

FACTUAL BACKGROUND

The Government of Haryana (“**Appellant**”) awarded M/s G.F. Toll Road Pvt. Ltd. (“**Respondent**”) a works contract for construction, operation and maintenance of a road on BOT (Build, Operate and Transfer) basis (“**Contract**”) in January 2009. The Contract contained a dispute resolution clause, whereunder disputes were to be referred to an arbitral tribunal of three members, and the arbitration would be governed by the Rules of Arbitration (“**Rules**”) of the Indian Council of Arbitration (“**ICA**”). The dispute resolution clause provided that the Appellant and Respondent were each to nominate one arbitrator, with the presiding arbitrator to be appointed in accordance with the ICA Rules.

When disputes arose between the parties, the Respondent addressed a notice to the ICA in May 2015, invoking arbitration, and thereafter nominated their arbitrator. The Appellant followed suit by nominating their arbitrator, who was a retired Engineer-in-Chief.

The ICA and the Respondent both objected to the appointment of the Appellant’s nominee arbitrator, as he had previously been an employee of the Appellant. The Appellant refuted this objection on the basis that not only was there no rule prohibiting a former employee from acting as an arbitrator, but since its nominee arbitrator had retired over 10 years ago, his impartiality could not be called into question. When the ICA remained unmoved, the Appellant requested the ICA for 30 days’ time to appoint a substitute arbitrator.

The ICA did not accept the Appellant’s contention or request and proceeded to appoint a substitute arbitrator on behalf of the Appellant. The ICA also appointed the presiding arbitrator and thus the arbitral panel came to be constituted.

The Appellant raised an objection on the issue of jurisdiction before the arbitral tribunal under Section 16 of the Act. The Appellant also challenged the constitution of the arbitral tribunal before the District Court, Chandigarh by alleging that the substitute nominee arbitrator ought to have been appointed by the Appellant itself under Section 15(2) of the Act. The District Court dismissed the application on the basis that the Appellant should raise jurisdictional objections before the tribunal through an application under Section 16 of the Act.

The Appellant’s revision petition before the Punjab and Haryana High Court too was dismissed on similar grounds.

Aggrieved by the Order of the High Court, the Appellant approached the Supreme Court.

ISSUES AND FINDINGS

The Supreme Court noted that the High Court, in passing its Order, had failed to consider the provisions of Section 15(2) of the Act², which provide that appointment of a substitute arbitrator must be carried out in accordance with the same rules and procedure as were applicable for the appointment of the arbitrator being replaced. Therefore, as the arbitration agreement provided that each party would appoint one arbitrator, the substitute arbitrator was also to be appointed by the Appellant. Furthermore, since the Appellant had requested for time to appoint a substitute arbitrator, the ICA could not have usurped the Appellant’s power to do so, unless the Appellant had been unwilling or the time had expired.

As regards the appointment of the Appellant’s original nominee, the Supreme Court found that there was no provision under the Act disqualifying a former employee from acting as an arbitrator, and any apprehension of bias in the present case was unwarranted, as the concerned nominee had retired over 10 years before his appointment. Further, the Supreme Court noted that there were only bald allegations made that the Appellant’s nominee would not be impartial and independent, and nothing from the record supported such allegations.

The Supreme Court went on to observe that although the case before it was governed by the un-amended Act, even the Act as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (“**the 2015 Amendment**”) had not significantly changed this position. The 2015 Amendment had codified certain grounds to determine whether the independence or impartiality of an arbitrator could be questioned.

The Supreme Court opined that the language of the first entry to the Fifth and Seventh Schedules to the amended Act disqualified *current* employees from acting as arbitrators, but not *past* employees, even though individuals with “other” past or present business relationships with a party are also barred. In the Supreme Court’s view, “other” business relationships necessarily had to be read as being distinct from an employer-employee relationship.

The case was, however, finally disposed of on the basis that the parties had mutually agreed to refer their disputes to a sole arbitrator, in supersession of the arbitration agreement.

ELP COMMENT

Although the case before the Supreme Court related to arbitration proceedings initiated prior to the introduction of the Amendment Act, it also passed observations regarding the post-amendment position.

While the Supreme Court, in the present case, was concerned with a scenario where the former employee had ceased to be an employee of the party over 10 years prior to his appointment, it may be noted that Entry 31 of the Fifth Schedule to the amended Act provides that if the arbitrator had been associated with a party – *inter alia* as a former employee – within the past three years, such a relationship could give rise to justifiable doubts as to his independence or impartiality.

In our experience, arbitrators often give a generic disclosure under the Sixth Schedule of the Act. It may be prudent to ask for specific disclosures to arbitrators who are former employees, which may include, *inter alia*:

- whether the arbitrator regularly advises the appointing party or an affiliate thereof even though neither the arbitrator or his firm derives a significant financial income therefrom;
- the date on which the arbitrator ceased to be an employee of one of the parties or affiliates thereof;
- the number of occasions, in the past three years, the arbitrator has been by one of the parties or affiliates thereof.

References:

¹ Civil Appeal No. 27 of 2019, Supreme Court of India.

² Section 15 – “*Termination of mandate and substitution of arbitrator.* –
(1)...

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

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