
(2009) 02 MAD CK 0070
In the Madras High Court
Case No : O.P. No. 781 of 2007

SKF India Limited

APPELLANT

Vs

MGP Associates Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 03-02-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 12(1), 12(2), 12(3), 13(2)

Citation : (2009) 3 LW 251

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Rohit Kabadia for King and Patridge, for the Appellant; Karthik Seshadri, for Iyer and Thomas, for the Respondent

Final Decision : Allowed

Judgement

S. Rajeswaran, J.—This petition has been filed challenging the award dated 16.05.2007 passed by the respondents 3 to 5/ Arbitrators, u/s

34 of the Arbitration and Conciliation Act 1996.

2. The facts which are necessary for disposing of the above Original petition are as under:

The first respondent company was engaged in the business of Engineering Consultancy of the Predictive Maintenance Services, including Vibration

Analysis, Machine Dynamics and Dynamic Balancing. The respondents 1 and 2 conducted Seminars and are involved in the development of

Computer based Training. The petitioner, before this Court, is a Multi National company having its Principal office in Sweden. They are mainly

manufacturing Bearings. During the end of December 2002, the petitioner company deputed its officers to the respondents 1 and 2 expressing their

interest in the services offered by the first respondent. Discussions were carried

out and ultimately, the petitioner showed interest in acquiring the assistance of the first respondent to strengthen their newly launched Reliability System and to eliminate competition in the field. With the above objective in mind, the petitioner carried various diligent checks on the functioning of the first respondent. On 30.6.2003, a Confidentiality Agreement was entered into between the parties. The investigation made by the petitioner comprised of technical due diligence, Accounting due diligence and Legal due diligence. According to the respondents 1 and 2, after being thoroughly satisfied about the working of the first respondent, the petitioner informed the respondents 1 and 2 that they would keep the due diligent reports confidential and therefore, copies of the same were not given to them. By letter dated 12.03.2004, the petitioner offered to purchase the assets of the first respondent excluding debts, liabilities receivables (or) obligations of the first respondent. All the assets to be purchased by the petitioner were valued by their own valuation team. The petitioner offered Rs. 115 Million as price for the purchase of assets. The purchase price was offered in two parts namely one lumpsum of Rs. 85 millions and another deferred payment of Rs. 30 millions. Out of the lumpsum payment of Rs. 85 millions, the petitioner reserved their right to deposit Rs. 20 millions in an interest bearing Escrow Account for a period of two years as security for the due compliance of the terms and Employment Agreement with the second respondent. So far the second part of the purchase price of Rs. 30 millions called ""Earnout"" which was based on average annual earnings before interest and tax for a period of two years from the date of assets purchased. The petitioner also offered a commission of 10% on the net sales value of the Computer Based Training (CBT) for a period of five years. On 6.04.2004, An Asset Transfer Agreement was entered into between the first respondent and the petitioner and the same was duly confirmed by the second respondent. Simultaneously, the first respondent, the petitioner and one M/s. Mullah and Mullah, an Advocate firm, represented by its partner entered into an Escrow Agreement as per the Assets Transfer Agreement and a sum of Rs. 20 millions was deposited with the said Mullah and Mullah, who had been appointed as Escrow agent by the first respondent and the petitioner. The said amount was held by the Escrow agent in Trust for the first

respondent as per the terms of the Escrow agreement.

3. On 6.4.2004, an Employment Contract was also entered into between the second respondent and the petitioner whereby the second

respondent was employed as President, VEC Division, for a period of two years from the date of closing of Assets Transfer Agreement. The

second respondent is entitled to fix a remuneration of Rs. 5 millions annually including the perquisites and benefits. He was also entitled to receive a performance bonus.

4. After the above agreement, it was made clear to all the customers of the second respondent that all future transactions would be handled by the

petitioner and the second respondent has become an integral part of the petitioner as President, VEC Division. In December 2004, the petitioner

has made some changes and made VEC Division a part of Reliability Systems Division. However, in between February 2004 and February 2005,

differences of opinion crept in between the parties and the second respondent was asked to give up his claim for the Escrow payment and the Earn

out payment. The second respondent by letter dated 15.02.2005, accepted to make the organisational changes, but, did not accept any changes

or novation in terms of the Assets Transfer Agreement. This resulted in the petitioner terminating the employment of the second respondent which

is wrongful and illegal according to the second respondent. That apart, by letter dated 15.02.2005, the petitioner alleged mis-representation on the

part of the respondents 1 and 2 and made known their intention of denying the escrow payment and wanted the respondents 1 and 2 to agree to

the same. It was not accepted by the respondents 1 and 2 and they sought for arbitration to settle their disputes. Accordingly, the respondents 1

and 2 nominated their Arbitrator and the petitioner also nominated their Arbitrator and the two Arbitrators agreed upon the third Arbitrator and

thus, the arbitral tribunal was constituted.

