Office at 4th Floor, Pashupalan building, Singh More, Hesag, P.O. & P.S. – Hatia, District – Ranchi.

... ... **Respondent**

CORAM:HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD

For the Applicant :Mr. Mrinal Kanti Roy, Advocate

Order No. 07/Dated 28th April, 2022

The instant application is under Section 11(6) (c) of the Arbitration & Conciliation Act, 1996 for appointment of an independent and impartial Sole Arbitrator in pursuance of Clause 22 of the Lease Deed executed between the parties in order to adjudicate the dispute.

2. The facts of the case, as per the pleading made in the instant Arbitration Application, read hereunder as:-

The society entered into a lease deed with the respondent for running of a cold storage belonging to the

respondent situated at Boreya in the district of Ranchi, which was executed on 27.08.2015.

The lease deed was for a period of five years. The lease deed contains a condition by which the applicant was to give possession of 2600 MT of coal storage and accordingly, the Society stored maize and potato weighing about 2300 MT in the said cold storage.

It is the case of the applicant that in the month of July, 2017, the pillars of the cold storage started giving way and the applicant vide his letter dated 23.07.2017, made a complaint to this effect to the respondent.

The respondent, even in spite of the request to take immediate action to avoid major accident, has taken no decision in this regard.

It is the further case of the petitioner-applicant that due to non-initiation of repairing of the aforesaid coal storage, the coal storage finally collapsed which resulted into huge financial loss to the tune of Rs.3,15,99,589/-.

The applicant, having no other option but to invoke Clause 22 of the lease deed dated 27.08.2015 which contains a condition for arbitration for settlement of dispute between the parties.

The petitioner-applicant gave notice as per the condition stipulated under the agreement clearly stating at paragraph 10 therein that in terms of the agreement, the

Registrar Cooperative Society had been named as an Arbitrator, however, in view of the amendment of Arbitration and Conciliation Act, 1996, which has taken effect from 23.10.2015, the Registrar, Cooperative Society, who is ex-officio Director of Respondent, cannot act as an Arbitrator and accordingly the respondent was requested to give consent for appointment of one of the retired Judge named in the notice to act as a sole Arbitrator. However, no response was given to the aforesaid notice and, therefore, the instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed.

3. Mr. M.K.Roy, learned counsel appearing for the petitioner-applicant, has submitted by taking aid of the Amended Arbitration Act, 2015, whereby and whereunder provision has been inserted as under Section 12 thereof wherein it has been stipulated that when a persons is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, as referred under Sub-Sections (a) and (b) which contains that in case the concerned arbitrator who is named in the arbitration agreement or to be appointed, is having 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 and 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.

Further, 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 and as under Explanation 2, the disclosure shall be made by such person in the form specified in the Sixth Schedule.

It has further been argued by taking aid of Sub-Section 5 of Section 12 thereof that 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.

Submission has been made, in the backdrop of the aforesaid legal position, that in the agreement, since the Registrar, Cooperative Society, who is Ex-officio Director of the said Society, has been named to act as a sole Arbitrator, therefore, there is no expectation from the

Registrar, if allowed to act as an Arbitrator to act independently, since, the Registrar is having direct relationship with the interest of the party respondent and hence the condition stipulated in the agreement naming the Registrar to act as sole Arbitrator is absolutely incorrect and, therefore, the instant application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of sole Arbitrator for appointing a retired Judge of this Court so as to resolve the dispute as impartial entity.

4. This Court has heard the learned counsel appearing for the petitioner-applicant and perused the documents available on record.

The fact which is not in dispute in this case is that there is an arbitration clause in the lease deed dated 27.08.2015 as under Clause 22 that in case of any dispute, the dispute will be referred to the Registrar, Co-operative Societies, Jharkhand, Ranchi for arbitration and its decision will be accepted by both the parties. The aforesaid condition stipulated under Clause 22 of the lease deed reads hereunder as :-

“22. That in case of any dispute, the dispute will be referred to the Learned Registrar, Co-operative Societies, Jharkhand, Ranchi for arbitration and its decision will be accepted by the both the parties. The arbitration proceeding shall be guided by Arbitration & conciliation Act, 1996.”

