

\$~23(2021)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 6th January, 2022**

+ **O.M.P. (T) (COMM.) 2/2022 & IA No.198/2022**

UNION OF INDIA

..... Petitioner

Through Mr. Kumar Jwala, Mr. Santosh
Kumar & Mr. Rajiv Mishra,
Advs.

Versus

M/S. APS STRUCTURES PVT. LTD

..... Respondent

Through None.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

[Hearing Held Through Videoconferencing]

VIBHU BAKHRU, J (ORAL)

1. The petitioner has filed the present petition under Sections 14 and 15 of the Arbitration & Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, praying as under:

“a) Terminate the mandate of arbitrator appointed by the petitioner and substitute the Sole Arbitrator for adjudication of all the disputes and differences arising between the parties out of the Agreement dated 13.06.2017 entered into between the Applicant and the Respondents;”

2. The petitioner states that certain disputes have arisen between the parties in connection with execution of the work relating to OR's Barrack and Store for the Indo Tibetan Border Police (ITBP) at Mana.

The contract for the said work was awarded to the respondent. The stipulated date for commencement of work was 21.08.2010 and it was to be completed on or before 20.06.2011. The petitioner states that the respondent failed to execute the work and in the circumstances, the petitioner had no option but to get the work completed from another contractor.

3. The respondent invoked the Arbitration Agreement and sought reference of the disputes to arbitration. On 01.03.2018, the Chief Engineer, NZ-IV, CPWD, appointed Sh. Rajesh Banga as the Sole Arbitrator to adjudicate the disputes between the parties. The petitioner states that the mandate of Sh. Rajesh Banga expired and Sh. Mukund Joshi was appointed as the Arbitrator in place of Sh. Rajesh Banga.

4. Sh. Mukund Joshi made a disclosure as required under Section 12(1) of the A&C Act. However, the disclosure made by him did not indicate any circumstances that were likely to give rise to any justifiable doubts as to his independence and impartiality.

5. The petitioner alleges that the disclosure made by Sh. Mukund Joshi was not full and true inasmuch as, he did not disclose that at one point of time, he was involved with the performance of the contract in question and had directed recommencement of the work. The petitioner claims that it became aware of the same on a disclosure made by Sh. Mukund Joshi in another proceeding. In the said proceeding, Sh. Mukund Joshi had disclosed that on 12.11.2021, while he was serving as the Chief Engineer, NZ-III, CPWD, he had also held an additional

charge of NZ-IV for a short period of time. While holding the said additional charge, he was associated with the work in question and had taken a decision to direct recommencement of the work.

6. Mr. Kumar, learned counsel appearing for the petitioner, states that there is a perceived bias on the part of learned Arbitrator and therefore, his mandate is required to be terminated.

7. I have heard the learned counsel for the petitioner.

8. It is well settled that recourse to Section 14 of the A&C Act is not available in respect of any challenge to the arbitrator under Section 12(1) of the A&C Act. Such a recourse is permissible only in the event the arbitrator is ineligible by virtue of Section 12(5) of the A&C Act. Concededly, none of the circumstances as specified in the Seventh Schedule exist in the present case. Thus, *per se*, the learned Arbitrator cannot be held to be ineligible under Section 12(5) of the A&C Act to act as an arbitrator.

9. A challenge to the appointment of an arbitrator, other than on the ground of ineligibility as specified under Section 12(5) of the A&C Act, is required to be made as per the procedure set out in Section 13 of the A&C Act. Failing any agreement between the parties, such a challenge is to be made in the first instance before the arbitral tribunal. If the learned arbitrator does not recuse from the proceedings, he is required to pass an order in respect of the challenge and if the arbitrator rejects the challenge, he has to proceed to make an award. In terms of Section 13(5) of the A&C Act, the party challenging the arbitrator may

challenge the arbitral award under Section 34 of the A&C Act. However, it is not open for the party to seek recourse to this Court in this regard prior to the delivery of the award [See: *Progressive Career Academy Pvt. Ltd. v FIITJEE Ltd: 2011 SCC OnLine Del 2271*].

10. In *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited: (2018) 12 SCC 471*, the Supreme Court had drawn the distinction regarding the remedies available to challenge an arbitrator on the grounds as set out in Section 12(1) of the A&C Act and on the ground of ineligibility as set out in Section 12(5) of the A&C Act. The relevant extract of the said judgment is set out below:

“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as

to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.”

11. In view of the above, this Court is unable to accept that the present petition is maintainable. The same is, accordingly, dismissed. All pending applications are also disposed of.

12. It is clarified that nothing stated in this order be construed as an expression of opinion on the merits of challenge to the learned Arbitrator. All rights and contentions of the parties in this regard are reserved.

VIBHU BAKHRU, J

JANUARY 6, 2022

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