

(2014) 11 DEL CK 0307
In the Delhi High Court
Case No : ARB.P. 562/2014

S.P. Singla Constructions Pvt. Ltd.

APPELLANT

Vs

Government of NCT of Delhi

RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(8)(b), 11(8)(d), 12

Citation : (2015) 1 ARBLR 33

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Anirudh Wadhwa and Vipul Kumar, Advocate for the Appellant; Kiran Jai, Advocate for the Respondent

Judgement

Rajiv Shakdher, J.

Caveat No. 999/2014

1. Since the caveator/ respondent has entered appearance, the caveat stands discharged.

IA No. 22016/2014 (Exemption)

2. Allowed subject to just exceptions.

Arb. P. 562/2014 & IA No. 22015/2014 (Stay)

3. This is a petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (in short the Act), for appointment of an independent and impartial sole arbitrator for adjudication of disputes between the parties. Before I proceed further, at the very outset, it is to be noticed that, two (2) arbitrators have already recused themselves from the matter, and presently, the third arbitrator is seized, with the matter in issue. In order to adjudicate upon the petition, the following broad facts are required to be noticed.

4. The petitioner was awarded a contract for construction of a ROB on road No.

63, at Level Crossing No.III, on Delhi-Saharanpur Railway Line (hereinafter referred to as the "work"), pursuant to a tender issued on 11.11.2005. Apparently, during the course of the execution of the work in issue, disputes arose as between the parties herein and, consequently, the petitioner took recourse to the arbitration mechanism encapsulated in the contract entered into between the parties. The arbitration agreement is contained, admittedly, in clause 25 of the contract.

4.1 Pursuant to letters dated 21.01.2012 and 10.02.2012, the Chief Engineer of the respondent herein, who is the designated authority, appointed an arbitrator. A communication to that effect dated 09.04.2012 was issued by the Chief Engineer. A copy of this communication was sent to the arbitrator, as well. At this point in time, the arbitrator appointed was, one, Mr. V.K. Malik. Notably, the claims adverted to in the petitioner's letter of 21.01.2012, were referred to the arbitrator for adjudication.

4.2 Amongst the various claims referred, was claim no. 5, which reads as follows: "payment for escalation in prices/ wages, pursuant to contract provision". Importantly, this claim was valued by the petitioner at Rs. 65 lacs. The Chief Engineer referred this claim, along with other claims, for the value indicated by the petitioner.

4.3 Pertinently, Mr. V.K. Malik was replaced by the Chief Engineer, with one, Sh. S.R. Pandey, ADG (Retd.), CPWD, as the sole arbitrator vide communication dated 24.04.2012. The claims referred to Sh. S.R. Pandey were the same as those which were referred to the earlier arbitrator, i.e., Mr. V.K. Malik. The record, as filed before me by the petitioner, shows that Sh. S.R. Pandey held the hearing on 19.05.2012, where both parties were represented. The learned arbitrator on that date, evidently, fixed a time schedule within which pleadings had to be filed and admission/ denial of document had to take place. The order sheet seems to indicate that parties had agreed that the next hearing in the matter would take place after pleadings were filed and, admission/ denial of documents was carried out.

4.4 As a consequence of the directions passed on 19.05.2012, the petitioner herein (i.e., the original claimant), under the cover of its letter dated 18.06.2012, filed its statement of claims with the learned arbitrator, i.e., Mr. S.R. Pandey, with a copy to the respondent herein.

4.5 The statement of claims, so filed by the petitioner, included claim no.5 and, as indicated to the Chief Engineer of the respondent in its letter dated 21.01.2012, it continued to be valued at Rs. 65 lacs. In response to the petitioner's statement of claims, a statement of defence was filed by the respondent on 17.08.2012.

4.6 In rebuttal, the petitioner also filed a rejoinder, when for the first time, the petitioner, evidently, sought to indicate that the valuation made qua claim no.5, was subject to detailed re-conciliation after receiving complete details of the

measurement book (MB). It was also averred that the claim was subject to upward increase in view of "merits and intent of the contract".

