

(2021) 01 DEL CK 0072

In the Delhi High Court

Case No : Civil Writ Petition No. 9361, 9372, 9373, 9417 Of 2018

M/S Prem Sukh Bothra (HUF) Through Karta Prem Sukh
Bothra & Ors

APPELLANT

Vs

Office Of The Competent Authority And Ors

RESPONDENT

Date of Decision : 08-01-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

National Highways Act, 1956 — Section 3A, 3D, 3G(1), 3G(5), 3G(6), 3G(7)

Arbitration And Conciliation Act, 1996 — Section 12, 12(1)(b), 12(5), 13, 14(1)(a), 34

Delhi Land Revenue Act, 1954 — Section 27, 64

Citation : (2021) 01 DEL CK 0072

Hon'ble Judges : Manmohan, J;Asha Menon, J

Bench : Division Bench

Advocate : Saurav Agarwal, Yeeshu Jain, Jyoti Tyagi, Manish Mohan, Manisha Saroha, Sanjay Poddar, Padma Priya, Dhruv Nayar, Shivam Goel

Final Decision : Dismissed

Judgement

'''

Manmohan, J",'''

C.M.No.32195/2020 in W.P.(C) 9361/2018 (for vacation or fixing the matter for final hearing by R-3),'''

C.M.No.32194/2020 in W.P.(C) 9417/2018 (for vacation or fixing the matter for final hearing by R-3),'''

Keeping in view the averments in the applications and with consent of parties, the matters are taken up for hearing."'''

Accordingly, the applications stand disposed of."'''

CM APPL. 32621/2019 in WP(C) 9372/2018 (by R-3),'''

Keeping in view the averments in the application, the delay in filing the reply to

CM No. 12611/2019 is condoned." ,,,

Accordingly, the application stands disposed of." ,,,

W.P.(C) 9361/2018 ,,,

W.P.(C) 9372/2018 & C.M.Nos.46518/2018 (for stay by petitioner) ,,,

W.P.(C) 9373/2018 & C.M.No.46523/2018 (for stay by petitioner) ,,,

W.P.(C) 9417/2018 ,,,

1. Present writ petitions have been filed by the petitioners inter alia seeking appointment of an independent and impartial Arbitrator in accordance with ,,,

Section 3G(5) and (6) of the National Highways Act, 1956 (hereinafter referred to as the "Act") read with Arbitration and Conciliation Act, ,,,

1996 and Arbitration and Conciliation (Amendment) Act, 2015 and the Schedules appended thereto, more particularly, Fifth and Sixth Schedule." ,,,

2. At the outset, Mr.Sanjay Poddar, learned senior counsel for respondent no.3/ NHAH states that the present writ petitions are infructuous as the" ,,,

District Magistrate/Deputy Commissioner has been appointed as Arbitrator in accordance with Section 3G(5) of the Act on 09th October, 2018." ,,,

3. However, Mr. Saurav Aggarwal, learned counsel for the petitioners states that the present writ petitions are for appointment of an independent and" ,,,

impartial Arbitrator under Section 3G(5) of the Act. He states that this fact had been duly noted by the learned predecessor Division Bench in its ,,,

order dated 25th September, 2018 in which two judgments passed by learned Single Judges of this Court had been referred to. Since considerable" ,,,

reliance is placed upon the order dated 25th September, 2018 by learned counsel for the petitioners, the same is reproduced hereinbelow:-" ,,,

"Issue notice to show cause as to why petitions be not admitted. Counsels for the respondents accept notice. Since none is present on ,,,

behalf of the UOI, Ms Saroj Bidawat, Advocate who is present in court is requested to look into the matter and ensure that the concerned" ,,,

counsel appears in the matter on the next date. Let a complete set of paper book be supplied to Ms Bidawat. ,,,

We are informed by learned counsel appearing for NHAH that they are in the process of appointing an Arbitrator under Section 3G(5) of the ,,,