It further stipulates that arbitration proceeding shall be guided by Arbitration and Conciliation Act, 1996.

The petitioner-applicant raised a claim of an amount of Rs.3,15,99,589/- which arisen due to collapse of the coal storage for which the lease deed was entered into.

The petitioner-applicant has made request vide communication dated 13.03.2020 addressed to the Managing Director, Jharkhand State Adivasi Co-operative Vegetable Marketing Federation (VEGFED), Jharkhand, Ranchi for appointment of an independent and impartial sole Arbitrator in pursuance to Clause 22 of the lease deed dated 27.08.2015 executed between Jharkhand State Adivasi Co-operative Vegetable Marketing Federation (VEGFED), Jharkhand, Ranchi and National Farmers Club Cooperative Society Limited, for adjudication of the dispute with respect to the loss incurred to the National Farmers Club Cooperative Society Ltd., on account of collapse of Boreya Coal Storage. The content of the aforesaid letter is that the Registrar cannot be said to be an independent and impartial Arbitrator since he is having direct relationship with the respondent parties and as such, the name of former Judge of the High Court has been suggested for appointment as Arbitrator.

5. Thus, it is evident that the petitioner-applicant has moved this application by invoking the jurisdiction

conferred to this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of independent Arbitrator on the pretext that if the Registrar, as referred in the arbitration clause under Clause 22 of the lease deed, will be appointed as Arbitrator, there is every likelihood of malice, prejudice and partiality and, therefore, the same will be said to be in the teeth of the provision of Section 12 of the Arbitration and Conciliation (Amendment) Act, 2015 which contains a provision as under Section 12 thereof wherein the provision has been made for independent Arbitrator in case the Arbitrator, who is to be appointed, is having 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, wherein the Registrar of the Cooperative Society since is also Ex-officio Director of the respondent, therefore, it is not expected from the Registrar to act as an independent Arbitrator.

Admittedly, the instant application has been filed without resorting to the request made on behalf of the petitioner-applicant in terms of Clause 22 of the lease deed which stipulates to make a request for appointment of Arbitrator and in that circumstances, the dispute will be referred to the Registrar, Cooperative Societies, Jharkhand, Ranchi for arbitration and its decision will be accepted by both the parties.

The aforesaid lease deed, since has been entered in between the parties and as such, the same binds both parties being bilateral agreement. The petitioner-applicant, with all consciousness, has entered into the lease deed knowing fully well that in case of any dispute the same will be referred to the Registrar, Cooperative Societies, Jharkhand, Ranchi and after its acceptance, now he is questioning the impartiality of Registrar, Cooperative Societies, Jharkhand, Ranchi.

It is relevant to note herein that the agreement is dated 27.08.2015 which admittedly is prior to enactment of the provision of Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 which has been enacted with effect from 23.10.2015 and, as such, question of retrospective applicability of the provision of Section 12(5) will be an issue.

It is further relevant to note that the applicability of the Amended Act, 2015 with retrospective effect, on account of divergent views of two Coordinate Benches of Hon'ble Apex Court, is now referred before the Larger Bench in ***Union of India v. M.S. Tantia Constructions Limited [2021 SCC OnLine SC 271]*** to examine the correctness of order passed in ***Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, [2019 SCC OnLine 1635]***

and, as such, this Court is not going in this issue, rather, this Court is considering the issue – as to whether merely because an officer of the respondent has been named to be appointed as sole Arbitrator, is it sufficient to hold its ineligibility?

6. Similar issue fell for consideration before the Hon'ble Apex Court in the case of ***Aravali Power Company Private Limited v. Era Infra Engineering Limited [(2017) 15 SCC 32]*** wherein when the dispute arose pertaining to the progress of work which was found to be quite slow and, as such, the same compelled the appellant to cancel certain remaining works by taking decision in this regard.

