



Supreme Court holds that a party's former employee is not disqualified from acting as an arbitrator¹

Brief Facts

G.F. Toll Road Pvt. Ltd. ("**Respondent No. 1**" or "**GF**") entered into a Concession Agreement ("**Agreement**") with the Government of Haryana, PWD Branch ("**Appellant**" or "**GoH**"), regarding the construction, operation and maintenance of Gurgaon-Faridabad Road and Ballabhgarh-Sohna Road.

Certain disputes arose between the parties. GF invoked arbitration under the Agreement and requested the Indian Council of Arbitration ("**Respondent No. 2**" or "**ICA**") to commence the arbitration. As per the arbitration clause, both GF and GoH were to appoint their nominee arbitrators and the third arbitrator was to be appointed in accordance with the ICA Rules.

GF and GoH appointed their respective nominee arbitrators. ICA raised an objection to GoH's nominee arbitrator on the ground that the person being a retired employee of the State, there may be justifiable doubts with respect to his integrity, independence and impartiality. GoH requested ICA for a period of 30 days to appoint a substitute arbitrator. In response, ICA informed GoH that a nominee arbitrator has already been appointed on its behalf together with the Presiding Arbitrator.

Aggrieved by the appointment, GoH preferred an application under Section 15

of the Arbitration and Conciliation Act, 1996 ("**Act**") before the District Court, Chandigarh. Additionally, GoH also raised an objection on the issue of jurisdiction under Section 16 of the Act before the arbitral tribunal. The District Court held that the Section 15 application of GoH was not maintainable since the arbitral tribunal has already been constituted. GoH preferred a Civil Revision Petition ("**CRP**") before the Hon'ble Punjab and Haryana High Court against the District Court order. However, the High Court dismissed the CRP. Further, the arbitral tribunal dismissed the Section 16 application by a non-speaking order. Thereafter, GoH filed the Civil Appeal against the High Court order before the Supreme Court.

Issues

- (i) Whether the High Court committed an error in not considering the provisions of Section 15(2) of the Act?
- (ii) Whether the nominee arbitrator of GoH, who is its retired employee, gives rise to justifiable doubts as to his independence and impartiality to act as an arbitrator?

Judgment

Issue (i): The Agreement provided that each party shall nominate its arbitrator to the three-member arbitral panel. Following the objection, GoH had sought 30 days' time to appoint another nominee arbitrator as

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replacement. After raising the objection against the first nomination of GoH, ICA could have filled up the vacancy only if GoH had no intention to fill the vacancy. ICA could not have usurped the jurisdiction over appointment before the expiry of the time as requested by GoH. In view of Section 15(2) of the Act, the Court held that appointment of nominee arbitrator by ICA was unjustified and contrary to the rules of the ICA itself.

Issue (ii): The Court held that the objection of reasonable apprehension of bias is unjustified and unsubstantiated. The arbitrator being in the employment of GoH ten years ago, would not disqualify him to act as an arbitrator. Though the amended Act does not apply to the present case, the Court analysed the objection under the Fifth Schedule. The Court referred to Entry 1 of the Fifth Schedule, which provides that “*The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party*”. The Court held that the words “*is an*” clearly indicates that such a person is only disqualified from nomination if he/she is a present/current employee, consultant

or advisor of one of the parties. The word “*any other*” within Entry 1 would indicate a relationship other than that of an employee, consultant or an advisor and cannot be used to widen the scope of the entry to include past/former employees.

Analysis

The decision is significant since the Supreme Court chose to apply the principles of the amended Act though the appointment was made prior to amendment when Fifth Schedule was not a part of the Act. The Court also emphasised on the requirement of reasonable justifiable doubts and not mere unsubstantiated allegations of bias for removal of an arbitrator. It is pertinent to refer to the earlier decision of Punjab and Haryana High Court in *Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd.*², which had taken a similar view as that of the Supreme Court wherein it observed that there is no bar against a former employee, consultant or advisor. The words “*or has any other past or present business relationship with a party*” do not include a former employee, consultant or advisor of the party.

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1 Authored by Surjendu Sankar Das, Partner, Amee Rana, Associate and Anirveda Sharma, Associate; *The Government of Haryana, PWD Haryana (B and R) Branch v. M/s. G.F. Toll Road Pvt. Ltd. & Ors.*, Civil Appeal No. 27 of 2019, Supreme Court, 2019 SCC OnLine SC 2, judgment dated 3 January 2019.

Quorum: Abhay Manohar Sapre and Indu Malhotra, JJ.

2 (2016) 6 ArbLR 480.

PRACTICE AREA EXPERTS

Pallavi Shroff

Managing Partner and
National Practice Head Dispute Resolution
+91 98100 99911
E: pallavi.shroff@AMSShardul.com

Siddhartha Datta

Partner
+91 90070 68488
E: siddhartha.datta@AMSShardul.com

Binsy Susan

Partner
+91 96500 80397
E: binsy.susan@AMSShardul.com

Tejas Karia

Partner and Head, Arbitration Practice sub-group
+91 98107 98570
E: tejas.karia@AMSShardul.com

Ila Kapoor

Partner
+91 98717 92737
E: ila.kapoor@AMSShardul.com

Aashish Gupta

Partner
+91 98189 19857
E: aashish.gupta@AMSShardul.com

Anirudh Das

Partner
+91 98100 98329
E: anirudh.das@AMSShardul.com

Rishab Gupta

Partner
+91 98217 80313
E: rishab.gupta@AMSShardul.com

Smarika Singh

Partner
+91 97170 98075
E: smarika.singh@AMSShardul.com

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