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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Judgment: 30th July, 2021

+ **O.M.P. (T) (COMM.) 56/2021 and IA Nos. 7715/2021, 7716/2021, 7717/2021, 9049/2021 and 9050/2021**

DELHI TOURISM AND TRANSPORTATION

DEVELOPMENT CORPORATION (DTTDC) Petitioner

Through: Mr Sachin Datta, Senior
Advocate with Ms Anisha
Upadhyay, Ms Khushboo
Kapur, Advocates.

Versus

M/S SWADESHI CIVIL INFRASTRUCTURE

PVT. LTD. Respondent

Through: Mr Dinkar Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. Delhi Tourism and Transportation Development Corporation (DTTDC) (hereinafter 'the petitioner') has filed the present petition under Section 14(2) of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, praying that the mandate of the learned Arbitrator, be terminated and further directions be issued for substitution of the learned Arbitrator by an independent and impartial Arbitrator.

2. The petitioner claims that the learned Arbitrator has displayed open bias in the conduct of arbitral proceedings and therefore, has rendered himself *de facto* and *de jure* unable to perform his functions as an Arbitrator.

3. The petitioner had awarded the Contract for construction of “Dilli Haat at Janakpuri, New Delhi (SH: - Civil, Water Supply, Sanitary Installation, Drainage, Development & Internal Electrical Installation Works etc.)” to the respondent. Certain disputes have arisen between the parties in respect of the said Contract. The respondent invoked the Arbitration Clause for adjudication of the said disputes. On 27.06.2017, the Chief Engineer of the petitioner appointed Sh. Om Prakash Bhatia, Former Additional Director General (Works Special), CPWD as the Sole Arbitrator.

4. The respondent challenged the appointment of Sh. Bhatia, by filing a petition under Section 14 and 15 of the A&C Act [***OMP(T)(COMM) 58/2017*** captioned ***M/s Swadeshi Civil Infrastructure Pvt. Ltd. v. Delhi Tourism & Transportation Development Corporation***]. The said petition was disposed of by a consent order dated 21.02.2018 and Sh. A.K. Singhal, (Retired) Director General, CPWD was appointed as a Sole Arbitrator to adjudicate the disputes between the parties. This Court also clarified that the said appointment was subject to the learned Arbitrator making the necessary disclosure under Section 12 of the A&C Act and, not being ineligible under Section 12(5) of the A&C Act.

5. On 07.03.2018, the learned Arbitrator issued notice to both the parties and directed the respondent (the claimant before the Arbitrator Tribunal) to file its Statement of Claim within a period of thirty days from receipt of the notice. It is not disputed that he furnished his consent and made the necessary disclosure, which did not indicate any justifiable grounds to doubt his independence or impartiality.

6. The petitioner contends that the attitude of the respondent towards the petitioner is hostile and it has adopted unfair tactics to influence the Arbitrator. It also claims that the respondent has advanced arguments on the basis of documents, which were not taken on record and copies of the same were not supplied to the petitioner.

7. On 18.07.2018, the parties jointly agreed to extend the mandate of the Arbitral Tribunal for a period of six months from 06.03.2019 to 06.09.2019.

8. The petitioner submitted its Statement of Defence on 30.08.2018. However, at the material time, the petitioner did not file any counter claims.

9. The respondent submitted its rejoinder. It is the petitioner's claim that in its rejoinder, the respondent sought to modify its claims and also introduced new documents for altering the claims as initially made. The petitioner has contested the same and submitted a sur-rejoinder to the rejoinder filed by the respondent.

10. The petitioner contends that during the course of hearings held

before the Arbitral Tribunal, the counsel for the respondent had also sought to advance arguments, which were not supported by pleadings. It is stated that at the hearing held on 08.07.2019, learned counsel for the petitioner objected to the same and in view of the objections, learned counsel for the respondent stated that the respondent would file an application under Section 23(3) of the A&C Act for amending its Statement of Claims to supplement its claims.

11. It is contended on behalf of the petitioner that by an application under Section 23(3) of the A&C Act, the respondent sought to introduce new claims altogether under the guise of amending its claims.

12. At this stage, the petitioner filed counter claims before the Arbitral Tribunal, which were objected to by the respondent. The petitioner also objected to the respondent's application under Section 23(3) of the A&C Act.

13. It is averred by the petitioner that during the hearing held on 21.08.2019, oral submissions were made on behalf of the petitioner to contest the respondent's application for amendment of its Statement of Claims. The respondent also objected to the counter claims filed by the petitioner at a belated stage.