4.7 Apparently, on 17.12.2012, the petitioner filed an application, in the form of a letter, under Sections 16, 17, 23(3) and 27 of the Act, with the learned arbitrator. In this application, the petitioner sought directions qua the respondent for placing on record all documents, with copies to the petitioner, and in this connection, invited the respondent's attention to Exhibit C-6 read with Exhibit C-08 and, paragraph 18 of its rejoinder. This apart, in respect of claim no.5, the following was stated:

"....Taking into consideration amendment or supplement of claim No. 5, kind attention is invited to para 22 of the rejoinder. In endorsement of the rejoinder dated 17.08.2012, the claimants requested the Chief Engineer in respect to claim No. 5 pursuant to clause 25 in which it is provided "it is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and given separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award."

The claimants having not received the copies of documents, the statement of defence if any written to amended part of claim No. 5, concerning to full payments pursuant to clause 10 cc, or the copy of amendment of reference by the Chief Engineer in the context of Exc.-07. It is therefore the claimants finds it necessary to file this prayer to seek directions to the parties and the learned Sole Arbitrator may also pleased to declare that the Sole Arbitration Tribunal have allowed the amendment of claim No. 5, and requires no further terms of reference by the appointing authority pursuant to section 16 read with lines in clause 25 referred above..."

4.8 The application ended with a prayer that the respondent be directed to release undisputed payment as an interim measure, as referred to in paragraph 26 of the statement of claims, in consonance with Section 17 as against Section 9 of the Act, as was inadvertently referred to therein.

4.9 The matter, evidently, came up for hearing before the learned arbitrator on 01.03.2013 when, the application of the petitioner dated 17.12.2012, was taken up for hearing. The proceeding sheet seems to indicate that a submission was advanced on behalf of the petitioner to the effect that if its prayer for adjudicating upon, amended amount, in claim no.5, was not accepted, then it should be allowed two (2) months to approach the competent authority for having the amended claim referred to the arbitrator.

5. Consequently, the arbitrator indicated, that his decision with regard to the amendment sought in claim no. 5, would be intimated separately.

5.1 Resultantly, the learned arbitrator by a separate order dated 07.03.2013

(after advertng to the proceedings of 01.03.2013), while, rejecting the petitioner's application for amendment of valuation qua claim no. 5, allowed it a leeway of two (2) months to approach the competent authority to refer the amended claim to him for adjudication. In view of this, consideration of claim no.5 was stood over till 15.05.2013.

5.2 It appears that vide communication dated 11.04.2013, this aspect of the matter was taken up by the petitioner with the respondent. The request of the petitioner was, however, declined by the respondent vide communication dated 03.06.2013. While rejecting the request, the concerned officer of the respondent referred to the provisions of Section 23(3) of the Act.

5.3 The matter was, evidently, fixed thereafter for consideration by the arbitrator on 09.10.2013. On that date, the petitioner sought time on the ground that it had appointed a new counsel. For this purpose, accommodation of three (3) months was sought. The learned arbitrator, however, granted accommodation of two (2) months and fixed the matter for further deliberation on 07.12.2013. The fact that the learned arbitrator had granted an accommodation of only two (2) months, as against the three (3) months sought for by the petitioner, caused consternation to the petitioner. The petitioner, accordingly, moved this court with a petition under Section 11, 14 and 15 of the Act.

5.4 In this background, when the matter came up before the arbitral tribunal on 07.12.2013, the petitioner moved an application seeking an adjournment of the proceedings and a stay of further proceedings on the ground that this court had been moved by way of a petition under Section 11, 14 & 15 read with Section 37 of the Act, for appointment of an independent and impartial arbitrator. Consequently, the learned arbitrator directed the respondent to file its reply within fifteen (15) days. The learned arbitrator also indicated that his decision on the application filed by the petitioner will be communicated later on. Hearing in the matter was adjourned, as requested by the petitioner.

5.5 The matter was thereafter taken up by the arbitrator on 25.04.2014. The learned arbitrator, on 25.04.2014, communicated that since there was no stay on the proceedings by this court, there was no valid reason for him to keep the proceedings in suspended animation. He, therefore, concluded that he would continue with the proceedings. This communication of the learned arbitrator did not go down well with the petitioner and, consequently, an application was filed before the arbitrator seeking, once again, adjournment of the proceedings fixed before him on 10.05.2014. A prayer for adjournment, as on the earlier occasion, was accompanied by a prayer for stay of further proceedings before him.

