

**CASE COMMENT: M/S. JV ENGINEERING ASSOCIATE CIVIL
ENGINEERING CONTRACTORS v. GENERAL MANAGER, CORE,
ALLAHABAD**

*Vasundhara Kaushik**

GENERAL BACKGROUND OF THE CASE

The present petition was brought before the Hon'ble court by JV Engineering Associates Civil Engineering Contractors, herein after referred to as the Petitioner, challenging the arbitral award passed by Shri V.K. Manoharan in November 2018, appointed as the sole arbitrator for the purpose of deciding dispute between the Petitioner and General Manager, CORE, herein after referred to as the Respondent. The petition has been filed under section 34(2)(b)(iii) on the grounds that the arbitral award passed by the sole arbitrator is allegedly in conflict with the concept of morality and justice as provided by the section mentioned above. The arbitration clause under the agreement between the parties was invoked by the petitioner concerning the recovery of sum of Rs. 3,27,470 and the validity of the arbitral award that was passed by the arbitrator, who, as believed and contended by the petitioner, is not qualified to hold the position of an arbitrator as per the provisions of the section 12(5) read with schedule VII (1) of the Arbitration and Conciliation act of 1996.

FACTUAL MATRIX OF THE CASE

The petitioner, JV Engineering Associates, was awarded a contract for the construction of a control room along with an earth filling for the Traction Sub-station and retaining wall in the Kumbbla-Uppala in Palghat Division of Southern Railway. Though initially it was decided that the construction would be completed in around 15 months, there was a substantial delay in the same and 5 extensions was granted to the petitioner to complete the construction by the respondent. However, 4 out of 5 and not all extensions were granted with PVC (Price Variation Calculation) that gave rise to a dispute and urged the petitioner to solicit the arbitration proceedings. As per the agreement entered into by the parties, any dispute arising has to be resolved in accordance with Indian Railway Arbitration Rules, wherein, clause 64 (3) (a)(i) provides for arbitrating matters where claims do not exceed Rs.25,00,000. The case at hand

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was well within the boundary of the section as the disputed amount was Rs. 3,27,470 and therefore, the Principal Chief Engineer, CORE appointed Shri V.K. Manoharan, Deputy Chief Electrical Engineer, Railway Electrification-Kannur, as the sole arbitrator which was intimidated to both the parties and the arbitration proceedings commenced.

Cause of Action to invoke the Arbitral Proceedings

As claimed by the petitioners, the delay was purely procedural in nature and caused by the respondent. Out of the 5 extensions, for 4 of them the respondent, after entering into a Rider Agreement with the petitioner, had granted the extension period for the construction with (PVC) but for the disputed claim, there was no extension awarded by the respondent and the same gave rise to the cause of action for the petitioner to invoke the arbitral proceedings.

Cause of Action to challenge the Arbitral Award

The cause of action for challenging the award in the Hon'ble court arose when all the claims of the petitioner were dismissed by the sole arbitrator nominated by the Principal Chief Engineer CORE on grounds that the petitioner had not provided sufficient pieces of evidences to support its claim that the respondent had permitted the price escalation and the petitioner was unable to present before the respondent, within the stipulated and adequate time, the PVC amount.

Arguments on behalf of the Petitioner

1. Mr P.J. Rishikesh appeared on behalf the petitioner and submitted that the appointment of the sole arbitrator by the Deputy Chief Engineer that was made in accordance with the Indian Railways Arbitration Rules, was in violation of section 12(5) of the act of 1996.
2. The sole arbitrator is ineligible to discharge its duty as an arbitrator since he is an employee of the railways, the respondent, and this relationship of employer and employee falls within the ambit of Clause 1 of schedule VII of the act of 1996.
3. The counsel argued that the person responsible for the appointment of the sole arbitrator, that is the Principal Chief Engineer is not qualified under section 12(5) read with clause 1 of schedule VII of the act of 1996 to nominate an arbitrator since his relationship with the respondent falls within one of the prohibited categories of relationship between a party or parties and the arbitrator, laid down under the said schedule.

4. The sole arbitrator, at the time and even after its appointment did not disclose its existing relationship with the respondent railways. The arbitrator violated the terms of section 12(3) that provides grounds for challenging the position and appointment of the arbitrator on account of justifiable doubts concerning the arbitrator's independence and impartiality, the qualities that ought to be inherent in the arbitrator while resolving a dispute.
5. The arbitrator was erroneous in dismissing the claims of the petitioner and concluding that the petitioner had not presented the respondent with the proof of submission of the grant of escalation. He has failed to notice that a copy of the Rider Agreement of 12.12.2017 was submitted to it and the note of which was taken down in the Minutes of the proceedings dated 04.10.2018 by the arbitrator itself.