14. By an order dated 29.08.2019, the Arbitral Tribunal rejected the counter claims raised by the petitioner. The petitioner claims that during the course of the hearing, the Authorised Representative of the respondent had conceded to the genuineness of counter claim no.1, however, the Arbitral Tribunal did not record the same while rejecting

the petitioner's counter claim.

15. Aggrieved by the order dated 29.08.2019 passed by the Arbitral Tribunal rejecting the petitioner's counter claim, the petitioner preferred a petition under Section 34 of the A&C Act impugning the said order (award) dated 29.08.2019 before the Court of the learned District Judge, South East District Saket [OMP (COMM) 131/2019].

16. The said petition was dismissed by the learned District Judge by an order dated 15.10.2020.

17. The petitioner preferred an appeal against the said order dated 15.10.2020 before this Court [FAO (COMM) 1/2021].

18. Before the Division Bench of this Court, the petitioner also impugned the conduct of the arbitral proceedings by the Arbitral Tribunal. The said appeal was disposed of with the consent of the counsel for the parties. The parties agreed that the Arbitral Tribunal would consider the counter claims as referred by the Appointing Authority, subject to the respondent's right to contest the same as barred by limitation. The Division Bench also noted down the petitioner's contention that it would apply for termination of the mandate and substitution of the learned Arbitrator. However, this Court clarified that it had not expressed any opinion on the submissions made in this regard as such a prayer could not be considered in the said proceedings. The Court also amply clarified that all rights and contentions of the parties regarding the same be left open.

19. On 03.09.2019, the respondent moved before this Court under Section 29A of the A&C Act seeking extension of the mandate of the learned Arbitrator as the same was expiring on 05.09.2019.

20. The said petition under Section 29A of the A&C Act [OMP(MISC)(COMM) 356/2019] was allowed by a Coordinate Bench of this Court by an order dated 01.12.2020, whereby this Court extended the mandate of the Arbitrator till 30.09.2021 and further observed that the extension would be reckoned with effect from 06.09.2019.

21. Thereafter, the petitioner filed an application under Section 12 and 13 of the A&C Act seeking to challenge the mandate of the Arbitral Tribunal. The said application was dismissed by the Arbitral Tribunal by an order dated 16.04.2021. In the aforesaid backdrop, the petitioner has filed the present petition.

22. It is contended on behalf of the petitioner that the Arbitral Tribunal has been conducting the arbitral proceedings in a biased manner and has shown open hostility towards the petitioner. The present petition is founded on various allegations made by the petitioner to the aforesaid effect. The allegations made by the petitioner are disputed by the respondent. The respondent claims that the allegations made by the petitioner are untrue and contrary to the allegations made and in fact, it is the representatives of the petitioner who have been misbehaving with the Arbitral Tribunal. The orders passed by the Arbitral Tribunal also indicate that on a particular occasion, the representatives of the petitioner had adopted a somewhat combative

approach.

23. At this stage, this Court is not inclined to examine the allegations made in the present petition as no interference with the arbitral proceedings are either warranted or permissible at this stage on the grounds as canvassed by the petitioner.

24. Section 5 of the A&C Act restricts intervention by any judicial authority and by virtue of the said provision, judicial authorities are proscribed from intervening except where it is so provided.

25. The petitioner has sought to challenge the appointment of the learned Arbitrator on the ground that there are justifiable doubts as to his impartiality. Indisputably, the said challenge is required to be considered by the Arbitral Tribunal in the first instance. The scheme of Sections 12 and 13 of the A&C Act is clear. In terms of Sub-section (1) of Section 13 of the A&C Act, the parties are free to agree on a procedure for challenging an arbitrator. However, failing such an agreement, the party who intends to challenge the arbitrator is required to do so in terms of Sub-section (2) of Section 13 of the A&C Act. The same is required to be done by sending a written statement setting out the reasons for challenging the Arbitral Tribunal.

26. In terms of Sub-section (3) of Section 13 of the A&C Act, unless the arbitrator so challenged withdraws from his office, the Arbitral Tribunal is required to decide on the challenge. Sub-section (4) of Section 13 of the A&C Act expressly provides that if such a challenge is not successful, the Arbitral Tribunal would continue with the arbitral

proceedings and make an arbitral award. The only recourse available to the party, who is unsuccessful in its challenge to the Arbitral Tribunal, is to challenge the arbitral award made under Section 34 of the A&C Act.