5.6 The learned arbitrator, Mr. S.R. Pandey, in these circumstances, withdrew from the arbitration proceedings and refunded the fee of Rs. 30,000/- each, paid to him by the two parties.

6. I must note here that on the record, the petitioner has placed a communication dated 12.05.2014 (Annexure P-22), which emanates from the

Executive Engineer of the respondent. By this communication the respondent has recorded that since the learned arbitrator had communicated on 09.05.2014 that he would not be continuing with the hearing scheduled for 10.05.2014, this position was sought to be confirmed. As to the argument, which the learned counsel for the petitioner advanced based on this letter, I would be dealing with the same, in the later part of my judgment.

7. Be that as it may, vide communication dated 20.05.2014, the Chief Engineer of the respondent, in exercise of his powers under clause 25 of the agreement, appointed, one, Mr. O.P. Bhatia, ADG (Retd.), CPWD as the sole arbitrator in the matter. As was done in the earlier occasion, the claims of the petitioner were referred. Along with the claims, the counter-claims were also referred.

7.1 The petitioner being aggrieved by this action of the respondent vide communication dated 23.05.2014 called upon the Chief Engineer of the respondent to consider appointing an independent and impartial arbitrator. Reference in this regard was made to Sections 12(1) and 11(8)(b) of the Act. The Chief Engineer, however, disagreed with the position taken by the petitioner and communicated the same vide letter dated 02.06.2014. In this letter, the Chief Engineer said that he was empowered to appoint an arbitrator from a panel of arbitrators maintained by the Government of NCT of Delhi.

7.2 The petitioner, thereafter, sent another letter to the Chief Engineer, which is dated 20.06.2014. This letter was, however, also copied to Sh. O.P. Bhatia. The result of this was that, Mr. O.P. Bhatia, vide communication dated 14.08.2014, indicated that he would want to withdraw from the proceedings.

7.3 The result of this was that, the Chief Engineer, once again, in exercise of his powers conferred under clause 25 of the agreement, vide communication dated 22.08.2014, made an appointment. This time around, one, Mr. K.N. Aggarwal, DG (Retd). CPWD, was appointed as an arbitrator in the matter. On 01.09.2014, Mr. K.N. Aggarwal entered upon reference and fixed the preliminary date of hearing in the matter, which was, 18.09.2014.

7.4 The petitioner did not stop here. By a letter dated 02.09.2014, it approached the Chief Engineer with its grievance. The grievance this time was that the Chief Engineer had erroneously construed his power qua appointment of arbitrators, by confining the same to the panel of the government of Delhi. The petitioner followed the letter dated 02.09.2014, with a letter dated 18.09.2014. In the letter dated 18.09.2014, the petitioner requested Mr. K.N. Aggarwal not to proceed in the matter.

7.5 At the hearing held on 18.09.2014, the arbitrator declared that he fulfilled the requirement of Section 12 of the Act as he did not have personal interest in the outcome of the case, and that, there were no circumstances which were likely to give rise to justifiable doubts as to his independence and impartiality. Pertinently, none appeared on behalf of the petitioner. The counsel for the petitioner, one, Mr. A.K. Mirchandani, was contacted on his mobile, who

communicated that he was not in a position to attend the meeting, as he had gone abroad and had returned only a day before.

7.6 Mr. K.N. Aggarwal, by a communication dated 25.09.2014 indicated that he would deal with the prayer made by the petitioner that he should not proceed further with the arbitration. Evidently, the petitioner had raised doubts about the impartiality of Mr. K.N. Aggarwal as well, which was communicated to him vide email dated 18.09.2014 followed by letter dated 15.10.2014. Since the learned arbitrator had fixed the date of hearing today, i.e., 14.11.2014, despite said protestations by the petitioner, in the interregnum, the present petition was moved.

