



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO.1359 OF 2024

Solaris Developers Pvt. Ltd. .. Petitioner

Versus

State Bank of India Supervising Staff .. Respondent
Bhagyashree Co-Operative Housing
Society Ltd.

...

Mr.Anshul Anjarlekar with Ms.Asmita N. Rajbhar i/b
Mr.Mangesh J. Nalawade for the Petitioner.

Mr.Prashant Chawan with Mr.Yashodhan Divekar,
Mr.Ravindra Chile and Mr.Rohan Karande i/b M/s Divekar &
Co. for the Respondent.

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CORAM: BHARATI DANGRE, J.
DATED : 30th JANUARY, 2024

P.C:-

1. The present Petition filed under Sections 14(2) and Section 15(2) of the Arbitration and Conciliation Act, 1996 (for short, "**The Act of 1996**") seek the following reliefs:-

"(a) That this Hon'ble Court be pleased to terminate the mandate of Advocate Ms.Seema Sarnaik as the Arbitrator, since the same is in violation of section 14(1) of the Arbitration & Conciliation Act, 1996 and the relevant provisions of the law;

(b) That this Hon'ble Court be pleased to declare that the constitution of the Ld. Arbitral Tribunal of Advocate Ms.Seema Sarnaik is *de jure*, as the Ld. Arbitrator is closely associated with the parties;

(c) That this Hon'ble Court be pleased to substitute the existing Advocate Ms.Seema Sarnaik and appoint any person as this Hon'ble Court may deem fit as the Sole Arbitrator to adjudicate upon the disputes between the parties.”

2. The Arbitral Tribunal was constituted under the orders passed by this Court, for resolving the disputes that arose between the parties, in terms of the Development Agreement dated 27/08/2013 and I need not delve deep into the nature of dispute between the parties.

Suffice it to note that on being nominated as Arbitrator by order dated 08/10/2021, the learned Arbitrator forwarded a statement of disclosure dated 26/10/2021 under Section 11(8) read with Section 12(1) of the Act of 1996.

It is the contention of the Petitioner that the Arbitrator did not disclose her family relationship with one Mr.Harshad Tirodkar, Secretary of the Respondent/Society and her unknown family member, who is closely related to Mr.Harshad Tirodkar. It is also alleged that in her disclosure statement, she did not disclose her close relationship and friendship with the partner of the Advocates for the Respondent/Society.

3. The Petition itself proceed to narrate that the Arbitrator conducted a preliminary meeting on 22/11/2021 and proceeded to deal with the claim as well as the counter-claim. The Petition has also enlisted several instances to attribute unfair and partial behaviour of the Arbitrator towards the Petitioner, with a prejudiced mind that the Petitioner is not an honest person and is delaying the proceedings.

In the wake of the insinuations in the Petition, with a plea that the Arbitrator is not acting fairly and with a neutral mind and was rather partial and unfair in the proceedings, substitution is sought by invoking Section 14(2) read with Section 15 of the Act of 1996.

4. The learned counsel Mr.Prashant Chawan representing the Respondent/Society has tendered his affidavit-in-reply affirmed on 29/01/2024 and he has raised the preliminary objection about the maintainability of the proceedings itself.

According to the learned counsel, a mechanism is prescribed under the Act of 1996, where the appointment of the Arbitrator, on the ground of existence of justiciable doubt about his independence or impartiality is to be challenged, by way of challenge procedure prescribed under Section 13 and, therefore, the present Petition is not maintainable.

5. I find substance in the submission of Mr.Chawan, as it can be seen that Section 12 of the Act of 1996, which has stipulated the grounds for challenge, contemplate that the appointment of an Arbitrator can be challenged only in the manner prescribed in sub-section (3).

The provision in form of sub-section (1) of Section 12, being inserted by the Amending Act of 2016 w.e.f. 23/10/2015, in tune with the most important aspect and hallmark of arbitration, being the independence and impartiality of an Arbitrator, would contemplate disclosure by the proposed Arbitrator in his approach, as regards the circumstances stipulated in clauses (a) and (b) of sub-section (1).

The *Explanation 1* appended to sub-section clearly stipulate that 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. Sub-section (5) is also inserted by the Amending Act of 2016, which clearly contemplate that 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, he shall be ineligible to be appointed as an Arbitrator.

However, the proviso permit waiver of the applicability of this sub-section by an express agreement in writing.

6. Section 13 prescribe the procedure for posing a challenge and it read thus :-

“13. Challenge procedure.-(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.”

7. The grounds which are contemplated for challenging an appointment of an Arbitrator are only two; (a) if the circumstances exist that give rise to justifiable doubt as to his independence and impartiality (b) he does not possess the qualifications agreed to by the parties.

8. From the reading of the pleadings in the Petition and on hearing the learned counsel for the Petitioner, it is evident that he wants to bring his case within Section 14 (a), which contemplate termination of mandate of the Arbitrator and his substitution, if he become *de jure or de facto* unable to perform his functions and in order to point out that the Arbitrator has incurred such an ineligibility, he would rely upon two entries in the Seventh Schedule, being Entry Nos.9 and 10, which read thus :-

“9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.”

9. What is important to note is the Explanation 1, appended to the said Schedule, which reads thus :-

“Explanation 1.- The term “close family member” refers to a spouse, sibling, child, parent or life partner.”

By no stretch of imagination. it is the claim of the Petitioner that the Secretary of the Society would fall within

the purview of “close family members” and, therefore, the ineligibility, which would fall upon an Arbitrator, which would be captioned as *de jure* incapability to discharge the functions as Arbitrator, is not attracted. If this is not so, then what is permissible mode, is to raise a challenge to the appointment of the Arbitrator by the procedure prescribed under section 13.

In any case, the reading of the Petition, which has narrated various existing circumstances with an apprehension/ justifiable doubt as to the independence and impartiality of the Arbitrator must be tested via the procedure prescribed under Section 13 and not by the Petition under Section 14(2) of the Act of 1996 on the ground that the Arbitrator has *de jure* become incompetent to act.

Reliance upon the decision of the Hon’ble Supreme Court in the case of ***V.K.Dewan and Company Vs.Delhi Jal Board and Ors.***¹ is not of any succour to the learned counsel for the Petitioner, as the facts of the case would clearly reveal that when the arbitration proceedings were on-going, the Respondent appointed the Arbitrator as a Consultant in its organization and the High Court dismissed the application on the ground that it was mere suspicion of bias and it is in these circumstances, the Apex Court has recorded that the High Court was wrong, as the appellant had reasonable ground for entertaining a feeling that the arbitrator may be biased against it, whether in fact true or not.

Such being not a scenario here and, particularly when, there is a specific procedure available when the Petitioner has perceived that the Arbitrator shall not be impartial for

1 (2010) 15 SCC 717

whatsoever reasons, one of which may be a close affiliation, with the Secretary but which by itself do not make the Arbitrator *de jure* ineligible as per Seventh Schedule.

The present Petition is, therefore, dismissed, with liberty to take appropriate proceedings, as are permissible in law.

(SMT. BHARATI DANGRE, J.)