The dispute was raised by the respondent, namely, M/s. Era Infra Engineering Limited by invoking the arbitration clause as under Clause 56 of the General Conditions of Contract wherein, it has been stipulated that the Arbitrator will be appointed by the Chairman and Managing Director, NTPC Limited in case any dispute arises with respect to non-completion or unwillingness to act for completion of the work.

The respondent, while making request for appointment of Arbitrator in view of the condition stipulated under Clause 56 of the General Conditions of Contract of the contract agreement, an issue has been

raised by drawing the attention to the legal issue that once the order of part cancellation has been passed at the highest level of the owner/employer, any forum or resolution of dispute constituted by the said authority and particularly, its subordinate is of no legal consequence.

It is well settled proposition of law that nobody can be the judge of its own cause. Therefore, in the light of the aforesaid settled position of law, the request for appointment of independent Arbitrator was made, a retired Judge of the High Court, so as to seek vindication of grievance. Objection to such submission has been made on behalf of the appellant namely Aravali Power Company Private Limited.

An application was filed by the respondent being Arbitration Petition No.136 of 2016 by invoking the jurisdiction of the concerned High Court conferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an independent Arbitrator for adjudicating dispute between the parties. The cause of action as per the pleading made in the said petition arose on the various dates when requests were made by the petitioner to the respondent for issuance of long outstanding payments. The cause of action further arose on 29-7-2015 when arbitration was invoked by the petitioner. The cause of action further arose, when the respondent

erroneously and illegally rejected the petitioner's request for appointment of an independent Arbitral Tribunal.

The High Court passed order setting aside the appointment of Arbitrator and directed to suggest three names of panel Arbitrators from different departments, to the respondent, who could thereafter choose any one of them to be the Arbitrator in the matter. The decision of the High Court was challenged before the Hon'ble Supreme Court to the extent that the High Court had directed the appellant to submit three names from its panel of Arbitrators from which list the respondent was directed to select sole Arbitrator.

The Hon'ble Apex Court, after taking into consideration the condition stipulated under Clause 56 of the General Conditions of Contract and dealing with the provision as contained under Section 12 of the Arbitration and Conciliation (Amendment) Act, 2015, has passed order as under paragraph 19 wherein it has been observed referring to Section 12(1) by holding therein that Section 12(1) as it then stood before the Amendment Act came into force, obliged the person approached in connection with possible appointment as an arbitrator, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

The Hon'ble Apex Court by making reference of the case observed that the Arbitrator undoubtedly was an employee of the appellant but so long as there is no justifiable apprehension about his independence or impartiality, the appointment could not be rendered invalid and unenforceable.

The Hon'ble Apex Court has relied upon the judgment rendered in ***Indian Oil Corporation Limited and Others v. Raja Transport Private Limited [(2009) 8 SCC 520]*** wherein it was held that mere fact that the arbitrator is an employee is not ipso facto a ground to raise any presumption of bias or partiality. It is not the case that there had not been any fair and correct disclosure. All that the respondent alleged in its petition seeking termination of the mandate of the arbitrator was, "...he has himself in his official capacity in the respondent Company dealt with contracts of nature similar to the contract works in question...". The respondent, while relying on the provisions of the Amendment Act had also submitted, "...allegedly appointed individual is the Chief Executive Officer of the respondent herein, who on account of such position also has the controlling influence over the respondent Company".

The Hon'ble Apex Court further observed in the aforesaid paragraph by making reference of paragraph 13

of the judgment under appeal that the arbitrator was not the Engineer In-charge or the day-to-day in-charge of the work and as a matter of fact, the Engineer In-charge was AGM (CCD-Township) who had a team of other Engineers working under him and that AGM (CCD-Township) reported to AGM (ME — CCD) who in turn reported to CEO (Apcpl) i.e. the arbitrator. The facts on record and the hierarchy as mentioned do not show that the arbitrator in the present matter was either the dealing authority in regard to the contract or was directly subordinate to the officer(s) whose decision is the subject-matter of dispute. In fact, the decision, which could be subject-matter of dispute, was that of his subordinates. He may have dealt with contracts of nature similar to the contract works in question but that by itself does not render the appointment invalid. Since there is nothing on record which could raise justifiable doubts about the independence or impartiality of the named arbitrator, in the light of the observations of this Court in ***Indian Oil Corporation Limited and Others v. Raja Transport Private Limited*** (Supra) the appointment of the arbitrator could not in any way be termed to be illegal or unenforceable.