8. In the background of these facts, it was sought to be argued by Mr. Anirudh Wadhwa, learned counsel for the petitioner, that the proceedings carried on by the third arbitrator, Mr. K.N. Aggarwal, and those who had preceded him, were vitiated for the reason that they had failed to disclose in writing circumstances, which were likely to give rise to justifiable doubts as to their independence or impartiality. According to the learned counsel, this was a mandatory requirement, which required the arbitrator to state at the outset their possible connection with the matter which was referred to them for adjudication or, circumstances which could give rise to justifiable doubts as to their independence and impartiality. Since, the respondent had the power of appointment of arbitrators, the appointment of ex-employees of the Government, created a perverse incentive and conflict of interest qua such persons who were put on the panel. This court, as a nominee of the Chief Justice, was required to take into account the provisions of Sections 11(8)(b), 12, 18 and 28, which set out the scheme of the Act.

8.1 Though not referred to during the course of the oral arguments, the petition also makes a reference to the extracts of the 246th Report of the Law Commission as also extracts from various books on arbitration, to support the same submission. The stress was on the fact that where there was an inherent bias in the appointment of a person as an arbitrator-appointee, the fact that one of the parties had consented to the procedure for appointment, would not bind such a party, and therefore, by logical corollary, this court.

8.2 As an example of the purported bias, the learned counsel for the petitioner adverted to the fact that while the arbitrator failed to allow the petitioner to enhance the value of claim no.5, the respondent was, in contradiction, allowed to lodge a counter claim.

REASONS

9. I have heard the learned counsel for the petitioner and examined the record. While the petitioner has tried to weave in issues qua appointment of independent and impartial arbitrators by adverting to the scheme of the Act, the report of the Law Commission and opinion of various authors, what cannot be lost sight of, is the factual background in which these issues have been raised. Let me,

therefore, first bring back the focus on the facts of this particular case.

9.1 The record shows that pursuant to a request made for reference of disputes by the respondent to an arbitrator vide letters dated 21.01.2012 and 10.02.2012, the disputes were referred to the arbitrator. The reference was made, in the first instance, vide a communication dated 09.04.2012. By this communication, one, Mr. V.K. Malik, was appointed as an arbitrator. The said letter was accompanied by a list of claims adverted to by both parties including claim no.5, which was valued at Rs. 65 lacs. Claim no.5, as indicated above, related to payment on account of escalation in prices/ wages pursuant to contract provision. Apparently, in the very same list, there is also a reference to counter claim no.1, wherein cost of reference to arbitration was valued by the respondent, at Rs. 10 lacs.

9.2 For reasons not articulated in the petition, Mr. V.K. Malik was replaced by Mr. S.R. Pandey. Communication to this effect was issued by the designated authority, i.e., Chief Engineer, PWD, Govt. Of NCT of Delhi. This communication is suggestive of the fact that Mr. V.K. Malik was, at the relevant point in time, working with the Ministry of Urban Development. Once again, the communication by which Mr. S.R. Pandey was appointed as an arbitrator, was accompanied by a list of claims and a counter-claim preferred by the respondent. There was no change in the content of this list.

9.3 The first hearing, apparently, held by Mr. S.R. Pandey, was on 19.05.2012. At this hearing, the schedule for filing of pleadings was set down; in addition parties were directed to file their respective affidavits within fifteen (15) days to admit/deny each other's documents.

9.4 The petitioner complied with the direction by filing its statement of claims with Mr. S.R. Pandey, under the cover of its letter dated 18.06.2012. Notably, in paragraph 3 of the statement of claims, there is a reference to the fact that the petitioner had invoked the arbitration clause and requested the appointing authority to appoint a sole arbitrator having regard to the provisions of Section 11(8)(d) of the Act. This assertion is, immediately, followed by a statement of fact that the Chief Engineer had, in the first instance, appointed Mr. V.K. Malik, and thereafter, had appointed the then arbitrator, which was Mr. S.R. Pandey, with whom the statement of claims was filed. Nothing was said that the appointment of Mr. S.R. Pandey was not in accordance with the provisions of Section 12 of the Act or, did not comply with, as is now sought to be stated, provisions of Section 11(8)(d) of the Act.

9.5 It is also important to note, claim no.5 adverted to in the statement of claim and was valued at Rs. 65 lacs. I must state, however, that in paragraph 24 of the statement of claims, in which averments were made with regard to claim no.5, the petitioner does state that the claim was subject to due reconciliation after receiving complete details of measurement book and records. It is also stated therein that the value of the said claim was subject to upward increase in view of

"merits and intent of the contract".

