Reportable

* **HIGH COURT OF DELHI AT NEW DELHI**

+ OMP No.356/2004

Date of decision : 30th November, 2007

AHLUWALIA CONTRACTS (INDIA) LTD.
... PETITIONER

! Through : Mr. Ashish Bagat Advocate.

Versus

$ HOUSING & URBAN DEVELOPMENT CORPORATION & ANR. ..... RESPONDENTS

^ Through : Mr. Anurag Kumar with
Mr. P.N. Kumar, Advocates.

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not? Yes

(3) Whether the judgment should be reported in the Digest ? Yes

ARUNA SURESH, J.

1. This petition under section 12 and 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act") has been filed by the petitioner seeking revocation of mandate of the sole arbitrator Shri W.D. Dandage appointed by respondent No.1 in accordance with the arbitration clause 9.2 of the General Conditions of the Contract.

2. Petitioner is an engineering and designing construction

company. It entered into an agreement dated 8th April, 1994 with respondent No.1 for executing the work of construction of car parking basement at HUDCO Place, Khelgaon, Andrewsganj, New Delhi. A dispute arose regarding the payments claimed by the petitioner for the work executed by it which were not released by respondent No.1. Petitioner invoked the arbitration clause of the agreement vide letter dated 26th April, 2004 to the appointing authority for reference of the dispute having arisen between the parties to arbitration and also requesting the petitioner to appoint an arbitrator. This letter also included the points of dispute in reference. Consequently, respondent No.1 appointed Mr. L.R. Gupta, Ex.DG, CPWD as the sole arbitrator to enter into reference and decide the dispute which had arisen between the petitioner and respondent No.1. However, Mr. L.R. Gupta vide his letter dated 15th June, 2004 declined to accept the appointment. Therefore, petitioner sent another letter dated 21st June, 2004 requesting respondent No.1 for appointment of another arbitrator. Respondent No.1 accordingly appointed Mr. W.D. Dandage, respondent No.2 as the sole arbitrator vide letter dated 29th June, 2004.

3. Mr. W.D. Dandage as a sole arbitrator had adjudicated an earlier dispute between the same parties

pertaining to the work “Construction of Guest Houses Cluster “B” at HUDCO Place, Andrews Gunj, New Delhi”. Award pronounced in the said proceedings by the said arbitrator has been challenged by the petitioner and the objections are pending adjudication. Under these circumstances, the petitioner has alleged that he has a strong apprehension that the arbitral tribunal would be carrying a pre-conceived notion with colours of biasness against the petitioner particularly in the context that the earlier award suffered from inherent colour of biasness which resulted in the gross miscarriage of justice. The petitioner therefore forwarded his objections to the appointment of respondent No.2 as the sole arbitrator vide letter dated 1st July, 2004 and requested for change of the arbitrator. Before petitioner could get reply from respondent No.1, it received notice from respondent No.2 informing it that he had fixed the matter for 17.07.2004 as the date for holding preliminary hearing and also called upon the parties to provide immediate an Executive Class air ticket for journey to and fro from Delhi to Pune as respondent No.2 is a resident of Pune.

4. Petitioner thereafter filed his objection application before the Arbitral Tribunal under section 13 (2) of the Act containing his objections to the appointment of

respondent No.2 as the sole arbitrator for the reasons of his apprehension of biasness. This application was dismissed by the sole arbitrator vide detailed order dated 21st July, 2004 certifying that neither at the time of the appointment as sole arbitrator in the present case nor thereafter any circumstances existed which is likely to give rise to justifiable doubts as to his independence and impartiality to decide the dispute referred to him by the CMD HUDCO.

5. Aggrieved, the petitioner has filed the present petition before this court seeking the termination of mandate of respondent No.2 and appointment of any other person as an arbitrator, may be a person having engineering background and is on the panel of Indian Council of Arbitration.

6. Respondent No.1 has contested this objection petition on the following grounds:-

(a) The present petition for revocation of mandate is not maintainable and is an abuse of process of law and the only remedy available to the petitioner is to take action under section 34 of the Act if he is aggrieved of the award after its final pronouncement by the arbitrator.

(b) The arbitrator has been appointed in terms of the arbitration clause incorporated in the agreement and the arbitrator has already entered into reference.

(c) The objection petition filed by the petitioner before the arbitrator was decided in accordance with section 16 of the Act.

(d) The respondent has also filed objections against the award pronounced by Mr. W.D. Dandage in the matter of dispute regarding construction of Guest Houses Cluster "B" at HUDCO Place, Andrews Gunj, New Delhi.

