Dispute Resolution Hotline

December 17, 2018

INELIGIBILITY OF ARBITRATORS - ARBITRATION AMENDMENT ACT APPLIES PROSPECTIVELY

- The Arbitration and Conciliation (Amendment) Act, 2015 does not apply retrospectively to arbitration proceedings commenced prior to it coming into force, unless the parties otherwise agree.
- Parties cannot approach the Court for the appointment of an independent arbitrator when an arbitrator has already been appointed pursuant to the arbitration agreement.

INTRODUCTION

In *SP Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh*,[1] the Supreme Court clarified that if an employee arbitrator has been appointed pursuant to the terms of an arbitration agreement prior to the Amendment Act of 2015, a party cannot approach the Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Act**") to seek the appointment of an independent arbitrator.[2] Any challenge to the arbitrator appointed ought to have been raised before the arbitrator himself in the first instance.

However, possibly the Hon'ble Supreme Court has missed the opportunity to interpret a proviso in the arbitration clause of the Contract (*defined below*) which stated that any statutory modification or re-enactment of the A&C Act shall apply to the arbitration proceeding. This proviso, if held to be applicable, would have the effect of barring the employee arbitrator from continuing with arbitral proceedings by virtue of Section 12(5). However, without assessing the proviso, the Supreme Court held that Section 12(5) would not be invoked since arbitral proceedings had commenced before the enactment of the Amendment Act.

FACTS

S.P Singla Construction Pvt. Ltd. ("**Appellant**") entered a construction work contract ("**Contract**") with the State of Himachal Pradesh on December 19, 2006. Work was to be completed by January 4, 2009; extended until June 30, 2010. However, the work was completed only by June 4, 2011. The Appellant raised a dispute regarding payment for the work tendered by it through a letter on October 18, 2013 and invoked arbitration clause in the Contract, which is extracted below:

"***Clause 65 of the General Conditions of Contract***-*…..Except where otherwise provided in the contract all questions and disputes relating to inter alia concerning the works of the execution or failure to execute the same whether arising during the progress of the work* ***or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer-in-Chief/Chief Engineer, Himachal Pradesh Public Works Department****. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant that he had to deal with the matters to which the contract relates, and that in the course of his duties as Government servant he had expressed views on all or any of the matters in dispute or different.* ***The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason that (sic) the Chief Engineer, HPPWD at the time of such transfer vacation of office or inability to act shall appoint another person to act as arbitrator*** *in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor, it is also a terms of this contract that no person other than a person appointed by the Chief Engineer, HPPWD, should act as arbitrator and if for any reason that is not possible the matter is not be claim in dispute is Rs.50,000/- (Rupees Fifty Thousand) and above, the arbitrator shall give reasons for the award.* ***Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause****." (emphasis supplied).*

Pursuant to Clause 65 above, the Chief Engineer, HPPWD appointed the "Superintendent Engineer, Arbitration Circle, HPPWD, Solan" as the arbitrator on October 30, 2013. However, the Appellant either remained absent from the proceedings or sought adjournments stating that it intended to challenge the appointment of arbitrator before the Chief Justice. Even after a hearing, no statement of claim was filed by the Appellant, due to which, arbitration proceedings were terminated under Section 25(a) of the Act on August 6, 2014.[3]

The Appellant filed a petition before the High Court under Section 11(6), 14 and 15 of the Act praying for the appointment of an independent arbitrator. The High Court rejected the application, and the Appellant appealed the same before the Supreme Court.

ISSUES BEFORE THE SUPREME COURT

1. Whether the appointment of an arbitrator in arbitration proceedings commenced prior to the Amendment Act would attract the disqualification prescribed in Section 12(5) of the Act?

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2. Whether a party can apply to appoint an arbitrator under Section 11(6) of the Act when an arbitrator has already been appointed pursuant to the terms of the arbitration agreement?

JUDGMENT

The Amendment Act applies prospectively in relation to arbitral proceedings

The Appellant argued that the arbitrator appointed under Clause 65 of the Contract was ineligible pursuant to Section 12(5), which was inserted by way of the Amendment Act.

The Supreme Court first considered if the Amendment Act would be applicable to the arbitral proceedings between the parties. The Court noted that the proceedings in this case commenced back in 2013, much prior to the commencement of the Amendment Act on October 23, 2015. The Supreme Court relied on its judgment in *Board of Control for Cricket in India v. Kochi Cricket Private Limited*[4] wherein it held that provisions of the Act cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree. Thereby, the Supreme Court held that Section 12(5) of the Act does not apply to the present proceedings unless the parties agree otherwise.

In light of this observation, the Supreme Court then examined Clause 65 to determine if the parties had agreed that the Amendment Act is applicable. In this regard, the Appellant placed reliance on Clause 65 of the Contract which stated that "*the agreement is subject to any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause*. It also relied on the exact clause in the case of *Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Private Limited*[5] (*"**Ratna Infrastructure**"*), wherein the Delhi High Court held that the wording "*any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration*" is sufficient to show an agreement between the parties to attract the applicability of the Amendment Act. The Delhi High Court held that pursuant to this understanding, Section 12(5) was applicable to the proceedings under that case as there was an 'agreement between the parties'.