9.6 It may also be pertinent to note here, neither at the hearing held on 19.05.2012 before Mr. S.R. Pandey, nor, as indicated above, at the stage of filing of statement of claims, did the petitioner insist on Mr. S.R. Pandey disclosing his interest and/or connection with the subject matter which may give rise to justifiable doubt as to his independence and impartiality. The record reveals that the respondent filed its counter statement of facts on 18.07.2012. This was followed with the petitioner filing its rejoinder on 17.08.2012.

9.7 In the rejoinder, for the first time, the petitioner slipped-in so to say, its amendment to the statement of claims, in respect of claim no.5. In the rejoinder, the petitioner valued the statement of claims at Rs. 2.65 crores, which was also tentative as it was indicated that this figure was given pending correct evaluation of the claim under the said head. This aspect may have gone unnoticed but for the fact that an application was moved by the petitioner after nearly six (6) months of filing of its statement of claims and five (five) months after filing of its rejoinder. The application for amendment was resisted by the respondent. The application of the petitioner seeking an amendment to claim no.5 was taken up for hearing by the then arbitrator, Mr. S.R. Pandey on 01.03.2013. The proceeding shows that the counsel for the petitioner, while advancing submissions on the merits of the application, also made an alternative prayer that in case the arbitrator was not inclined to allow the amendment, he should grant two (two) months time to the petitioner to approach the competent authority for having the amended claim no. 5 referred to him.

9.8 The arbitrator on that date indicated that he would be passing a separate order, which he did on 07.03.2013. By the said order, Mr. S.R. Pandey, after setting his reasons therein, rejected the petitioner's prayer for entertaining the amended claim on the ground that his jurisdiction was confined to the claim as was referred to him, which included its value. In this regard, reference was made by the arbitrator to clause 25(ii) of the contract, which inter alia, provided that the party invoking the arbitration would furnish a list of disputes, with amounts at which claims were valued, along with a notice for appointment of arbitrator.

9.9 However, by the very same order, the alternative prayer was allowed, by which the petitioner sought time to approach the appointing authority for reference of amended claim to the arbitral tribunal. As prayed, the arbitrator, found that prayer fair and reasonable and, accordingly, allowed two (2) months to the petitioner, as prayed. In these circumstances, it was indicated in the order that claim no.5 would be taken up for consideration only after 15.05.2013.

10. It is in this background that on 11.4.2013, the petitioner approached the Chief Engineer, PWD for reference of the amended claim. With this letter, an amended statement of claims was filed, which included claim no.5. In so far as claim no.5 was concerned, it is now stood enhanced to Rs. 3,97,50,000/-. The explanation given was that, the said figure included the actual escalation in the

cost of construction, as referred to in paragraph 1.2 of the arbitrator's decision dated 07.03.2013.

10.1 This aspect was considered by the respondent. Vide communication dated 03.06.2013, the request for reference of the amended, that is, enhanced value of claim no.5 was rejected on the ground that it could not be referred to at the point at which the matter was positioned. Reference in this regard was made to provisions of Section 23(3) of the Act.

10.2 The facts, as set out by me, in the earlier part of my order, would show that the petitioner sought repeated accommodation in the matter before the arbitral tribunal. The learned arbitrator was also told that a petition had been filed in this court under Section 14 and 15 of the Act. A specific request was made that the arbitral proceedings should be stayed. The list of dates appears to indicate that this petition was filed on 07.12.2012.

10.3 Initially, the arbitrator, evidently, acquiesced to the request for adjournment, which was fixed on 07.12.2013, while giving time to the respondent to file a reply qua the application seeking stay on the arbitral proceedings. Ultimately, though, the learned arbitrator vide order dated 25.04.2014, ruled that since, there was no direction issued by the court for staying the arbitration proceedings, he would hear the matter on 10.05.2014.

10.3 The petitioner having realized that the arbitrator was of the disposition that the proceedings should go on, tried to set up another road-block by taking recourse to an application, which is dated 09.05.2014, whereby his mandate was sought to be challenged, broadly, for the reason that he had failed to disclose his interest in terms of Section 12(1) of the Act. The prayer sought in the application, though, was that, the arbitration proceedings fixed on 10.05.2014, should be adjourned, and that, there should be a stay on further proceedings in the matter.