Arguments on behalf of the Respondent

1. Mr. P.T. Kumar appeared and argued on behalf of the respondents. The counsel argued that the petitioners did not hand over the PVC bills over to the respondent and rushed into filing the claim for the price escalation without letting the respondents look into the same and negotiate the same with their finance department.
2. The counsel argued that the petitioners are not qualified in raising the plea for challenging the arbitral award at this stage since it has not initially filed an application under section 13(2) of the act of 1996 that requires either of the parties who wish to challenge the arbitral award passed by an arbitral tribunal, to file a written application consisting of such grounds for challenge of the award within 15 days of either becoming aware of the constitution of the arbitral tribunal or any circumstance referred to in section 12(3).
3. The counsel argued that the petitioner not only did not raise any objection to the constitution of the arbitral tribunal but also continued to diligently participate in the arbitral proceedings till the arbitral award was passed.
4. The counsel further argues that the petitioner had already been paid much more than the value in each of the contract and therefore, the demand of the petitioner was uncalled for and wrong.

Findings of the Hon'ble Court

After hearing both sides and taking due consideration of the arguments, Hon'ble Justice Ms. P T Asha observed the following:

1. Section 12 of the arbitration and conciliation act of 1996 requires that the potential arbitrator, as soon as it has been approached to be appointed as an arbitrator for a matter, should disclose to the parties any interest that it might have in the subject matter of the dispute that might affect its neutrality and the same was not followed by both the appointing authority as well as the sole arbitrator appointed.
2. Neutrality being the touchstone of any arbitration proceeding, the same has been made amply clear in this case and that is what has led to the amendment of section 12 of the act of 1996 and insertion of clause 5 to section 12 read with Schedule VII.
3. Taking into account the legislative intent through the amendment of section 12 of the Arbitration and Conciliation act of 1996, the Hon'ble justice held the arbitration proceeding in the present case as invalid on the following grounds:
 - a. That the arbitrator, Shri V.K. Manoharan, being an employee of the respondent company Railway therefore, falls within the prohibited degree of relationship as provided under Clause 1 of schedule VII of the act of 1996 and is one of the grounds on which an arbitral award can be challenged under Section 12(5) of the act of 1996.
 - b. That if the person or an authority responsible for the appointment of the arbitrator, in this case the Principal Chief Engineer, CORE is itself in a relationship with one of the parties then it renders their duty to appoint an arbitrator proffer ineligible to hold and discharge such responsibility, further, making the appointment as invalid and void ab initio.
 - c. That since in the case at hand, the clauses pertaining to the rules of General Conditions of the Contract of the Indian Railways was not amended that have been brought about to section 64 (3)(a)(ii) and section 64 (3)(b) of the Indian Railways Arbitration Rules, and that advances a firm ground showing the ineligibility of the appointing authority to appoint the sole arbitrator, before the court.
 - d. That the petitioners had not in any expressed terms or agreement waived off the ground to challenge the arbitral award provided under section 12(5). The proviso to section 12(5) lays out the opportunity to the parties to waive off the applicability of sub-section 5 after the commencement of the arbitral dispute.

- e. That on all the above grounds the arbitral award passed by an ineligible sole arbitrator, deserves to be set aside on the ground of incompetence of the arbitral tribunal formed.

CASE COMMENTARY

The modern society is in a phase of rapid learning and development. In order to keep up with the new dynamic projects in the market, the laws have to be amended respectively. The laws should be modified to make them address the emerging societal as well as legal issues rising out the acceptance of those dynamic projects successfully and for that, legal statutes also need to stand the test of practical applicability by regular and necessary amendments to it. However, in order to observe and accept any new changes, it is essential to keep the roots of any statute or a legislation intact while amending those statutes with latest developments that can provide the legislations a firm ground to stand and continue to progress on.

Through the present case, the Hon'ble judge of the Madras High Court has reinforced the most quintessential characteristic of an arbitration procedure, the neutrality of an arbitrator that emanates from the independent and impartial character of the arbitrator. The arbitrator so appointed for a dispute is expected to bring to the table only its knowledge of the subject matter of the dispute and experience in resolving such disputes, leaving behind any such element or attribute that could reveals or indicates a neutrally compromised personality of the arbitrator before the parties. The above is the same motive behind the legislators to bring in the amendment in section 12 of the Arbitration and Conciliation act of 1996, in order to prevent any mischief of concealed interest on part of either the arbitrator appointing authorities or the appointed arbitrator itself.

The court has constructed its judgement keeping in mind the amendment made in section 12 of the act of 1996 that was introduced for the purpose of avoiding any tilt of the proceedings in favour of such party that either has a prior personal or a professional relationship with the arbitrator. Section 12 sub-section 5 of the act of 1996 requires the person or people appointed to an act as an arbitrator to disclose such relationships, if any, that fall within the prohibited category of relationship, provided under schedule VII of the act, with either of the parties to the dispute, affording a ground to the disadvantaged party to challenge the arbitral award on. The inclusion of such clause assists the judiciary in reposing the faith in the award passed by the tribunal and render such arbitrator as ineligible, if the prohibited relationship is proved to exist.

The purpose of the amendment in section 12 of the act of 1996 is to declare an arbitrator's ineligibility to function efficiently as an arbitrator before the procedure even begins, in order to avoid the wastage of any precious time that could have been invested in the appointment of a qualified arbitrator. An impartial arbitrator destroys the core motive applied while choosing arbitration over litigation, a neutral and unbiased status, along with the factor of being less time-consuming than litigation, as it would take more time to re-commence the arbitration proceedings when the arbitrator's neutrality has been jeopardized.