However, the Supreme Court did not consider the correctness of the Delhi High Court's judgment. Specifically, the Supreme Court held that "*we are not inclined to go into the merits of this contention of the appellants nor examine the correctness or otherwise of the view taken by the Delhi High Court in Ratna Infrastructure Projects case*."

The Supreme Court held that per Section 26 of the Amendment Act,[6] the Amendment Act does not apply to arbitral proceedings commenced prior to its commencement unless parties otherwise agree. Without delving into the language of the proviso, the Supreme Court merely held that Clause 65 of the Contract cannot be taken to be the agreement between the parties in order to apply the Amendment Act. Thus, it held that appointment of the employee arbitrator pursuant to Clause 65 of the Contract was not affected by Section 12(5) of the Amendment Act.

The Supreme Court relied on its judgment in *Indian Oil Corporation Limited v. Raja Transport Private Limited*,[7] to reiterate the position with regard to appointment of employee arbitrators prior to the Amendment Act. It was held that the fact that a named arbitrator is an employee of one of the parties cannot be the sole ground to raise a presumption of bias or lack of independence on his part. Thus, the Supreme Court held that appointment of an employee arbitrator under Clause 65 of the Contract was not void or unenforceable, as the arbitration agreement was governed by the settled position prior to the Amendment Act.

Appointment of arbitrator cannot be challenged under Section 11(6)

The Appellant submitted that it can directly approach the High Court for appointment of an independent arbitrator under Section 11(6) of the Act. The Supreme Court placed reliance on its judgment in *Antrix Corporation Limited v. Devas Multimedia Private Limited*[8] wherein it was held that, if a party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement by other party/parties, her remedy would be by way of petition under Section 13 of the Act,[9] and, thereafter by challenging the award to be set aside under Section 34 of the Act. The Supreme Court upheld this view and stated that in the present case, the arbitrator had been appointed pursuant to Clause 65 of the Contract and the provisions of law. Therefore, the arbitration agreement could not be invoked again under Section 11(6) of the Act.

Going a step further, the Supreme Court stated that the arbitrator in the present case had terminated the proceedings under Section 25(a) of the Act without issuing a notice of warning to the Appellant. Therefore, the Supreme Court directed that the order of termination of the arbitrator be set aside and that, pursuant to Clause 65 of the Contract, the Chief Engineer, HPPWD should appoint an arbitrator and proceed with the matter in accordance with law.

ANALYSIS

The Supreme Court has reinstated the settled procedure that must be followed by parties to challenge the appointment of the arbitrator. A party must file an application with the arbitral tribunal under Section 13, and if such application is rejected, the party can challenge the resultant arbitral award under Section 34. It has been made amply clear that a party may not flout this route by directly approaching the court under Section 11(6) of the Act to appoint a fresh arbitrator.

However, with regard to the applicability of Section 12(5) to arbitral proceedings commenced prior to, but pending at the time of enforcement of, the Amendment Act, the Supreme Court has not provided sufficient clarity as to what constitutes an agreement between parties to apply the amendments to A&C Act, in order to invoke the condition in Section 26 stating *unless the parties otherwise agree*". In the case of Ratna Infrastructure, the Delhi High Court had dealt with an identical clause but recorded a diametrically opposite finding. It had held that the phrase "*any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration..."* was sufficient to show an agreement by the parties to apply the provisions of the Amendment Act.

The Supreme Court did not sufficiently justify why Clause 65 of the Contract did not meet the test of agreement between the parties, despite having drawn attention to an identical clause and the corresponding ruling of the Delhi High Court. It did not delve into the situations which *could* be considered as an agreement between parties to apply the Amendment Act. It simpliciter considered the date of commencement of the arbitral proceedings, to rule that

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996
September 22, 2024

Section 12(5) of the Amendment Act did not apply in the present case rendering the employee arbitrator ineligible. In this regard, it would not be incorrect to state that the Supreme Court has missed an opportunity to further clarify the nuances of applicability of the Amendment Act where parties agree to subject arbitral proceedings to a statutory modification or reenactment of the A&C Act.

– Bhavana Sunder & Kshama A. Loya
You can direct your queries or comments to the authors

[1] Civil Appeal Nos. 11824-11825 of 2018 (Arising out of SLP (C) Nos. 1274-75 of 2018), Decided on December 4, 2018.

[2] Parties may have an appointment procedure prescribed in their arbitration agreement. Section 11(6) of the Act states that if a party(s) fails to act as prescribed under that procedure, or two appointed arbitrators fail to reach an agreement expected of them under that procedure or a person or an institution fails to perform a function entrusted to her/it under that procedure, then a party may request the High Court to take necessary measures to secure the appointment.

[3] Under Section 25(a) of the Act, the arbitral tribunal may terminate proceedings if a claimant fails to communicate her statement of claim.

[4] (2018) 6 SCC 287.

[5] (2017) SCC Online Del 7808

[6] *26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.*"

[7] (2009) 8 SCC 520

[8] (2014) 11 SCC 560.

[9] Under Section 13, parties may challenge an arbitrator by sending a written statement with reasons for challenge to the arbitral tribunal. If the challenge is unsuccessful, the arbitral tribunal may continue with the proceedings and make an arbitral award. It is open to the party to make an application for setting aside such arbitral award under Section 34 of the Act.