10.4 Faced with such fierce opposition from the petitioner, Mr. S.R. Pandey, the then learned arbitrator, decided to withdraw from the arbitration proceedings, citing personal reasons. This order was passed by Mr. S.R. Pandey on 13.05.2014. The learned arbitrator, as a matter of fact, returned the fee of Rs. 30,000/- paid to him by each of the parties herein.

10.5 Just one (1) day prior to the said date, it appears that, the respondent wrote a communication dated 12.05.2014 to the arbitrator, i.e., Mr. S.R. Pandey, whereby it sought to confirm that the indication given by him on 09.05.2014 that he would not hear the matter on 10.05.2014, as scheduled, continued to hold good. The reason that I have referred to this communication is that, the counsel for the petitioner sought to make much out of this communication. Based on this communication, the counsel sought to contend that the arbitrator was not acting fairly.

10.6 Continuing with the narrative, the respondent vide communication dated 20.05.2014, appointed, one, Mr. O.P. Bhatia, ADG (Retd.), CPWD, as a sole

arbitrator, in place of Mr. S.R. Pandey. An identical list of claims and counter-claims, which was submitted to Mr. S.R. Pandey, was also submitted to Mr. O.P. Bhatia.

10.7 Immediately thereafter, vide letter dated 23.05.2014, the petitioner wrote to the Chief Engineer, PWD with regard to its doubts as to the independence and impartiality of Mr. O.P. Bhatia, as well. In this letter, a reference was made to Executive Engineer's letter dated 12.05.2014, to which I have made a reference above. It was sought to be suggested that the Executive Engineer knew that Mr. S.R. Pandey was to withdraw from the arbitration proceedings. I must only note here that the letter dated 12.05.2014, inter alia, adverted to the fact that it had been communicated by Mr. S.R. Pandey to the Executive Engineer that he would not continue with the hearing scheduled on 10.05.2014. The decision to withdraw from the arbitral proceedings came only thereafter, i.e., on 13.05.2014. The Chief Engineer, PWD vide letter dated 02.06.2014 communicated to the petitioner that the appointment of Mr. O.P. Bhatia was in accordance with provisions of arbitration agreement set out in clause 25 of the principal agreement and, therefore, the petitioner should participate in the proceedings before the appointed arbitrator.

10.8 The petitioner, however, did not rest with this. By a letter dated 20.06.2014, it sought to reiterate its stand taken in the earlier letter dated 23.05.2014. These circumstances resulted in Mr. O.P. Bhatia also withdrawing from the proceedings. Mr. O.P. Bhatia communicated this decision to the parties vide communication dated 14.08.2014. I must only note here that Mr. O.P. Bhatia, inter alia, quite correctly stated that, while communicating his acceptance as an arbitrator to the Chief Engineer, he had in his letter dated 14.06.2014 clearly disclosed that there were no circumstances which could give rise to justifiable doubts to his independence or impartiality. He went on to say that since the petitioner continued to reiterate its position with regard to possible conflict in its letters dated 23.05.2014 and 20.06.2014, he had decided to withdraw from the proceedings under Section 14(1)(b) of the Act.

10.9 It is in these circumstances that the present incumbent, Mr. K.N. Aggarwal, was appointed as an arbitrator by the respondent. Communication to this effect was sent on 22.08.2014. Along with this communication, once again, a list of claims and counter-claims were attached, which was the same as was given to the previous appointees.

11. The petitioner, once again, started its tirade against this arbitrator, as well. Suffice it to say, the present incumbent Mr. K.N. Aggarwal in the proceedings (i.e., sitting no. 1 dated 18.09.2014), quite correctly, has emphasized the fact that he fulfilled the requirements of Section 12 of the Act. He also records that he does not have any interest in the outcome of the case, and that there were no circumstances which could give rise to justifiable doubts as to his independence and impartiality. To be noted, at the hearing held on 18.09.2014, only the respondent's representative was present, even though communication dated

01.09.2014 had been sent to both parties by the learned arbitrator. This fact emanates upon perusal of the order sheet dated 25.09.2014. The order sheet also records that Mr. A.K. Mirchandani, the representative of the petitioner had telephonically sought adjournment and, accordingly, the matter was posted for further proceedings on 15.10.2014.