NH Act, 1956. Learned counsel appearing for the petitioners relies on Section 3G(5) and 3G(6) of the NH Act, 1956 to contend that while" ,,,

making the appointment, the respondents will have to take into consideration the Schedule V of the Arbitration and Conciliation Act, 1996",,,

and the judgments rendered in the case of Devendra Kumar Gupta vs Union of India; O.M.P.(T) 5/2017, Dream Valley Farms Private",,,

Limited vs Religare Finvest Limited & Ors; ARB. 635/2016 decided on 19.10.2016 and ASSIGNIA -VIL JV vs Rail Vikas Nigam Limited; ARB.,,,

P. 677/2015 decided on 29.04.2016, more particularly paragraphs 9 and 10, which we reproduce below:-",,,

â??9. In Dream Valley Farms Private Limited vs. Religare Finvest Limited & Ors. ARB. 635/2016 decided on 19.10.2016 which runs as,,,

under:,,,

20. While in the normal course, that would be one option, in the present case not only are Clauses 22 and 24 of the Fifth Schedule attracted",,,

giving rise to justifiable doubts as to the independence and impartiality of the Arbitrator, but the conduct of the Arbitrator in seeking to",,,

mislead the Petitioner and suppress in the first instance the fact of his being a presiding Arbitrator in 27 arbitration matters relating to the,,,

Respondent smacks of dishonesty that is unbecoming of an Arbitrator.,,,

21. The Court is satisfied that for the purposes of Section 14 (1) (a) of the Act the Arbitrator becomes de jure disqualified from continuing,,,

as an arbitrator. His mandate is accordingly terminated.,,,

10. ASSIGNIA-VIL JV vs Rail Vikas Nigam Limited ARB.P. 677/2015 decided on 29.04.2016 by the Court as under:,,,

â??43. The Fifth Schedule i.e. supplementary provision read with Section 12 (I) (b) mandates that the appointment made by any party which,,,

would give rise to justifiable doubts as to the independence or impartiality of arbitrator if he has relationship with the parties or counsel or,,,

the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party, the same would give",,,

rise to justifiable doubts. Similarly the Seventh Schedule read with Section 12 (5) mandates that there shall not be any arbitrator's,,,

relationship with the parties or counsel who should also not be an employee, consultant, advisor or has any other past or present business",,,

relationship with a party. If the answer is yes, the person should not be appointed as arbitrator in the said matter. In the present case, the",,,

suggestion of the respondent to appoint its own employee who is either present employee or retired employee, the request cannot be",,,

accepted as the arbitration is invoked after amended Act has come into operation. In case the said request is allowed, the very purpose of",,,

amending the Act would be defeated. 44. I am clear in my mind that under the Arbitration and Conciliation (Amendment) Act, 2015, if any",,,

such case is covered as referred above in earlier para which cover the supplementary provision of schedule Fifth and Seventh, under those",,,

circumstances, the Court is duty bound to secure the appointment of an independent and impartial arbitrator as per Section 12 of the Act",,,

(as amended in 2015). As the arbitration is being an employee of one of the parties would definitely give rise to justifiable doubt as to his",,,

independence and impartiality.â??",,,

Counter affidavits be filed within four weeks. Rejoinder(s), if any, be filed within two weeks thereafter. The counter affidavits will address",,,

the issues raised and reflected in the order passed by this court today.,,,

Sl. No.,Designation of the Officer,Revenue District,State

(1),(2),(3),(4)

1,"District

Magistrate/Deputy

Commissioner",North,"National Capital Territory

of Delhi

2,"District

Magistrate/Deputy

Commissioner",North-West,"National Capital Territory

of Delhi

3,"District

Magistrate/Deputy

Commissioner",South-West,"National Capital Territory

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of Delhi

going to be paying compensation for such acquisition, and is a party to the proceedings. Admittedly, the DM is not an employee of the",,,

NHAI. Consequently, the Court is unable to agree with the submissions of learned counsel for the Petitioners that the DM is disqualified",,,

from acting as an Arbitrator in terms of Section 12 (5) of the AC Act read with the Seventh Schedule thereof.,,,