5. The respondents 1 and 2 sought to recover the balance purchase price under the Assets Transfer Agreement, claiming damages for wrongful

termination. The respondents also sought for 10% commission under clause 3.4 of the Assets Transfer Agreement. The following are the reliefs

sought for by the respondents 1 and 2 in the Claim petition before the Arbitral Tribunal consisting of the respondents 3 to 5:

- (a) To pay the first claimant a sum of Rs. 50,000,000/- (Fifty million only)
- (b) To pay interest accumulated on Rs. 20,000,000/- (Rupees twenty million only) lying in Escrow with the Escrow Agent, Mulla and Mulla, Mumbai from 06.04.2004 till date of repayment.
- (c) To furnish quarterly accounts on the sale of CBT packages and to direct the payment of 10% of the sales commission on the sales as per clause 3.4 of the Asset Transfer Agreement to the First Claimant.
- (d) To pay the second claimant a sum of Rs. 15 Millions for wrongful termination of the employment contract.
- (e) To relieve the second Claimant from all and any obligations of whatsoever as envisaged in Asset Transfer Escrow and Employment Contract including any Non Complete obligations.
- (f) Direct the respondents to provide the Claimants with the TDS Certificates for the Tax deducted towards the payments effected by them to the Claimants and to return all the documents belonging to the Claimants such as Statutory records etc., currently in the custody of the respondent.
- (g) Prohibit by an order of Permanent injunction restraining the respondents, their men, agents, servants from in any manner using the e-mail id mgpec@vsnl.com
- (h) Exemplary costs for unnecessary dragging the Claimants to arbitration.
- (i) Such other reliefs in the interest of justice.

6. The petitioner filed their defence statement and opposed the relief sought for by the respondents 1 and 2. According to the petitioner, the respondents 1 and 2 made wrong representations and deceived the petitioner to arrive at a price of Rs. 115 millions for the assets of the first

respondent. According to the petitioner, the respondents 1 and 2 are guilty of suppression of vital materials and facts. It was contended by the petitioner that, the purchase price of the assets was arrived at Rs. 115 millions on the basis of the figures supplied by the respondents 1 and 2.

They came to know that the projected targets of the second respondent and the customers list given by him were fabricated and incorrect. The

level of business claimed by the respondents 1 and 2 at or before the agreement never existed. Therefore, the petitioner, by letter dated

11.02.2005, suggested to the respondents 1 and 2 to merge the VEC Division

with Reliability Systems and to give up the claims of the respondents 1 and 2 to Escrow payment and earnouts and also to give up the commission and the bonus would be redefined in its new role. On 14.02.2005, the second respondent sent a letter only accepting the new role to him, but, not accepted the denial of the escrow payment and the earn outs amounts. It is further alleged by the petitioner that in violation of the agreement, the respondents 1 and 2 engaged in business in direct competition with the business of the petitioner by conducting Training programmes in Vibration Analysis which is prohibited under clause 9.5 of the agreement. Therefore, they approached the High Court u/s 9 of the Act 1996 for an order of injunction and the same was granted on 24.05.2005. Hence, they prayed for the dismissal of the claim petition filed by the respondents 1 and 2 before the Arbitral Tribunal.

7. The petitioner also made counter claims by seeking the following reliefs:

a) This Hon''ble Arbitration Tribunal may be pleased to publish an award directing MGP Associates Pvt. Limited to pay to SKF India Limited

such amount as is sufficient, for SKF India Limited to be put in the same position that SKF India Limited would have been, not limited to the

Consideration of Rs. 65 million which has already been paid by SKF India Limited to MGP Associates Pvt. Limited, as this Hon''ble Tribunal

determines to be payable.

b) This Hon''ble Arbitration Tribunal may be pleased to publish an award directing MGP Associates Pvt. Limited to pay to SKF India Limited Rs.