(e) The present petition is not maintainable as it cannot be said that the arbitrator will be biased and unfair while adjudicating upon the claim of the parties.

7. Learned counsel for the petitioner argued that the present objection as filed is maintainable as petitioner has availed of the provisions of section 13 (3) of the Act before filing the present objection in the court. Since the arbitrator rejected the application, petitioner has every right to challenge the appointment of the arbitrator as he apprehends that the arbitrator will not adjudicate upon the disputes independently or impartially. Under these circumstances, the

court has the power to appoint an independent arbitrator to enter into reference and adjudicate upon the disputes.

8. Learned counsel for the respondent submitted that perusal of the entire scheme of the Act indicate that the only remedy available to the petitioner is to file objections to the Arbitral award under section 34 of the Act if he is aggrieved of the arbitral award and he can also challenge the appointment of the arbitrator, his independence and his biasness in the said objections.

9. Section 12 of the Act lays down grounds for challenge. Whereas section 13 of the Act lays down the procedure to be followed for such a challenge. Section 14 of the Act permits the termination of mandate of an arbitrator for the reasons stated therein. Section 15 of the Act speaks of an appointment of an arbitrator in case the mandate of the arbitrator already appointed is terminated. Since these are the relevant provisions of the Act and have a bearing on the facts and circumstances of the present petition, they are reproduced as follows:-

> **"12. Grounds for challenge.**
>
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose

in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An 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) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made".

"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."

"14. Failure or impossibility to act.

(1) The mandate of an arbitrator shall terminate if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause

(a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3)If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

> **"15. Termination of mandate and substitution of arbitrator.**
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> (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—
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> (a) where he withdraws from office for any reason; or
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> (b) by or pursuant to agreement of the parties.
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> (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
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> (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral Tribunal.
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> (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral Tribunal."

10. Petitioner in the present petition has prayed for termination of the mandate of the arbitrator, respondent No.2 who has been appointed by respondent No.1, as it apprehends biasness on his part and also doubts his independence and impartiality. Therefore, the grounds for challenge to the mandate of the arbitrator falls under section 12 sub-section 3 (a) of the Act. Section 13 (3) of the Act makes it very clear that unless the arbitrator challenged

withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. Undoubtedly, this procedure was followed by the petitioner and the arbitral tribunal dismissed the challenge made by the petitioner. However, by virtue of section 13 (4) of the Act if a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) fails, the arbitral tribunal has to continue the arbitral proceedings and make an arbitral award. Sub-section 5 of Section 13 of the Act empowers a party challenging the arbitrator to make an application for setting aside such an arbitral award made under sub-section 4 in accordance with section 34 of the Act.

11. Under Section 14 (2) of the Act, the court has the power to decide on the termination of the mandate on any of the grounds referred to in clause (a) of Sub Sec. (1) and also in the circumstances enumerated in section 15 of the Act and appoint an arbitrator. Under section 14 of the Act the mandate of an arbitrator stands terminated if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without unnecessary delay or he withdraws from his office or the party agreed to the termination of his mandate. As per section 14 (1) (b) the mandate of an arbitrator shall terminate if he withdraws from

his office or the parties agree to the termination of his mandate. Section 15 provides for a procedure which has to be followed when mandate of the arbitrator is terminated and substitution of the arbitrator in the circumstances set out under sub-section 1 including those referred under section 13 and 14 of the Act is required. As per section 15 sub-section 2 of the Act where the mandate of an arbitrator terminates, a substitute arbitrator has to be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

12. In the present case, the petitioner instead of pursuing the remedy available to him for challenging the arbitrator as laid down in section 13 has sought appointment of a substitute arbitrator through the court on the grounds that the arbitrator so appointed by respondent No.1 also adjudicated upon the disputes between the petitioner and respondent No.1. It will not be out of place to mention here that both the parties have filed their objections to the said award pronounced by respondent No.2 in an earlier reference pertaining to another dispute between the parties to the present petition. Petitioner can challenge the mandate of the arbitrator after the arbitral award is pronounced by the arbitrator while filing objection in accordance with section 34

of the Act.

13. It is not disputed that there is no provision contained in the Act which permits the court to terminate the mandate of the arbitrator on challenge by a party under section 12 or 13 of the Act. It is not disputed that respondent No.2 has been appointed as an arbitrator by respondent No.1 in terms of the arbitration agreement inter se the parties. Therefore, this court has no power to substitute an arbitrator so appointed by respondent No.1 in terms of the arbitration agreement. The meaningful interpretation of these sections if read together is that challenge to the appointment of the arbitrator has to be raised by the petitioner before the arbitral tribunal itself. If he succeeds in the challenge, the petitioner has no cause of grievance left. But if he fail then he has to participate in the arbitral proceedings and if aggrieved by the award, to challenge the same in accordance with the provision of section 34 of the Act including the mandate of the arbitrator.