25. On the general plea that the remedy of arbitration is not efficacious and that the further challenge under Section 34 of the AC Act,,,

would be on very narrow grounds, the Court notes that the Petitioners have not challenged the constitutional validity of either Section 3G",,,

(1), (5) or (6) of the NH Act. It is, therefore, not open to the Petitioners to argue that the remedy of arbitration is not efficacious.",,,

26. The Court also notes that where an efficacious alternative remedy is provided under the statute itself, in this case the NH Act, the High",,,

Court exercising jurisdiction under Article 226 of the Constitution would generally be reluctant to interfere. In the present case, this Court",,,

for the reasons aforementioned, is of the view that the Petitioners should pursue their remedy before the learned Arbitrator in terms of",,,

Section 3G (5) read with Section 3G (6) and (7) of the NH Act.â??,,,

B) Manju Arora v. Union of India (supra) :-,,,

â??1. This petition was filed with the following prayers: -,,,

xxx xxx xxx,,,

(c) issue a writ of certiorari or any other appropriate writ, order or direction in the nature thereof, thereby quashing the appointment of",,,

District Magistrate, District New Delhi, by the Central Government, as an Arbitrator under Section 3 G(5) of the NH Act."",,,

xxx xxx xxx,,,

5. The counsel for the petitioner, at the outset, has contended that another petition namely, W.P. (C) 9372/2018 titled Moti Lal Bothra",,,

(HUF) Through: Karta Shri Moti Lal Bothra v. Office Of The Competent Authority (Land Acquisition) Under The National Highways Act,",,

1956 & Ors., also challenging the appointment of the District Magistrate as the Arbitrator, under Section 3G(5) of the National Highways",,,

Act, was also scheduled to be listed for today, but has not been listed for hearing, in the absence of an order therein for virtual hearing. It",,,

is contended that the petitioner in that writ petition has filed certain replies received to the queries under the Right to Information Act, 2005",,,

and which help the case of the petitioner herein also and the present petition be also thus ordered to be taken up on whichever date W.P.,,,

(C) 9372/2018 stands adjourned, as per the general notification during the pandemic in this regard.",,,

6. The counsel for the respondent No.2 National Highways Authority of India (NHA) has opposed the request of adjournment contending,,,

that the arbitration proceedings are held up. It is further stated that the question of the challenge to the District Magistrate acting as,,,

Arbitrator under Section 3G(5) of the National Highways Act has already been negated in A nubhav Chand Kathuria v. Union of India,",,

2019 SCC OnLine Del 7307 (DB,) in which also the counsel for the petitioner herein was the counsel for the petitioners and the said",,,

judgment has attained finality. It is thus contended that as far as the prayer in the present petition challenging the nomination by the,,,

Central Government of the District Magistrate, to act as Arbitrator is concerned, in view of the judgment in Anubhav Kathuriasupra, does",,,

not survive.,,,

xxx xxx xxx,,,

13. The counsel for the respondent No. 2 NHA, in addition to Anubhav

Kathuriasupra has also drawn attention to Vishwasrao Dattatray",,,

Kachare Vs. Union of India, Surendra Kumar Chhabda Vs. State of Chattisgarh MANU/CG/0693/2017 and National Highways Authority of",,,

India Vs. Sayedabad Tea Company Ltd. & Ors., to contend that therein also, the Courts have held that since the appointment of Arbitrator",,,

under Section 3G(5) of the National Highways Act is by Central Government and not by NHA, which has acquired the land, the",,,

appointment of Arbitrator by the Central Government is not bad under the Arbitration and Conciliation Act and merely because the District,,,

Magistrate has been appointed as the Arbitrator, there is no presumption that would be biased in favour of NHA.",,,

14. We thus dispose of this petition, declining the reliefs claimed in prayer paragraphs in terms of Anubhav Kathuriasupra and by clarifying",,,

that the disposal of this petition and the description of the land as agricultural in Sections 3A, 3D and 3G notifications, would not come in",,,

the way of the petitioner contending in the arbitration proceedings under Section 3G(5) of the National Highways Act, that the land is",,,

commercial and that the petitioner is entitled to compensation at commercial and not agricultural rates, and by reiterating the statements of",,,

the counsels for the NHA and CALA as contended in Anubhav Kathuriasupra,that they would not object to such claim of the petitioner on",,,

the ground of Arbitrator not having the jurisdiction to go into the said question.â??",,,