50 million or such amount of damages resulting to SKF India Limited as a result of the breaches of the Agreement committed by MGP Associates

Pvt. Limited and MG Poduval, as this Hon''ble Tribunal determines to be payable.

c) For the purpose of determination of the damages payable as a result of breach of non-compete provision, this Hon''ble Arbitration Tribunal may

be pleased to direct MGP Associates Pvt. Limited and M.G. Piduvall to disclose the profits made by them by virtue of the breaches of the

Agreement committed by them.

d) For such other and further reliefs as this Hon''ble Arbitration Tribunal deems fit;

e) For an Award against MGP Associates Pvt. Ltd. and M.G. Puduvall directing them to pay complete cost of the counter claim to SKF India

Limited.

8. On the basis of the above pleadings, the following issues were framed by the Arbitral Tribunal:

1. Does the Claimant No. 1 prove that it had developed a very good reputation in the Industry on account of the efforts put in by the Claimant No.

2 as alleged in para 3 of the Claims petition ?

2. Does the Claimant prove that the respondent deputed some of its officials to inform Claimant No. 2 that the respondent had specific interest in

the alleged services being offered by the Claimant No. 1 as alleged in paragraph 5 of the Claim petition ?

3. Does the Claimant prove that the respondent carried out three different forms of Due Diligence for a period of nine months as alleged in

paragraph 6 of the Claim petition ?

4. Does the Claimant prove that prior to 12.03.2004 the respondent had listed each and every item of assets being considered for purchase and

have conducted a valuation of these assets through the valuation team, as alleged in paragraph 6 of the Claim petition ?

5. Does the Claimants prove that the respondents were convinced that the sale of CBTs would be significant and they will use the global network

in more than 130 countries to ensure major sale of the products and that the claimants would be amply compensated for the reduced asset value as

alleged in paragraph 6 of the Claim petition ?

6. Does the respondent prove that the respondent supported the Claimants with all it's infrastructure and retained the employee of VEC in

consultation with Claimant No. 2 to ensure that Claimant No. 2 achieves its targets.

7. Does the Claimant prove that the organisational change was not in the best business interest and in positive way, thereby making it impossible

for Claimant No. 2 to perform and achieve the average EBIT, as alleged in para 11 of the Claim petition ?

8. Does the Claimant prove that the respondent had any mischievous intention or attempted to twist matters as alleged in para 13 of the Claim

petition ?

9. Whether the Asset Purchase Agreement dated 05.04.2004, Escrow Agreement dated 06.04.2004 and the Employment Contract dated

06.04.2004 are vitiated by "misrepresentation" on the part of the Claimant ?

10. Does the respondent prove that the performance levels of the business after the acquisition were extremely low as compared to the targets and

projections and the shortfall in the revenue was to the tune of 71.1% ?

11. Does the second Claimant prove that it's Employment Contract was terminated by the respondent on extraneous and unsustainable reasons as

alleged in para 15 of the Claim Statement ?

12. Whether the termination of the employment contract dated 6.04.2004 of the Second Claimant by the respondent is for ""any valid reasons""? If

not, what is the effect of such a termination ?

13. Whether the respondent is entitled enforce the terms of Clause 9.5 of the Asset Purchase Agreement after ""termination"" of the contract of

employment of the Second Claimant ?

14. Has not the respondent breached the terms of the Asset Purchase Agreement dated 05.04.2004 ?

15. What relief is the Claimant entitled to ?

16. What relief is the respondent entitled to ?

9. Before the Arbitral Tribunal, the second respondent was examined as CW1 and exhibits C1 to C21 were marked on the side of the

respondents 1 and 2. Similarly, two witnesses were examined as RW1 and RW2 on the side of the petitioner and exhibits R1 to R31 were marked

on their side.

10. The Arbitral Tribunal after evaluating the evidence found Issue Nos. 1 and 2 in favour of the respondents 1 and 2. Under Issue No. 4, the

Tribunal concluded that prior to 12.03.2004, the assets were valued as a whole and not individually and listed. Issue Nos. 6, 7 and 8 were taken

together and found that the petitioner is liable to make payment under the Escrow agreement. The Tribunal also concluded that the petitioner is

trying to improve their case only for the purpose of escaping the claims made by the respondents 1 and 2 and accordingly, held the issue No. 8

against the petitioner. While considering issue No. 9 on the basis of the evidence let in, the tribunal found that the respondents 1 and 2 did not hold

back any information relating to their business or give any wrong figures with a view to enter into the following respondents, the documents 1 and 2

namely Ex.C2, the letter of intent, Ex.C3, the Assets Transfer agreement, Ex.C4, the Escrow Agreement and Ex.C5, the Employment contract. It

further found that it was the petitioner who made some miscalculations about the proceedings in the event of the take over. In so far as Issue No.