27. The Scheme of Section 12 and 13 of the A&C Act was considered by the Division Bench of this Court in *Progressive Career Academy Pvt. Ltd. v. FIITJEE Ltd.: 180 (2011) DLT 714*. The Court had also noted that there was conflict in various decisions rendered by the Single Judges of this Court with regard to the aspect whether any interference on account of likelihood of bias was permissible at a pre-award stage. The Court had also examined the UNCITRAL Model Law and noted that the Parliament had not adopted the Model Law in its entirety on the subject of impartiality of the Arbitral Tribunal. And, the departure from the said Model Law, indicated that the Indian Parliament did not want any curial interference at an interlocutory stage of the arbitral proceedings on the perceived ground of bias. The Court held that such a challenge would be permissible only under Section 34 of the A&C Act after the award had been rendered. The relevant extract of the said decision is set out below:

“20. A comparison of the provisions dealing with the challenge to the arbitrator's authority in the A&C Act and the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality

of the Arbitral Tribunal. However, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further Appeal. It seems to us, therefore, that there is no room for debate that the Indian Parliament did not want curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13(5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral Tribunal, a challenge on this score is possible in the form of Objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is palpably different also to the English, Australia and Canadian Arbitration Law. This difference makes the words of Lord Halsbury in *Eastman Photographic Materials Co.* all the more pithy and poignant.

21. In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in *Interstate Constructions* is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way

of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in *Pinaki Das Gupta, Neeru Walia, Ahluwalia Contracts (India) Ltd. and Newton Engineering and Chemicals Ltd.*. We are of the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings.”

28. In *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.: (2018) 12 SCC 471*, the Supreme Court has authoritatively explained the said scheme of the A&C Act as under:

“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's

independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.”

29. It is clear from the above that save and except in conditions where an arbitrator is ineligible to act as such by virtue of Section 12(5) of the A&C Act, a challenge under Section 14 of the A&C Act would not be maintainable on the perceived doubts as to his independence and impartiality.

30. It is also relevant to note that the petitioner had sought to challenge the Arbitral Tribunal on the grounds of perceived bias and impartiality on previous occasions as well. A similar plea was raised by the petitioner before the Division Bench of this Court in its appeal preferred against the decision of the learned District Judge rejecting its challenge to the Arbitral Award, whereby its counter claims were held

to be not maintainable. In the said appeal [FAO(COMM) 1/2021], the Division Bench had declined to consider the petitioner's contention on the ground that the same could not be decided in those proceedings. However, the petitioners rights and contentions in this regard were left open.

31. The petitioner had also raised a similar plea before this Court to oppose the respondent's application under Section 29A of the A&C Act [O.M.P.(MISC.)(COMM.) 356/2019 captioned *M/s Swadeshi Civil Infrastructure Private Limited v. Delhi Tourism & Transportation Development Corporation*]. The said petition was allowed by an order dated 01.12.2020. This Court had observed that the learned Arbitrator was diligent in conducting the proceedings and had been holding hearings at regular intervals. The petitioner's contention that the mandate of the learned Arbitrator not be extended on grounds of doubts as to his impartiality was rejected by this Court. This Court also observed that "*a petition under Section 29A of the Act cannot be permitted to be used by one of the parties to seek substitution of an arbitrator merely on the basis of its unsubstantiated apprehension that the arbitrator is acting in a biased manner*". This Court also observed as under:

"7. In the light of the aforesaid, it is evident that the respondent's grievance regarding the manner of conduct of the arbitration proceedings cannot be a subject matter of the present petition, especially when it is not denied by the respondent that the matter is already at a very advanced stage. Needless to state, the respondent will be

free to raise its grievance, if any, regarding the manner of conduct of the arbitration proceedings in its petition under Section 34 of the Act while assailing the Award, if any, passed against it.”

32. The petitioner had filed a Special Leave Petition against the said order dated 01.12.2020 before the Supreme Court but the same was also dismissed.

33. The Coordinate Bench of this Court had, in unequivocal terms, observed that the petitioner’s grievance regarding the alleged manner in which the arbitral proceedings had been conducted could be raised by assailing the award. In view of the said conclusion, it was not open for the petitioner to have filed the present petition.

34. In view of the above, the present petition is dismissed. However, it is clarified that nothing stated in this petition should be read as an expression of opinion on the merits of the allegations made by the petitioner. As observed above, this Court is not required to examine the grievance at this stage. All rights and contentions of the parties in this regard are reserved.

35. All pending applications are also disposed of.

VIBHU BAKHRU, J

JULY 30, 2021
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