11.1 On 15.10.2014, the petitioner sent a communication to the learned arbitrator, inter alia, stating that his appointment was not acceptable to it, and that, his appointment was nullity under the provisions of the Act. A request was made that the proceedings should be adjourned sine die. Mr. K.N. Aggarwal, i.e., the arbitrator, though, on 15.10.2014, proceeded with the matter, while noting the fact that there was no appearance on behalf of the petitioner. He also noted the fact that a letter had been received from the counsel for the petitioner. Accordingly, while observing that he would consider two (2) applications moved by the petitioner dated 18.09.2014 and 15.10.2014, adjourned the matter to today, i.e., 14.11.2014 at 4.00 p.m. The respondent was given two (2) weeks to file a reply.

12. The events etched out above, clearly, demonstrate that though, arbitrator after arbitrator has been stating and disclosing that they have no personal interest in the matter, or that there are no circumstances in existence which could give rise to justifiable doubts about their independence and impartiality, the petitioner continues to make attempts at delaying the proceedings.

12.1 The argument of the learned counsel for the petitioner that the scheme of Section 12(1) of the Act requires the arbitrator to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence and impartiality, in my view, have been fulfilled. The arbitrator, at this stage, can only say that there is no conflict of interest. The counsel for the petitioner says that he should give details of his association with the respondent. In this behalf, reference was made to the fact that the arbitrators were chosen from a panel available with the Government of NCT of Delhi. Prima facie, mere empanelment of retired employees, who have dealt with civil works contracts, and have the necessary expertise, cannot lead to the conclusion that there are circumstances which could give rise to justifiable doubts as to their independence or impartiality.

12.2 As the facts obtaining in this case would show that when, Mr. S.R. Pandey, was appointed, no such assertion was made either in the statement of claim or by way of a separate application. Mr. S.R. Pandey's appointment, according to the petitioner, at least up to the stage, till he refused to entertain amendment to claim no.5, appeared to be in order. It is only when Mr. S.R. Pandey rejected the petitioner's request for amendment of claim no.5 on the ground of lack of jurisdiction on 01.03.2013, that the petitioner moved for his removal.

12.3 The averments in the petition seem to suggest that, for this purpose, apparently, a petition had been filed on 07.02.2013 in this court. During the

course of argument, the learned counsel for the petitioner did not inform the court as to whether actually a petition had been filed and what was its outcome.

13. Suffice it to say, after Sh. S.R. Pandey, on 13.05.2014, withdrew from the proceedings, the petitioner objected to appointment of every other arbitrator appointed by the respondent despite their explicit declaration that there were no circumstances which could give rise to justifiable doubts as to their independence or impartiality. The first causality on account of this approach of the petitioner was Mr. O.P. Bhatia and, an attempt, in this behalf, has been made with regard to Mr. K.N. Aggarwal, as well. According to me, this practice has to be deprecated.

14. The scheme of the Act clearly provides that notwithstanding the disclosure that the arbitrator may make in sub-section (1) of Section 12, a party can also challenge his appointment under clause (a) of sub-section (3) of Section 12 based on what it considers a circumstance which can give rise to justifiable doubts to his independence or impartiality; provided, it becomes aware of such circumstances after the appointment has been made. The Act does not empower the court to interfere at this stage.

14.1 The procedure for challenging the appointment of arbitrator is set out in Section 13 of the Act. Sub-section (5) of Section 13 clearly states, if the procedure set out in sub-section (4) of Section 12 is not successful, and as a result of which an arbitral award is made, the party can challenge the same only under Section 34 of the Act. Therefore, the argument of the petitioner that this court should intervene in the matter under Section 11 of the Act, is clearly impermissible.

14.2 The reference to provisions of Section 18 and 28 of the Act, in support of this argument, according to me, is misconceived. All that Section 18 of the Act says that parties would be treated with equality and each party shall be given full opportunity to present its case. Section 28(1)(a) generally speaks of, in so far as domestic arbitrations are concerned, that they shall be in accordance with the substantive law for the time being in force in India. Sub-Section (2) of Section 28 gives power to the arbitral tribunal to decide *ex aequo et bono* or as amiable compositeur, only if, parties expressly authorize the arbitral tribunal to do so. These are concepts by which the arbitrator can rule in equity or give a sensible commercial resolution of the dispute only if the agreement makes a provision in those terms. Sub-section (3) of Section 28 clearly establishes the fact that, in all cases, an arbitral tribunal is to decide, disputes, in accordance with the terms of the contract and, in that behalf, is required to take into account the usage of the trade applicable to the transaction.