In the aforesaid judgment, reference of proposition laid down by the Hon'ble Apex Court in ***Northern Railway Administration, Ministry of Railway, New Delhi v. Patel***

Engineering Company Limited [(2008) 10 SCC 240]

wherein a Bench consisting of three Hon'ble Judges of Hon'ble Apex Court had considered the fact laying down therein that before the alternative is resorted to, agreed procedure has to be exhausted. The agreement has to be given effect and the contract has to be adhered to as closely as possible. Corrective measures have to be taken first and the Court is the last resort.

Further, the relevant would be the discussion made at paragraphs 12, 13 and 14 of the aforesaid judgment which are quoted hereunder as :-

“12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

13. The expression “due regard” means that proper attention to several circumstances have been focused. The expression “necessary” as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken.

14. In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.”

The Hon'ble Apex Court, further, in the case of ***Union of India v. Singh Builders Syndicate [(2009) 4 SCC 523]*** has held at paragraph 14 that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.

The reference of the judgment rendered by Hon'ble Apex Court in ***Voestalpine Schienen GMBH v. Delhi***

Metro Rail Corporation Limited [(2017) 4 SCC 665] is required to be made wherein at paragraph 26 it has been laid down that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Paragraph 26 of the aforesaid judgment is quoted hereunder as :-

“**26.** It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide “to determine whether circumstances exist which give rise to such

justifiable doubts”. Such persons do not get covered by red or orange list of IBA guidelines either.”

7. Now moving to the facts of this case wherein the arbitration clause stipulates that in case of any dispute, the dispute will be referred to the Registrar, Cooperative Societies, Jharkhand, Ranchi. It would be evident from the lease deed which was entered in between the applicant National Farmers Club Cooperative Society Limited with Jharkhand State Adivasi Co-operative Vegetable Marketing Federation, Ranchi that the first party, i.e. Jharkhand State Adivasi Co-operative Vegetable Marketing Federation (VEGFED), Jharkhand, Ranchi since has been registered under the Jharkhand State Cooperative Societies Act, 1935, under which the Registrar is the authority, therefore, independent adjudication of the dispute, according to the petitioner-applicant, is not possible, cannot be said to be justifiable reason for not appointing the Registrar, Cooperative Societies, Jharkhand, Ranchi to act as an Arbitrator in terms of the condition stipulated under Clause 22 of the lease deed.

As has been held by Hon'ble Apex Court in ***Aravali Power Company Private Limited v. Era Infra Engineering Limited*** (Supra) as under paragraph 19 thereof that merely because the Arbitrator is an employee is

not ipso facto a ground to raise any presumption of bias or partiality.

Further, the decision which was required to be taken was by the respondent Society in the name and style of Jharkhand State Adivasi Co-operative Vegetable Marketing Federation, Ranchi, having been registered by the Jharkhand State Cooperative Society. Therefore, merely by granting registration by the Jharkhand State Cooperative Society, to which the Registrar is an authority, presumption cannot be arrived at about raising doubt about independence and impartiality of the named Arbitrator.

Further, in the judgment referred in the case of ***Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited*** (Supra) wherein it has been laid down that so far as it is possible, the terms of agreement is required to be adhered to. Therefore, merely by raising apprehension of independence and impartiality and on that ground even the request has not been made by the petitioner-applicant for appointment of Arbitrator in terms of the condition stipulated under Clause 22 of the lease deed, the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 cannot be held to be maintainable.

8. Accordingly, the instant Arbitration Application is dismissed.

However, it is left open upon the petitioner-applicant to make appropriate application in view of the condition stipulated under Clause 22 of lease deed dated 27.08.2015 for appointment of Arbitrator, if the petitioner-applicant so wishes.

(Sujit Narayan Prasad, J.)

Birendra/