

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Arb.Case No.71 of 2004.**

**Judgment reserved on:4.5.2006.**

**Decided on: May 25, 2006**

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**M/s.Rishi Electricals(P) Ltd.**

**...Objector.**

***VERSUS***

**H.P.State Electricity Board.**

**.....Respondent.**

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***Coram***

**The Hon'ble Mr. Justice Deepak Gupta, Judge.**

***Whether approved for reporting?<sup>1</sup> Yes.***

**For the Objector:**

**Mr.J.S.Bhogal, Sr.Advocate with  
Mr.Suneet Goel, Advocate.**

**For the Respondent:**

**Mr.Shrawan Dogra, Advocate.**

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**Deepak Gupta,Judge**

This judgment shall dispose of the objections filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') for setting aside the award dated 23.10.2002 passed by the Arbitral Tribunal.

2. The brief facts, necessary for the decision of the case, are that the respondent / Board issued a notice inviting tenders for supply of Galvanized Steel wires. The objector submitted his tender which was accepted and purchase order was issued to it on 9.6.1995. Disputes arose between the Board and the objector and in terms of the arbitration agreement the dispute was referred to arbitration. Initially Shri R.P.Goel, Chief Engineer (Projects) was appointed as the

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<sup>1</sup> *Whether the reporters of the local papers may be allowed to see the Judgment? Yes*

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sole Arbitrator but later on he was replaced by Shri O.C.Kaushal, who was the then Chief Engineer (Hydro Planning) of the respondent / Board. The Arbitral Tribunal announced its award on 23.10.2002.

3. I have heard Shri J.S.Bhogal, learned Senior Advocate, appearing on behalf of the objector and Shri Shrawan Dogra, learned counsel for the respondent / Board.

4. Shri Bhogal has basically raised three contentions before me. The first is that the Arbitrator was actuated by bias and personal interest in the matter. Objection was raised before the Arbitrator that he was biased and instead of deciding the objection himself the Arbitrator referred the matter to the Chairman and did not decide the same himself which is in violation of the provisions of the Act. The second question raised is that the arbitrator has acted in violation of Section 18 of the Act by not treating the parties equally and, therefore, the award is liable to be set aside. His third objection is that the award is not a reasoned award inasmuch as the objector had specifically raised a challenge to the authority of the person who filed the claim but neither an issue was framed in this regard nor this question was decided by giving reasons.

5. Mr.Dogra, on the other hand, contends that the scope of Section 34 of the Act is very limited. The arbitration agreement envisaged that the Arbitrator was to be appointed by the Chairman of the Board and Arbitrator was appointed as per the agreed procedure. No objection with regard to the personal interest or the bias of the Arbitrator was raised at the initial stage or in the proceedings or during

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the course of the settlement of the issues. He further submits that efforts should be made to uphold the award of the Arbitrator and not to scuttle the same. A Court has only a limited jurisdiction to set aside the award. Both the sides have relied upon the judgment of the Apex Court in ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705***. Section 34 of the Act permits the Court to set aside the arbitral award only on a few grounds. For the purposes of the present objection petition, the limited question is whether the arbitral award is in conflict with the Public Policy of India. The phrase Public Policy of India has been explained by the Apex Court in Para-31 of the said Judgment which reads as follows:-

“31. Therefore, in our view, the phrase “public policy of India” used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public polity connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award / judgment / decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term “public policy” in ***Renusagar*** case it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

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- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

Therefore, it is in the light of these observations of the Apex Court that the objections have to be considered. Mr.Bhogal, appearing for the objector, submits that the Arbitrator was appointed as per the terms of the award. He, however, submits that during the course of the proceedings that the Arbitrator was appointed as whole time member of the respondent / Board. According to Mr.Bhogal, this gave rise to an apprehension in the mind of the claimant that the Arbitrator may not be fair and may have a personal interest in the matter and accordingly on 24.7.1999 a request was made before the Arbitrator that he may rescuse from the proceedings. The order of the Arbitrator on the said objection reads as follows:-

“At the outset of the hearing the learned counsel for respondent supplier submitted that the present Arbitrator has been elevated in the rank of Member (C ) and has thus become part of the claimant Board. In the circumstances, the present Arbitrator may not be in a position to do complete justice between the parties. In reply the learned counsel for the claimant Board stated that as per clause No.15

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of the Contract Agreement the Chairman, HPSEB or his nominee shall be the sole Arbitrator. In the instant case the present Arbitrator was nominated by the Chairman, HPSEB. The present parties have expressed no-confidence in the present Arbitrator.

2. In view of the above position, the present proceedings are kept in abeyance and the matter is referred to the Chairman, HPSEB for appropriate direction / orders, for the further completion of the pending proceedings. Both the parties will be informed accordingly of the next course of action in due course.”

Thereafter, the Arbitrator sent a letter to both the parties on 28.8.1999 which reads as follows:-

“As per certain contention made by the learned counsel of the respondent supplier and in view of the last order recorded during the hearing held on 24.7.1999 the above matter was referred to chairman, HPSEB for seeking appropriate orders for completion of the pending proceedings.

The Chairman through Chief Engineer (MM) vide U.O. No.HPSEB:CE(MM)/IV/GSS/8/95-11629 dated 19.08.1999 has decided as under:-

‘Chairman after perusal and consideration of the matter has decided that you may continue as arbitrator in the subject cited case.’

Accordingly, the case is now hereby fixed on 10<sup>th</sup> September, 1999 at 2.30 P.M. in the Chamber of Member (Civil) for further consideration. Both the parties are hereby directed to attend the hearing on

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the above mentioned date, time and venue failing which ex-parte proceedings will be held.”