15. Therefore, the grievance of the petitioner, which emanated really after Mr. S.R. Pandey, earlier arbitrator, had rejected its amendment to claim no.5, by which the value of the said claim was sought to be enhanced, has to be seen in the context of the provisions of Section 28(3) of the Act.

15.1 Mr. S.R. Pandey, the then arbitrator, in his order dated 07.03.2013 has

adverted to clause 25, and thereupon, based on his understanding ruled that he can decide only those disputes which are referred to him. Based on sub-clause (ii) of clause 25, he came to the conclusion that since the party invoking the arbitration has to give a list of disputes with the amounts claimed, in respect of each such dispute, the amount claimed was an inseparable element of the dispute referred to him by the competent authority. The arbitrator, however, granted liberty to the petitioner to approach the competent authority for reference of amended claim, along with the notice for appointment of arbitrator. The respondent by a letter dated 03.06.2013, rejected the petitioner's request, by referring to Section 23(3) of the Act.

16. In this context, two issues arise: First, whether the arbitrator being, admittedly, the creature of the contract, was hemmed in by the provisions of clause 25 of the contract. Second, if both, the determination of the arbitrator and the respondent, were erroneous, what was the remedy available to the petitioner.

17. In so far as first issue is concerned, quite clearly, as per the scheme of the Act, the arbitrator's jurisdiction is ring-fenced by the terms of the agreement obtaining between the parties. It is the case of the petitioner that both the arbitrator's opinion, as well as the respondent's decision of 03.06.2013, is erroneous. If that be so, then certainly at this stage the court cannot intervene. The stage for intervention, in case the aggrieved party chooses to assail the same on this ground, can only arise after an award is passed.

17.1 The respondent could have, in this case, possibly taken a pragmatic view by referring the amended value of the claim (under claim no.5) to the arbitrator for adjudication so as to exclude the possibility of the award being rendered vulnerable on this ground. The respondent, however, having chosen to take recourse to provisions of Section 23(3) of the Act, the scheme of the Act does not envisage intercession by the court at this stage.

17.2 Sub-Section (3) of Section 23 of the Act generally permits a party to amend or supplement his claim or defence, during the course of the arbitral proceedings, unless otherwise agreed to by the parties or, where the arbitral tribunal considers it inappropriate to allow the amendment or, the pleadings being supplemented having regard to the delay in making such an application.

17.3 For good or worse, the respondent appears to have taken stand that the reference qua claim no.5 was made to the arbitrator at the behest of the petitioner. As noted by me above, the valuation of the claim was made subject to re-conciliation and other material being placed on record. Therefore, while there is some bit of rationale in the arbitrator taking the decision that he was hemmed in by the provisions of clause 25 of the contract, nothing prevented the respondent to agree to refer the amended claim to the arbitrator. As indicated above, there could be a possible view that the valuation under claim no.5 was tentative and the arbitrator could have, while adjudicating upon the claim, decided as to whether or not it was sustainable, and to extent it was sustainable.

17.4 However, whichever way one were to look at it, the decision of both, the arbitrator and that of the respondent, cannot be interdicted by the court in a proceeding under Section 11 of the Act, and, that too, on the ground that it brings into play circumstances which gave rise to justifiable doubts about the arbitrator's independence or impartiality.

17.5 In this behalf, at some stage, counsel for the petitioner had said that lack of partiality was displayed by the arbitrator when the counter claims had been entertained.

17.6 As indicated by me above, counter claim forms part of the reference to the arbitrator. In case the arbitrator were to embark upon a counterclaim, not referred to in the list appended to his letter of appointment, the petitioner is free to agitate that aspect of the matter before the arbitrator. This objection, like the other objections, will have to await, under the scheme of the Act, till the pronouncement of the award.

18. Thus for the reasons given above, I find no merit in the petition. The petition and the application are, accordingly, dismissed.