14. Learned counsel for the petitioner has referred to **"Firm Ashok Traders & Anr.** Vs. **Gurumukh Das Saluja & Ors, AIR 2004 Supreme Court 1433".** In the said case the point in issue before the court was regarding the applicability

of section 69 of the Partnership Act and also its effect on the maintainability of application filed under section 9 of the Arbitration and Conciliation Act, 1996. A relief which can be claimed by a party under section 9 of the Act is in the nature of interim relief and it does not speak of composition of arbitral tribunal, its appointment, termination, etc. Therefore, this judgment is of no help to the petitioner in this case.

15. In **"Dharam Prakash Vs. Union of India & Anr., 2007 (94) DRJ 431 (DB)",** wherein constitutionality of section 13 (3), 13(4), 13(5) as well as section 34 of the Act were under challenge, it was held by the Division Bench of this court :-

> "We have considered the aforesaid submission of the learned counsel for the petitioner. It is to be noted that the aforesaid Act is enacted mainly in the pattern of the Modern Law adopted by the United Nations Commission on International Trade law. The object and the reasons of the Act clearly indicate that the intention of the Act is to lay emphasis on speedy disposal of arbitration proceedings. The Act also seeks to minimise judicial intervention in the progress and completion of arbitration proceedings, which is crystal clear from a bare reading of Section 5 of the Act which provides that no judicial authority would intervene except where so provided in the Act. Consequently, the bar on court interference on challenging the arbitral

> tribunal during the pendency of the arbitration proceeding was meant to minimise judicial intervention at that stage as any interference at that stage would be against the spirit with which the Act was enacted. Sub-section (5) of Section 13 of the Act lays down that challenging an arbitral award is permitted even on the grounds taken by the aggrieved party on which the challenge to the arbitral tribunal was made. There is no provision in the Act which would enable the court to remove an Arbitrator during the arbitration proceedings. But, at the same time the party having grievance against an Arbitrator cannot be said to be without a remedy and the said remedy becomes available as soon as the arbitral award is made by the Arbitrator or the arbitral tribunal."

16. Reference is also made to **"Bharat Heavy Electricals Ltd.** Vs. **C.N.Garg & Ors., 2001 (57) DRJ 154 (DB)".** In the said case also it was observed :-

> "The legislature was more than cautious while providing in explicit term that no judicial Authority shall intervene except where so provided (Section 5). Thus clear mandate is to bar judicial interference except in the manner provided in the Act. Conversely if there is no provision to deal with a particular situation, Courts cannot assume jurisdiction and interfere. Comparing this legislation with the earlier legislation on the subject-namely the Arbitration Act, 1940, the message is loud and clear. The legislature found mischief in various provisions contained in the Arbitration Act, 1940 which would enable a party to approach the Court time and again during the pendency of arbitration proceedings

resulting into delays in the proceedings. Law makers wanted to do away with such provisions. So that arbitration proceedings are not unduly hampered. The very purpose of arbitration, which is an alternate Dispute Redressal Forum, is defeated once the Courts interfere with these proceedings. The experience in the working of the old Arbitration Act showed that it was resulting in more delays than in civil suits. Therefore, not only such provisions were omitted in the new Act, provision in the form of Section 5 was inserted to convey the message. The scheme of the new Act is clear enough, i.e. during the arbitration proceedings Court's interference is done way with. The new Act deals with the situation even when there is challenge to the constitution of the Arbitral Tribunal. It is left to the Arbitrator to decide the same in the first instance. If a challenge before the Arbitrator is not successful, the Arbitral Tribunal is permitted to continue the Arbitral proceedings and make an Arbitral award. Such a challenge to the constitution of the Arbitral Tribunal before the Court is then deferred and it could be only after the arbitral award is made that the party challenging the Arbitrator may make an application for setting aside an arbitral award and it can take the ground regarding the constitution of Arbitral Tribunal while challenging such an award. Thus course of action to be chartered in such contingency is spelt out in the Act itself. Court interference on basis of petitions challenging Arbitral Tribunal during the pendency of the arbitration proceedings would be clearly against the very spirit with which the Arbitration and Conciliation Act,
1996 has been enacted. The mischief which existed in the earlier enactment

and
is sought to be removed by the present enactment cannot be allowed to be introduced by entertaining writ petitions in the absence of any provision in the new Act in this respect. A statute is an edict of the legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. A statute is to be construed according “to the intent of them that make it” and “the duty of judicature is to act upon the true intention of the legislature - the mens or sententia legis”.”