10 is concerned, the finding of the arbitral tribunal is that the shortfall of the revenue is not clearly established and the shortfall is claimed from an

imaginary level of business fixed by the petitioner. Issue Nos. 11 and 12 were considered together and it was answered that the termination of the

Employment Contract was illegal and without any valid reason. But, the arbitral tribunal further held that as the respondents 1 and 2 never achieved

the pro-rata EBIT of Rs. 19.1 million, their claim for full payment on ""EARNOUT"" was rejected. While answering Issue No. 13, the tribunal found

excepting making the allegation that the respondents 1 and 2 conducted a training programme in Vibration Analysis on 12.05.2005, no further

details were supplied and it was not proved as to whether any remuneration was paid to the second respondent. Therefore, no relief was granted

on that account by the tribunal. While deciding the issue No. 14, the tribunal concluded that none of the warranties have been shown to have been

breached or resulted in the petitioner being induced to enter into the Transfer Agreement and it is the petitioner who committed the breach in not

paying the full lumpsum purchase price. While considering Issue No. 15, the tribunal held that the following amounts are payable by the petitioner

to the respondents 1 and 2:

(1) A sum of Rs. 20,000,000/- (Twenty million of rupees) with accrued interest from 6.4.2004 till 5.4.2006 at the rate agreed upon under Ex.C3

and Ex.C-4 and thereafter at 12% per annum till date of Award.

(2) The remuneration under Ex.C6 at the rate of Rs. 50,00,000/- (Five Million rupees) per year from 15.02.2005 (date of termination of

employment) till 5.4.2006 (the end of employment period) with interest at 12% per annum from 6.4.2006 till date of Award.

(3) On the above amounts the rate of interest from date of award shall be 12% per annum till date of payment.

(4) All other clauses of the claimants are rejected.

11. In Issue No. 16, the counter claims of the petitioner were rejected on the ground that there was no mis-representation on the part of the

respondents 1 and 2 or any wrongful inducement was made to the petitioner to enter into the agreement. Accordingly, the tribunal granted the

following reliefs to the respondents 1 and 2 by the award:

(1) The respondents shall pay the claimants a sum of Rs. 20,000,000/- (Rupees twenty million) with accrued interest from 6.4.2004 till 5.4.2006

as prescribed in the contract and with further interest from 6.4.2006 till date of award at the rate of 12% per annum.

(2) The respondents shall pay Rs. 59,71,555/- (Rupees fifty nine lakhs seventy one thousand five hundred and fifty five only) being the

remuneration payable for the period from 15.02.2005 till 5.4.2006 with interest at 12% per annum from 6.4.2006 till date of award.

(3) From the date of the Award the above amounts shall carry interest at 12% from the date of Award till the date of payment.

(4) Each party shall bear their respective costs.

12. Challenging the above award dated 16.05.2007, the petitioner filed the above Original petition u/s 34 of the Act, 1996. It is also relevant to

refer to the fact that pending proceedings before the arbitral tribunal, the petitioner filed a petition u/s 12 read with Section 13(2) of the Act, 1996

by contending that the fourth respondent/Arbitrator, Thiru C. Ramachandran and the second respondent are relatives and both of them are hailing

from Palakad, Kerala. It is further alleged that the second respondent frequently visited the above said Arbitrator and in fact, on 4.11.2006 and

5.11.2006 it was the second respondent who gave a lift to the said Arbitrator to attend the hearing. It was further alleged by the petitioner that the

second respondent visited the house of the said Arbitrator on 4.11.2006 when cross examination was going on. On 11.11.2006 and 19.11.2006,

the second respondent was in the house of the said Arbitrator for a long duration. In support of these allegations, the petitioner filed an affidavit of

a detective agent. As they came to know about those incidents on 10.02.2007, it created a justifiable apprehension in the minds of the petitioner

getting a fair and unbiased verdict from the arbitral tribunal and hence, the petitioner filed I.A. No. 1 of 2007 u/s 12 read with Section 13(2) of the

