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SC: FORMER EMPLOYEE IS NOT DISQUALIFIED FROM BEING APPOINTED AS AN ARBITRATOR

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Vide a recent judgment dated 3 January 2019 in the matter of *Government of Haryana PWD Haryana (B and R) Branch v M/s G F Toll Road Pvt Ltd & Ors (Civil Appeal No. 27/2019 in S.L.P. (C) No. 20201 of 2018)*, the Supreme Court has, to an extent, clarified the issue regarding the appointment of a former employee of a company which is a party to an arbitration as an arbitrator under the present as well as the previous arbitration regime. The Supreme Court, in an attempt to settle this contentious issue raised by the Government of Haryana (Appellant State), has *inter alia* held that a former employee is not disqualified from acting as an arbitrator, even under the Arbitration and Conciliation (Amendment) Act 2015 (2015 Amendment Act) provided that there are no justifiable doubts as to his/her independence and impartiality to act as an arbitrator.

Background

The Appellant State and M/s. G F Toll Road Pvt Ltd (Respondent No 1) entered into a contract for the execution of works towards construction, operation and maintenance of Gurgaon - Faridabad Road and Ballabharg - Sohna Road. Subsequently, a Concession Agreement dated 31 January 2009 (Agreement) was entered into between the parties, which provided for the following dispute resolution clause:

> *"39.2 Arbitration*
>
> *39.2.1. Any dispute, which is not resolved amicably as provided in Clause 39.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2. sub-clause (b) below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration Act.*
>
> *39.2.2. There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration."*

During execution of the Agreement, disputes arose between the parties, and Respondent No 1 addressed a letter to the Indian Council of Arbitration (Respondent No 2) invoking arbitration and requested Respondent No 2 to commence arbitration proceedings against the Appellant State. Thereafter both the Appellant State and Respondent No 1 nominated their respective arbitrators.

Respondent No 2 raised an objection to the nominee arbitrator of the Appellant State on the ground that he was a retired employee of the Appellant State, and there may be justifiable doubts with respect to his integrity and impartiality as an arbitrator. The Appellant State refuted the objections stating that there was no rule prohibiting such nomination and there could be no justifiable doubt as to his impartiality as the nominee arbitrator had retired over ten years ago. Respondent No 1 also raised an objection regarding the independence and impartiality of the nominee arbitrator of the Appellant State.

Respondent No 2 confirmed its objection and informed the Appellant State that it was in the process of appointing an arbitrator in place of the nominee arbitrator of the Appellant State. The Appellant State then requested Respondent No 2 for 30 days to appoint a substitute arbitrator. However, Respondent No 2 appointed a nominee arbitrator on behalf of the Appellant State as well as the Presiding Arbitrator.

Aggrieved by the said appointment, the Appellant State filed a Petition under Section 15 of the Arbitration and Conciliation Act, 1996 (1996 Act) before the District Court, Chandigarh on the ground that the constitution of the Arbitral Tribunal was illegal, arbitrary and against the principles of natural justice. The Appellant State also filed an application under Section 16 of the Act before the Arbitral Tribunal on the issue of jurisdiction.

The District Court held that the Petition was not maintainable, since the Arbitral Tribunal had already been constituted, and an objection under Section 16 of the 1996 Act should be raised before the Arbitral Tribunal to rule on its own jurisdiction.

Thereafter, in a Civil Revision Petition filed by the Appellant State, the Punjab and Haryana High Court upheld the order of the District Court, and further held that, when an objection is raised regarding the nomination of an arbitrator, and the agreement is silent on the mode of appointment of a substituted arbitrator, the rules applicable would be that of the institution under which the arbitration is held. Further, the application under Section 16 of the 1996 Act of the Appellant State came to be dismissed by the Arbitral Tribunal. Thus, the Appellant approached the Supreme Court.

Findings and Conclusions by the Supreme Court

For appointment of a substitute arbitrator, the Supreme relied on Section 15 (2) of the 1996 Act and the judgment in the case of *ACC Ltd v Global Cements Limited* ((2012) 7 SCC 71) to hold that a substitute arbitrator must be appointed according to the rules that are applicable for the appointment of the arbitrator being replaced, even though the agreement does not specifically provide for it. It was thus held that Respondent No 2 could not have usurped the jurisdiction over appointment of the nominee arbitrator on behalf of the Appellant State prior to the expiry of the 30 days period requested by the Appellant State to nominate a substitute arbitrator. Accordingly, it was held that such appointment by Respondent No 2 was unjustified and contrary to the Rules of Respondent No 2 itself.

In relation to the appointment of the nominee arbitrator of the Appellant State, the Supreme Court while relying on a House of Lords judgement in *Re Medicaments and related Classes of Goods (No 2)* (2002 (1) All ER 465) held that the test to be applied for bias is '*whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the arbitrator was infact biased*'. It was also observed by the Supreme Court that the present case was governed by pre-amendment 1996 Act, and it went on to hold that the 1996 Act did not bar the appointment of a former employee as an arbitrator, provided there were no justifiable doubts as to his/her independence and impartiality. In the present case, the nominee arbitrator of the Appellant State had left its employment for over ten years, and as such the allegation of bias were untenable.

Regarding the 2015 Amendment Act, Entry 1 in Schedule V reads as under:

"Arbitrator's relationship with the parties or counsel

1. *The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party." (emphasis supplied)*

It was observed by the Supreme Court that the words "is an" indicate that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties. The word "other" used in abovementioned Entry 1, would indicate a relationship other than an employee, consultant or an advisor and the same cannot be used to widen the scope of the Entry to include past/former employees. Thus, Supreme Court observed that even the 2015 Amendment does not bar a former employee from being appointed as an arbitrator, provided there are no justifiable doubts as to his/her independence and impartiality.

Comment

This decision of the Supreme Court reinstates the object of the present arbitration regime, in as much as the scope for opposition regarding the apprehension of bias, independence and impartiality of arbitrators has been circumscribed. Thus, it appears that only when there are justifiable doubts of the independence and impartiality of a former employee to act as an arbitrator, will the Court interfere in appointment of such an employee as arbitrator. Persons who are present employees, consultants, advisors of a party or persons who have any other past or present business relationship with a party continue to be disqualified from appointment as an arbitrator. However, it is pertinent to note that the Supreme Court has only considered a bare interpretation of the provisions pertaining to the appointment of an arbitrator, and have not considered instances of bias and the possibility of influence of a former employer upon its employees especially if the time lapse between the retirement/ resignation and their appointment as an arbitrator for such party is not as long as ten years, as was the case in the judgement analysed above. This could lead to repercussions on the confidence of the parties to adopt arbitration as the dispute resolution mechanism.

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