It was further observed :-

“A possible question in this connection may arise about there being no provision for removal of an Arbitrator during the arbitration proceedings by the Court. Admittedly the Act does not contain any provision where the Court can remove an Arbitrator during the pendency of arbitration proceedings. In this connection we have to remind ourselves of the intention behind the legislation, i.e. the Arbitration and Conciliation Act, 1996. As already observed, the Act is modelled after the UNCITRAL Model Law. This Model Law has been adopted by various countries. The need for such a Model Law arose because of increased international commercial activity. Such activity in modern times is at Government or Semi-Government level. In such circumstances it was only fair and proper that all the participating countries should have similar legal provisions when it came to Arbitration. In fact Arbitration is envisaged as a method for speedy alternate redressal of disputes between the parties to commercial transactions. If Court interference was permitted during

arbitration proceedings, the very object of speedy redressal of disputes would have been frustrated. That is why keeping the peculiar conditions in India, coupled with
the need for speedy resolution of disputes, the provision of Court interference was avoided. Rather Section 5 was inserted which provides that there will be no judicial intervention. We have already noted that a party having grievances against an Arbitrator on account of bias and prejudice is not without remedy. In has only to wait till the arbitral award comes and it can challenge the award on various grounds including bias and prejudice on the part of the Arbitrator. Before the stage of challenge of award under Section 34 comes, Sub-sections (1), (2) and (3) of Section 13 envisage a situation where the Arbitrator may on his own recluse himself on objection being taken qua his functioning as an Arbitrator or where both the parties agree to his removal as per procedure accepted by them. If both fail, the Arbitrator is required to decide on the
challenge to his functioning as an Arbitrator levelled by a party. The Arbitrator is expected to be a fair person and if he finds that there is substance in the allegations, an Arbitrator is expected to dispassionately rule on such an objection. Failing all this the last resort for an aggrieved party is the challenge under Section 13(5) read with Section 34. Thus going on with the ethos of the new Act of speedy progress of arbitration proceedings without judicial interference coupled with the fact that an aggrieved party is not without remedy, it cannot be said that the absence of a provision regarding removal of an Arbitrator renders the relevant provisions of the statute ultra

> vires the Constitution. We are of the considered view that absence of a provision of removal of an Arbitrator does not render the relevant statutory provisions invalid or ultra vires the Constitution of India."

17. In "**Newton Engineering & Chemicals Ltd.** V/s. **Indian Oil Corporation Ltd. & Two Ors.", 2007 (93) DRJ 127"** while relying upon **"Bharat Heavy Electricals Ltd.** Vs. **C.N.Garg & Ors."** (supra), this court concluded as follows:-

> "To conclude, I have no hesitation in holding that there is no provision in the Act empowering this Court to terminate the mandate of the Arbitrator who has entered upon the reference and/or to substitute the same with an Arbitrator appointed by this Court. The necessary corollary is that the challenge to the appointment of the Arbitrator must be raised by the petitioner before the Arbitral Tribunal itself. If such challenge succeeds, the petitioner shall have no cause for grievance left. If, however, the petitioner is unable to succeed before the Arbitral Tribunal, it shall have no option except to participate in the arbitral proceedings and if aggrieved by the arbitral award, to challenge the same in accordance with the provisions of Section 34 of the Act."

18. In view of my observations as above, I conclude that the present objection petition is not maintainable. The remedy available to the petitioner is to file objections under section 34 of the Act including his challenge to the

appointment of the arbitrator on the grounds of biasness and unfairness, if he is aggrieved of the arbitral award which may be pronounced by the arbitrator; respondent No.2 after completing the arbitral proceedings before him. Hence, the objection petition is accordingly dismissed.

19. Interim order of this court dated 13th October, 2004 is hereby vacated. Respondent No.2 shall proceed with the reference and adjudicate upon the disputes inter se the parties as referred to him after giving them notice and fixing a date for appearance before him. The arbitrator shall make every endeavor to expedite the adjudication without any unnecessary delay.

17. Objection Petition is accordingly dismissed. All pending applications also stand disposed of.

File be consigned to record room.

NOVEMBER 30, 2007 **ARUNA SURESH**
vk **(JUDGE)**