Act 1996. This petition was opposed by the respondents 1 and 2 by filing a counter wherein it was pointed out that this was an attempt to delay

the completion of arbitration and deny the amounts ultimately due to them. On

merits they denied that the second respondent and the Arbitrator are relatives. It was further stated that on one occasion, the second respondent extended the courtesy of dropping the Arbitrator to Thiru

C.Ramachandran after the proceedings are over and as a matter of courtesy could have entered the house of the Arbitrator. It was specifically

denied by the second respondent that on 11.11.2006 and 19.11.2006, he visited the Arbitrator's house. It was further contended by the

respondents 1 and 2 that no reliance could be placed upon the report of a private detective agent.

13. The Arbitral Tribunal by order dated 3.3.2007 dismissed the application on the ground that the petitioner could not be prejudiced by the

continuation of Thiru C.Ramachandran as an Arbitrator. This order dated 3.3.2007 was also challenged by the petitioner before this Court u/s

13(5) of the Act 1996, in the very same petition filed u/s 34 of the Act 1996.

14. Heard Mr. Rohit Kabadia, the learned Senior counsel for the petitioner and the learned Counsel for the respondent 1. I have also perused the

entire materials including the award under challenge and also the order of the tribunal dated 3.3.2007.

15. The learned Senior counsel for the petitioner vehemently contended that the application filed by them u/s 12 read with Section 13(2) of the Act

1996 was not properly considered by the Arbitral Tribunal. Immediately after coming to know about the relationship of the second respondent and

the Arbitrator and the number of visits made by the respondent No. 2 to the residence of the Arbitrator, an application was filed making specific

allegations along with an investigation report. But, the arbitral tribunal brushed aside the same on the basis of the weak counter statement filed by

the second respondent. According to the learned Senior Counsel an evasive counter was filed by the second respondent and that itself was

sufficient to allow the application. Further, no enquiry was conducted by the arbitral tribunal on the basis of the allegations levelled at by the

petitioner along with an investigation report and the tribunal erroneously disallowed the application on the ground that it was only an attempt to

protract the proceedings which is not correct. In support of his submissions, the learned Senior Counsel relied on the Supreme Court judgment

reported in International Airports Authority of India Vs. K.D. Bali and Anr, .

16. That apart, the learned Senior Counsel assailed the award on the grounds that:

1. The award is contrary to the substantive law of the land, which is Sale of Goods Act in the present case;
 2. The award ignored the material facts and documents which are available on record;
 3. The award is contrary to the terms of the agreement between the parties; in this case, the letter of intent and the assets transfer agreement;
 4. That the award contains patently contradictory findings;
 5. That the tribunal failed to consider all the available documents and gave great emphasis to the employment contract alone which is incorrect and
- also that the award is contrary to the clauses contained in the Assets Transfer Agreement.

17. Per contra, the learned Counsel for the respondents 1 and 2 submits that the petition filed by them u/s 12 and 13 of the Act 1996 was not filed

within 15 days as contemplated under the Act and even otherwise it was properly dealt with by the arbitral tribunal which need not be interfered

with by this Court. In this regard, he relied on the decision of this Court reported in Novel Granites Ltd. and Another Vs. Lakshmi General

Finance Ltd. and Another, . The learned Counsel further submits that all the grounds raised by the learned Senior Counsel u/s 34 of the Act are not

really attracted under that section and therefore, it is to be deemed that none of the grounds raised u/s 34 get attracted and accordingly, the award

is to be upheld by dismissing the Original petition. In short, the endeavour of the learned Counsel for the respondents 1 and 2 is to support the

award in full.

18. I have considered the rival submissions carefully with regard to facts and citations.

19. First let me consider the challenge to the award made by the petitioner u/s 13(5) of the Act 1996 on the ground that circumstances existed that

gave rise to justifiable doubts as to the 4th respondent's herein (Arbitrator Thiru C.Ramachandran) independence or impartiality.

20. Admittedly, an application was filed by the petitioner herein in I.A. No. 1 of 2007 in A.R.C. No. 1 of 2005 u/s 12 read with Section 13(2) of

the Act 1996. In that petition, the reasons given by the petitioner for filing I.A.