Neutrality, when read in a very general sense, is the concept of removing greed, fear and other selfish emotions from oneself while indulging in any financial or investment decisions. The goal of becoming or being neutral is to be able to remove emotion from the process of making objective decisions, so that the best possible decision can be made, regardless of whatever emotional consequences those decisions may bring out.⁵⁰⁶ Neutrality needs to come from within. It cannot be acquired, borrowed or bought at a store. Neutrality bases its existence in the observance of strict impartiality, free of prejudice, so as to not generously yield an advantage of an unfair nature to either party at war; and particularly in so far restraining its trade to the accustomed course which is held in time of peace, as not to render assistance to one of the belligerents in escaping the effects of the other's hostilities. Even an advance of monetary help from the arbitrator to one of the contentious parties can be taken as an act in furtherance of abandonment of the arbitrator's neutral status.⁵⁰⁷

A neutral arbitrator is expected to remain and exhibit equidistant state of mind and action throughout the arbitral proceedings. Maintaining a neutrally motivated professional personality may assist in strengthening the arguments and opinions of the arbitrators to the extent that may immediately attract indisputable trust from the parties, resulting in speedy disposal of the matter. It clearly indicates to the parties that the arbitrator is open and willing to hear any suggestions and disagreements to its arbitral award and the award may not be imposed upon the parties.

As rightfully observed by the Hon'ble justice in the present case that neutrality is the touchstone of any arbitral proceedings, the same can be achieved by assuring that the parties are being guided by an official who extends its impartial and independent views in the dispute. An arbitrator is neutral in so far as it does not play a role in any such factor after the disclosure of which, it sways away its qualification of being a peacemaker in its most impartial sense.

⁵⁰⁶ Emotional Neutrality, available at: <https://www.investopedia.com/terms/e/emotional-neutrality.asp> (Visited October 4, 2021).

⁵⁰⁷ Neutrality, available at: <https://legal-dictionary.thefreedictionary.com/neutrality> (Visited October 3, 2021).

The arbitrator may also lose its neutrality in between the proceedings, even if it held an unbiased position in the initial stage of the proceedings. For instance, during the proceedings the arbitrator may show personal inclination and become an interested party to the subject matter in a dispute of property. It may abandon its impartiality by becoming interested as a buyer of the property and therefore, it would want to settle the dispute in favour of the seller so that it can buy the property in return of leading the dispute in preference of the seller. This could steer the entire proceedings in the direction of the seller, the outcome of which would be an unfair decision and an unjust burden on the buyer of the property. In such cases, one of the ways to ensure the neutrality on behalf of the arbitrator can be by making it take an oath or an undertaking to not to initiate an interest in the subject matter of the dispute at the later stages of the arbitration proceeding, and the same should be mentioned using a clear and unequivocal language in the contract of arbitration itself and until then, section 12 of the act could act as a bar on not only any prior relationships but also towards interest developed by the arbitrator post initiation of proceedings, lending it an opportunity to opt out of the proceedings after a written statement without jeopardizing the proceedings and progress made towards resolution of the dispute, if any.

As arbitration is growing its reach into the current and emerging laws on national and international platforms, the neutrality of the arbitrator is becoming ever more important. It is not only the parties to the arbitration that have the duty to appoint an emotionally independent and impartial arbitrator but the arbitrator itself owes a responsibility towards the maintenance of the sanctity of the entire arbitration proceedings by disclosing its financial or emotional interest if any in the subject matter.

As an outcome of this judgement, the parties to arbitration and the appointing authorities would exercise extra precaution while choosing the most qualified official to hold the position of an arbitrator. It will also make the one appointed as the arbitrator to perform its functions and duties in such manner so as to skilfully rise above and abandon its prejudiced attitude, if any, against the interest of one of the parties, despite the fact that its appointment has been made by either one or by agreement of both the parties.

Underscoring the principle of neutrality and upholding the components of impartiality and independence as the constructive ingredients of a successful and fair arbitration proceedings, Hon'ble Justice P.T. Asha has reiterated the views held by the Hon'ble bench of apex court in *M/S. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd*, that observed

independence and impartiality to be the hallmarks of any arbitration proceedings.⁵⁰⁸ It would further ensure the reduction or even chances of adjudicating an arbitrable dispute by passing any colourable rulings in the same. A neutral character supposes the absence of any element of proximity or nearness with either the parties or the subject matter of the dispute that could sell-out the impartiality of the arbitrator and assume duplicity in its function as an adjudicator. Therefore, in order for the procedure of Arbitration to succeed as the most opted dispute resolute mechanism, the arbitrator, along with the authority or parties responsible for their appointment should not put in any emotional or unbiased investment in the dispute so as to avoid the chances of having a stained reputation.

⁵⁰⁸ *M/S. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd*, [(2017) 4 SCC 665].