

Dispute Resolution Hotline

January 09, 2019

C: FORMER EMPLOYEE CAN BE APPOINTED AS AN ARBITRATOR

- The Arbitration Act does not disqualify a former employee from acting as an arbitrator, provided there are no justifiable doubts as to his independence and impartiality;
- Even the 2015 Amendment Act does not preclude former employees being appointed as arbitrators;
- When the mandate of an arbitrator terminates for any reason whatsoever, a substitute arbitrator shall be appointed according to the rules applicable to the appointment of the original arbitrator;

INTRODUCTION:

Recently, in the case of *The Government of Haryana PWD Haryana (B and R) Branch ("State/ Appellant") v. Ms. G.F. Toll Road Pvt. Ltd. & Ors¹ ("Respondents")*, the Supreme Court once again had occasion to decide whether the appointment of an arbitrator, who was formerly an employee of one of the parties, could by itself lead to justifiable doubts regarding his independence and impartiality. It also considers the scope of Entry 1 in the fifth schedule inserted to the Arbitration & Conciliation Act, 1996 ("**Act**") by way of the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**").

FACTUAL MATRIX:

M/s. G. F. Toll Road Pvt. Ltd. ("**Respondent No.1**") was awarded a works contract for construction, operation and maintenance of Gurgaon Faridabad Road and Ballabhgarh-Sohna Road on a Build, Operate and Transfer basis pursuant to which a concession agreement ("**Agreement**") was entered into in 2009. The dispute resolution clause therein inter alia provided that "**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**". The Arbitration was to be held in accordance with the rules of the Indian Council of Arbitration ("**ICA**").

When disputes arose between parties, Respondent No.1 on March 30, 2015 invoked arbitration. Respondent No.1 appointed a retired Engineer-in-Chief as their nominee arbitrator. The State also appointed a retired Engineer-in-Chief as its nominee arbitrator.

The ICA raised an objection to the arbitrator appointed by the State on the grounds that he was a retired employee of the State and that therefore there may be justifiable doubts with respect to his integrity and impartiality. Respondent No. 1 also raised the same objection and forwarded the same to the ICA. The State refuted this by stating that there could not be any justifiable doubts since their nominee arbitrator had retired over 10 years ago.

Thereafter, the ICA reiterated that it has been firmly established that the State's nominee had a direct relationship with the State, which may raise justifiable doubts as to his independence and impartiality in adjudicating the dispute. It went on to state that ICA was in the process of appointing an arbitrator in place of the one appointed by the State. In response, the State requested a period of 30 days to choose a substitute arbitrator as its nominee. However, the ICA went ahead and appointed the substitute arbitrator as well as the presiding arbitrator.

The State approached the District Court challenging ICA's appointment of a substitute arbitrator on its behalf. The challenge was dismissed by the District Court which *inter alia* held that the same was not maintainable and that the State could raise this issue under Section 16 of the Act before the tribunal. Aggrieved by this decision, the State filed a civil revision petition before the Punjab and Haryana High Court which refused to set aside the District Court's decision. It also went on to hold that when the agreement is silent on the mode of appointment of a substitute arbitrator, the rules applicable would be those of the institution under which the arbitration is held. Subsequent to this, the Section 16 application filed by the State also came to be dismissed by the Arbitral Tribunal. Hence, the State approached the Supreme Court ("**Court**").

JUDGMENT:

On ICA's appointment of the Substitute Arbitrator

The Supreme Court observed that the P&H High Court had failed to take note of section 15(2) of the Act which provides that a substitute arbitrator must be appointed according to the rules applicable to the appointment of the arbitrator being replaced. Placing reliance on *ACC Ltd. V. Global Cements Ltd.²* it held that the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically provide so. Since in the present case, the Agreement expressly provided that each party shall nominate one arbitrator, and the presiding arbitrator would be appointed under the ICA rules, the Court found that ICA's appointment of a substitute arbitrator in place of the one appointed by the State was wholly unjustified and contrary to ICA Rules itself, especially since the State had requested 30 days to appoint a substitute. It observed that the ICA could have filled up the vacancy only if the State had no intention of filling up the vacancy.

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The Court noted that the State's nominee arbitrator had retired over 10 years ago from the services of the State. It observed that the 1996 Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. In deciding this issue, the Court considered the decisions in *Locabail Ltd. v. Bayfield Properties*³ and also on the Court of Appeal decision in *Re Medicaments and related Classes of Goods (No.2)*⁴. In doing so, it held that the fact that the arbitrator was in the employment of the State over 10 years ago, would make the allegation of bias untenable. The Court noted that the ICA had only made a bald assertion that the State's nominee arbitrator would not be independent and impartial and that mere allegations of bias are not a ground for removal of an arbitrator.

On scope of Entry 1 in the Vth schedule of the Act introduced by the 2015 Amendments

The bench took note of Entry 1 in the Fifth Schedule which was identical to Entry 1 in the Seventh Schedule⁵ introduced by the Amendment Act. The fifth schedule contains grounds to determine whether circumstances exist which could give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Entry 1 to the Fifth Schedule 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)"

The Court observed that the words "*is an*" indicates that the person so nominated is only disqualified if he is a present/current employee, consultant, or advisor of one of the parties. It further observed that the words "*other*" used in "*any other*" indicates a relationship other than an employee, consultant or an advisor and therefore held that the word "*other*" cannot be used to widen the scope of the entry to include past/ former employees.

In any event, the objection of the ICA was untenable as the appointment had been made prior to the 2015 Amendment Act, i.e. when the Fifth Schedule had not been inserted.

ANALYSIS

Independence and impartiality of arbitrators has always been a highly subjective issue. Prior to the introduction of the Amendment Act, the practice of appointment of government employees as arbitrators was always frowned upon by the Courts but permitted subject to certain thresholds. The Amendment Act introduced the fifth schedule as a steering tool laying out specific grounds to determine whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

In spite of this being a pre-amendment case, the Court has taken the opportunity to reiterate the spirit of the said amendments, so as to limit the subjectivity involved in the adjudication of such objections, while at the same time ensuring that parties do not level bald allegations without any basis, for the purposes of delaying/scuttling the arbitration. In this matter, the Court went on to note that the objection raised by the ICA against the arbitrator was unjustified and contrary to the provisions of the Act.

The Court, while concluding its judgement, allowed parties to agree upon the arbitration being conducted by a sole arbitrator in supersession of the arbitration clause in the agreement which provided for a three-member arbitration panel, facilitating the speedy disposal of the dispute especially since a lot of time had already lapsed litigating around peripheral issues rather than the dispute itself.

— Siddharth Ratho & Sahil Kanuga

You can direct your queries or comments to the authors

¹ The Government of Haryana PWD Haryana (B and R) Branch v. M/s. G.F. Toll Road Pvt. Ltd. & Ors. [2019] CIVIL APPEAL NO. 27/2019 (Supreme Court of India).

² (2012) 7 SCC 71

³ 2000 (1) All ER 65

⁴ 2002 (1) All ER 465

⁵ Fifth and Seventh Schedules were newly inserted by the Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23 Oct 2015).

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