No. 1 of 2007 are that:

1. The arbitrator Thiru C.Ramachandran and the second respondent herein (second claimant) are relatives and both are well known and are hailing from Palakad, Kerala;

2. The second respondent herein frequently visits the above said Arbitrator;

3. On 4.11.2006 and 5.11.2006, the second respondent herein gave lift to the Arbitrator to attend the hearing;

4. The second respondent herein visited the house of the above said Arbitrator on 4.11.2006 after the Arbitration proceedings and when cross examination was going on; and

5. On 11.11.2006 and 19.11.2006, the second respondent herein was in the house of the above said Arbitrator for long duration.

21. In support of the allegations, the petitioner filed an affidavit of a detective agent. It was further stated by the petitioner that they came to know

about the above only on 10.02.2007 and this created a justifiable doubt and apprehension in the minds of the petitioner getting a fair and unbiased

verdict from the arbitral tribunal.

22. The respondents 1 and 2 herein filed a counter affidavit which was sworn by the second respondent. It was pointed out by the second

respondent that this nothing but an act of the petitioner to delay the completion of the arbitration. He further stated that the second respondent and

the above said Arbitrator are not relatives and on one occasion, he extended the courtesy of dropping the Arbitrator Thiru C.Ramachandran after

proceedings and as a matter of courtesy he could have entered the house of the Arbitrator. He further denied that on 11.11.2006 and 19.11.2006

he visited the arbitrator's house. It was further denied that the second respondent was in the arbitrator's house for 21/2 hours as alleged by the

petitioner herein. It was further contended by the second respondent that no reliance could be placed upon the report of a private detective agent.

23. It was also an admitted fact that the petitioner herein has filed an investigation report, based on which, an affidavit has been filed. The Tribunal

rejected the application on the ground that:

1. The Arbitrator and the counter affidavit states that there is no relationship between the parties as alleged.

2. At the time of commencement of the arbitration proceedings, on 9.11.2005, all the arbitrators gave a declaration that they are not interested in any of the parties;

3. The present application was filed on 10.02.2007 and the time limit u/s 13(2) of the Act 1996 is only 15 days; but the application was filed belatedly.

4. No positive action is attributed to the concerned Arbitrator which enabled the petitioner to entertain any apprehension; and

5. One cannot lose sight of the fact that the application was filed at the fag end of the proceedings which commenced in 2005.

24. On the basis of the above said reasons, the application filed u/s 13(2) of the Act 1996 was rejected by the Arbitral tribunal.

25. As per Section 12(3) of the Act 1996, an Arbitrator may be challenged, on only if, circumstances exist that give rise to justifiable doubts as to

his independence or impartiality or he does not possess the qualifications as agreed to by the parties.

26. For better appreciation of the question of law involved, it is useful to refer to Section 13 of the Act 1996 which reads as under:

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.

27. From the above, it is very clear that a party intends to challenge an Arbitrator u/s 12(3) of the Act 1996 shall within 15 days, after becoming aware of the constitution of the arbitration tribunal or after becoming aware of any circumstances referred to in Sub-section 3 of Section 12, send a written statement of the reason for the challenge to the arbitral tribunal. Once such a challenge is made, the arbitral tribunal is duty bound to decide the challenge and if the tribunal rejects such a challenge, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. The party who challenged the Arbitrator may make an application for setting aside such arbitral award in accordance with Section 34 of the Act and if the arbitral award is set aside, on an application made under Sub-section 5 of Section 13, the court may decide as to whether the arbitrator who is challenged is entitled to any fees.

28. In the light of the above facts and the relevant legal provisions, if the order of the tribunal dated 3.3.2007, rejecting the application filed u/s

13(2) of the Act 1996 is concerned, I am of the considered view that the arbitral tribunal has not properly decided the challenge made by the

petitioner herein and in fact, the tribunal was swayed by the delay in filing the application at the fag end of the proceedings which commenced in