12. Keeping in view the aforesaid judgments, this Court is of the view that the petitionersâ?? reliance on the order dated 25th September, 2018 is",,,

untenable in law, especially when it refers to orders passed by two learned Single Judges, whereas two Division Benches have subsequently",,,

specifically rejected similar arguments advanced by the petitioners in the present batch of writ petitions.,,,

13. This Court is further of the opinion that respondent no.3/NHA by asking a separate constitutional authority like Delhi Government to nominate its,,,

officer as an Arbitrator had committed no wrong. It is the duty of every litigant to pre-empt litigation and to ensure speedy disposal of matters to,,,

reduce the interest burden.,,,

14. In fact, the respondent no. 3/NHAâ??s preference for appointment of District

Magistrate/Deputy Commissioner as the Arbitrator is perfectly" ,,,

understandable inasmuch as the office of the District Magistrate is in possession of all the relevant land records and in the event of any dispute with ,,,

regard to measurement of the land, the District Magistrate has the authority to decide the same under Sections 27 and 64 of the Delhi Land Revenue" ,,,

Act.,,,

15. It is pertinent to mention that the appointment of the Arbitrator is not by name but by office. Accordingly, there is no merit in the allegation that a" ,,,

specific individual has been appointed as an Arbitrator at the instance and behest of the respondent no.3/NHAI.,,,

16. This Court is also of the view that just because the District Magistrate was engaged in the progress of Dwarka Expressway Project, it cannot lead" ,,,

to the apprehension that he would not give adequate compensation to the petitioners and/or that he would be biased in favour of the NHAI.,,,

17. Further, this Court is of the view that just because secretarial assistance is provided to the Arbitrator by one of the parties, it cannot be assumed" ,,,

and presumed that he would be biased in favour of that particular party.,,,

18. This Court is of the opinion that the petitioners have an alternative efficacious remedy under Sections 12 and 13 of the Arbitration and Conciliation ,,,

Act, 1996, in the event, the petitioners have an apprehension of bias on the part of the Arbitrator." ,,,

19. The Chairman of respondent no. 3/NHAI has signed the Note of appointment of the Arbitrator in his capacity as Secretary, Ministry of Road" ,,,

Transport and Highways as at that time he was holding a dual charge both as Secretary, Ministry of Road Transport and Highways and Chairman, ,,,

NHAI. Accordingly, the doctrine of necessity is attracted in the present batch of writ petitions." ,,,

20. This Court is also in agreement with the contention of learned senior counsel for respondent no.3/NHAI that contemporaneous correspondence ,,,

shows that the Arbitrator in the present batch of writ petitions has been nominated by Govt. of NCT of Delhi and appointed by the Central ,,,

Government. Further, the Delhi Government applied its mind and took its own time in giving its consent to appointment of the District Magistrate as" ,,,

the Arbitrator.,,,

21. Moreover, as pointed out by the two Division Benches in the aforesaid two

judgments i.e. Anubhav Chand Kathuria (supra) and Manju Arora",,,

(supra), the District Magistrate is not under the control and supervision of NHAI and his appointment is at the behest of the Central Government.",,,

22. Consequently, this Court is of the view that the arguments advanced by learned counsel for the petitioners are contrary to facts and untenable in",,,

law. In view thereof, the present writ petitions and stay applications are dismissed and the interim order dated 13th November, 2018 is vacated.",,,

23. Further, as the arbitration proceedings were stayed at the request of the petitioners, this Court directs that no interest for the period 13th",,,

November, 2018 till date shall be payable to the petitioners by the respondent no.3/NHAI, in the event, an award is rendered by the Arbitrator in",,,

favour of the petitioners. All pending applications stand disposed of.,,,

24. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.,,,