Accordingly, the Arbitrator continued to proceed and hear the matter. Mr.Bhogal submits that the Arbitrator totally abdicated his functions. It was for him to decide the question whether he should continue to hear the arbitration or not. In this behalf, Mr.Bhogal has relied upon the provisions of Section 12 of the Act. Section 12(1) provides that when a person is approached for being appointed as Arbitrator he should disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Sub section (2) provides that an Arbitrator not only at the time of his appointment but throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing about the circumstances referred to in sub-section (1) of the Act. Section 13 (2) of the Act provides that a party, who intends to challenge an arbitrator, shall do so within fifteen days after becoming aware of the constitution of the arbitral Tribunal or after having become aware of any circumstances giving rise to justifiable doubts about the independence and impartiality of the Arbitrator or his qualifications. In case such doubts are raised he shall send written statement in this regard to the Arbitrator. Sub-section (3) of Section 13 of the Act provides that unless the Arbitrator himself withdraws from the office or the other party agrees to challenge, the Arbitral Tribunal shall decide the challenge itself and in case he does not accept the challenge he shall continue the arbitral proceedings. A party who has raised such challenge is entitled to raise this ground while challenging

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the final award under Section 34 of the Act. On the basis of the aforesaid provisions, it is contended on behalf of the objector that the Arbitrator abdicated his functions inasmuch as vide his order dated 24.7.1999 he himself did not decide the question as to whether the challenge with regard to his bias should be accepted or not. Instead of doing that he referred the matter to the Chairman of the Board. A perusal of the letter dated 28.8.1999 clearly indicates that the Arbitrator without any application of mind followed the directions of the Chairman of the Board that he should continue as Arbitrator in the cited case.

6. In my view, the provisions of Sections 12 and 13 of the Act are very salutary and must be complied with in letter and spirit. Even if in an arbitration agreement an Arbitrator is named or if a particular person is given the authority to appoint an Arbitrator then also when the Arbitrator is appointed and he holds any office or position which may create a doubt in the mind of any one of the parties with regard to his independence or impartiality he must inform the parties about holding such position. It is for the parties then to decide whether to raise a challenge or not and whether to continue with the same Arbitrator or not. The appointment of an Arbitrator can be challenged on the grounds that circumstances exist that give rise to the justifiable doubts with regard to his independence or impartiality or that he does not possess the qualifications of an Arbitrator as agreed to between the parties. Under Section 13 of the Act procedure for challenge is provided. Once the party raises a challenge it is for the

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Arbitrator himself to decide whether he should continue with the proceedings or not. Even a Court will not normally interfere in the continuation of the proceedings by the Arbitrator after rejecting the challenge. The decision, however, must be of the Arbitrator himself. He cannot abdicate his functions and pass on the burden to decide this issue to somebody else. In the present case, no doubt, the right to appoint the Arbitrator was with the Chairman but when an objection was raised casting doubt on the impartiality of the Arbitrator he could not have again referred the matter to the Chairman. He should have decided it himself. In fact, the order and the letter quoted above, clearly indicate that the Arbitrator felt that he was bound by the decision of the Chairman. This, in my opinion, itself is sufficient ground to hold that the objector had justifiable doubts with regard to the impartiality of the Arbitrator and as such, in my opinion, the award cannot be sustained.

7. The second contention raised is that the Arbitrator did not act fairly in accordance with Section 18 of the Act. Section 18 of the Act reads as follows:

***“18. Equal treatment of parties.-*** The parties shall be treated with equality and each party shall be given a full opportunity to present his case.”

8. This Section provides that the Arbitrator should treat both the parties equally and should give them equal opportunities. In the present case, it was the Borad which was the claimant. There was no issue the onus of which was on the claimant. On 9.6.1995 the



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objector, who was the defendant before the Arbitrator, concluded his evidence. Thereafter, request was made on behalf of the Board that they want to produce a witness in rebuttal to prove statement RA-1. This was objected to but the Arbitrator allowed the claimant Board to examine a witness to prove this document. No error can be found with this portion of the order of the Arbitrator. However, thereafter on the next hearing when the Board examined Shri M.R.Sharma to prove the said statement the counsel for the objector requested that in view of the fact that an additional opportunity had been given to the claimant and new document has been placed on record, the supplier may also be granted a date to lead further evidence to counter the statement RA-1. This was not accepted. A perusal of the award itself shows that while passing the award one of the main documents relied upon by the Arbitrator is the statement RA-1 especially with regard to the quantification of the amount to which the claimant was entitled. He has assessed the loss on the basis of this statement itself.

9. In my view, the contention of the petitioner that the parties were not treated equally by not giving an opportunity to the supplier to lead additional evidence after such an opportunity had been given to the claimant is correct. No doubt, an Arbitrator can evolve his own procedure and is not bound by the provisions of the Civil Procedure Code or the strict rules of evidence. However, rules of natural justice must be held to be part and parcel of the Public Policy of India. If after closure of the evidence of the defendant he could permit the claimant to examine another witness on a very material

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issue it would have been much fairer on his part to have permitted the supplier to lead such evidence as the supplier wanted to lead.

10. In view of the above discussion, in my opinion, the Arbitrator erred in not deciding the challenge with regard to his impartiality himself and in fact showed bias by referring the matter to the Chairman of the respondent / Board and by abiding by the decision of the Chairman without any application of mind of his own. He also did not treat the parties equally inasmuch as he did not give an opportunity to the objector to rebut the evidence of the Board.

11. Contention No.3 need not be decided in view of the decision taken on the above two contentions.

12. In view of the aforesaid discussion, the award of the Arbitral Tribunal is set aside. Since the award is being set aside on procedural grounds, the claimant may apply for appointment of fresh Arbitrator who shall decide the matter afresh.

**May 25, 2006**(soni)

**( Deepak Gupta )  
Judge.**