2005. While doing so, the tribunal has lost sight of Section 12(2) of the Act 1996, according to which, the Arbitrator from the time of his

appointment and throughout the arbitral proceedings shall without delay disclose to the parties in writing any circumstances referred to in Sub-

section (1) of Section 12 unless they have already been informed of them by him. From Section 12(2) of the Act 1996, it is very clear that it is not

sufficient and adequate that the Arbitrator should disclose at the time of his appointment in writing the circumstances likely to give rise to justifiable

doubts as to his independence or impartiality, but also throughout the arbitral proceedings (emphasis supplied). Therefore, the reason given by the

arbitral tribunal that at the time of commencement of the arbitration proceedings on 9.11.2005, all the arbitrators gave a declaration that they are

not interested in any of the parties. Atleast, the tribunal ought to have received an affidavit from the Arbitrator concerned, once an application has been filed by the petitioner u/s 13(2) of the Act 1996. That apart, the 15 days contemplated u/s 13(2) is 15 days after becoming aware of any circumstances referred to in Sub-section (2) of Section 12 and in the present case, the contention of the petitioner was that they came to know about this only on 10.02.2007 and immediately they filed the petition. But, the tribunal found that the report of the investigator relied on by the petitioner made reference to events dated 4.11.2006, 5.11.2006, 11.11.2006 and 19.11.2006 and the petition filed on 10.02.2007 was not filed within 15 days. This approach of the tribunal is also not acceptable as the petitioner could only approach the tribunal after receiving the report and the events referred to in the report do not necessarily start the limitation time running. Even otherwise, the tribunal ought to have conducted an enquiry in this matter in detail considering the serious nature of the allegations levelled at the Arbitrator by the petitioner. If on a proper enquiry, it is found that there are some basis in the allegations levelled by the petitioner, then it would not be in the interest of justice to continue the proceedings with the above said Arbitrator whose independence and impartiality were challenged by the petitioner. No witness was examined by the tribunal on the report submitted by the investigator to find out the veracity of the report. In such circumstances, I am of the considered view that the tribunal has simply swept aside the allegations on the ground that it was filed at the fag end and was hit by limitation without really making an effort to find out the truth of the allegations and the veracity of the report submitted by the detective agency.

29. That apart, when the petitioner made a specific allegation, that the second respondent visited the Arbitrator at his house and he was also in the arbitrator's house for long duration, the stand of the second respondent was that on one occasion he extended the courtesy of dropping the Arbitrator and as a matter of courtesy he could have entered the house of the Arbitrator. This is not a specific denial and in fact, I find it very evasive and in such circumstances, it is deemed that there are some merits in the allegations made by the petitioner against the Arbitrator. Further, it is not desirable for a litigant to enter into the house of an Arbitrator when his case is being posted before him and the same has not reached its

finality. Even assuming that the visit is only a courtesy visit and is nothing to do with the pending proceedings before the Arbitrator, still it will create

a bad impression and genuine doubts in the minds of the other side and therefore, such a conduct should be avoided by the arbitrator. After all

justice should not only be done but also seems to be done.

1. In AIR 1988 SCC 1099 (cited supra), the Hon''ble Supreme Court held as under:

5. Several points were taken in support of the application for revocation. It was sought to be urged that the petitioner had lost confidence in the

sole arbitrator and was apprehensive that the arbitrator was biased against the petitioner. It is necessary to reiterate before proceeding further what

are the parameters by which an appointed arbitrator on the application of a party can be removed. It is well settled that there must be purity in the

administration of justice as well as in administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. It is well said

that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality

or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might

possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality

just; arbitrator must not do anything which is not in itself fair and impartial. See Russel on Arbitration, 18th Edn., p. 378, and observations of

Justice Boyd in *Re Brien and Brien*. Lord O''Brien in *King (De Vosci) v. Justice of Queen''s Country* observed as follows:

By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable

evidence to satisfy us that there was a real likelihood of bias. I do not think that their vague suspicions of whimsical, capricious and unreasonable

people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds - was

reasonably generated - but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision.

(emphasis supplied)

See *Queen v. Rand*; *Ramnath v. Collector, Darbhanga* *Queen v. Meyer* and

Eckersley v. Mersey Docks and Harbour Board (1894)QB 667.

6. In the words of Lord O'Brien, L.C.J. there must be a real likelihood of bias. It is well settled that there must be a real likelihood of bias and not

mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by interest.

See in this connection Gullapalli Nageswara Rao v. State of Andhra Pradesh and Mineral Development Ltd. v. State of Bihar. Recently this Court

in a slightly different context in Ranjit Thakur v. Union of India had occasion to consider the test of bias of the Judge. But there must be

reasonableness of the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should

not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned Judge of the High Court

that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is

biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical

person. While on this point we reiterate that learned Counsel appearing for the petitioner in his submissions made a strong plea that his client was

hurt and had apprehension because the arbitrator being the appointee of his client was not acceding to the request of his client which the petitioner

considered to be reasonable. We have heard this submission with certain amount of discomfiture because it cannot be and we hope it should never

be (that) in a judicial or a quasi-judicial proceeding a party who is a party to the appointment could seek the removal of an appointed authority or

arbitrator on the ground that appointee being his nominee had not acceded to his prayer about the conduct of the proceeding. It will be a sad day

in the administration of justice if such be the state of law. Fortunately, it is not so. Vague suspicions of whimsical, capricious and unreasonable

people are not our standard to regulate our vision. It is the reasonableness and the apprehension of an average honest man that must be taken note

of. In the aforesaid light, if the alleged grounds of apprehension of bias are examined, we find no substance in them. It may be mentioned that the

arbitrator was appointed by the Chief Engineer of the petitioner, who is in the service of the petitioner.

30. But, the learned Counsel for the respondents 1 and 2 strongly relied on a decision of this Court reported in 2003(3) C.T.C. 148 (cited supra),

to contend that the petition filed by the petitioner u/s 13(2) of the Act 1996 was clearly barred by limitation of the Act, and the Arbitral tribunal has

correctly decided that petition. In the above judgment this Court observed as under:

8. If for any reason the petitioner had exercised doubt on the independence or impartiality of the Arbitrator, then the petitioner should have

challenged such appointment of Arbitrator within 15 days, from the date of appointment or from the date on which he became aware of the such

circumstances that lead to doubt the impartiality. The petitioner has not taken any steps in this regard within the time specified under Sub-section

(2) to Section 13. Therefore, the petitioner cannot challenge the appointment of the Arbitrator after 15 days. In the present case, the petitioner

had, in fact, participated in the arbitral proceedings. Therefore, the belated challenge cannot be entertained.

31. From the above, it is very clear that what was observed by this Court is that, the petitioner should challenge such appointment of Arbitrator on

the ground of independence or impartiality within 15 days from the date on which he became aware of such circumstances that led to doubt and

impartiality. There is no quarrel over the above decision of this Court and the same will not be useful to the case of the respondents 1 and 2

because in the case on hand it was the specific stand of the petitioner that they came to know about the impartiality of the Arbitrator only on

10.02.2007 and immediately the petition was filed. However, the arbitral tribunal did not conduct an enquiry to go into this aspect as the question

of limitation is a mixed question of fact and law. Further, the tribunal has not gone into the question of condoning the delay if sufficient grounds are

made out. After all, u/s 34 of the Act, 1996 the time stipulated for challenging an arbitral award is three months. However, the very same section

provides a grace period of 30 days to receive the challenge to an award even if the three months period expired and thus the act provides for

condoning the delay of 30 days in filing a petition u/s 34 of the Act 1996. But, such a proviso is absent in Sub-section (2) of Section 13 and

therefore, it may be possible for the tribunal to condone the delay in filing a petition u/s 13(2) of the Act 1996 in appropriate cases. Considering

the fact that the tribunal failed to make an enquiry into the claim of the petitioner that they filed the petition u/s 13(2) immediately after coming to know about the impartiality, this question is not decided and the same is left open to be decided in an appropriate case.

32. Therefore, in the light of the above facts and law, I am convinced that the conduct of the Arbitrator, the fourth respondent herein (Thiru C.

Ramachandran) in permitting the second respondent/second claimant to visit his house when the arbitral proceedings were going on, gave rise to

justifiable doubts as to his independence or impartiality and therefore, the tribunal ought to have stopped the proceedings by accepting the petition

filed by the petitioner u/s 13(2) of the Act.

33. Therefore, I have no hesitation in setting aside the award under challenge and accordingly, the Original petition is allowed on this ground alone.

34. Since, I have set aside the entire award on this ground alone, I have not considered the other grounds made by the petitioner herein to attack

the award under challenge. Considering the fact that Section 13(2) petition was filed at the fag end of the proceedings before the arbitral tribunal,

the Arbitrator, the fourth respondent, who was challenged, is entitled to his fees.

35. As the award was set aside, u/s 13(5) of the Act, opportunity is given to the parties to initiate fresh arbitration proceedings in accordance with

law.

36. In the result, the Original petition is allowed. No costs. All the connected miscellaneous petitions are also closed.