



ELP Arbitration: Update



SUPREME COURT TAKES SUO MOTU COGNIZANCE OF INVALIDITY OF APPOINTMENT UNDER SECTION 12(5) OF THE ARBITRATION AND CONCILIATION ACT 1996; HOLDS THAT SECTION 12(5) OF THE ACT IS A MANDATORY AND NON-DEROGABLE PROVISION

*Haryana Space Application Centre (HARSAC) & Anr. v. M/s Pan India Consultants Pvt. Ltd.*¹

FACTS:

- In 2010, Haryana Space Application Centre (**Appellant No. 1**) invited Requests for Proposal for modernization of land records.
- Vide a letter dated 28 February 2011, the said contract for modernization of land records was awarded to Pan India Consultants Pvt. Ltd. (**Respondent**) and three other vendors. Accordingly, on March 29, 2011, Service Level Agreements (**SLAs**) were executed between the parties including the Appellant No. 1 and the Respondent. The arbitration clause contained in Clause 6.11 of the SLA executed between the Appellant No. 1 and the Respondent allowed both the parties to nominate their respective arbitrators.
- Subsequently, certain disputes arose between the parties. The Appellant No. 1 thus invoked the arbitration clause contained in the SLA and appointed the Principal Secretary to Government of Haryana as its nominee arbitrator. The Respondent too appointed its nominee arbitrator. On September 14, 2016, the arbitral tribunal stood constituted.
- After final submissions were made by both the parties and before the tribunal could render an award, the Appellant No. 1 addressed a letter to the tribunal. In the letter, the Appellant No. 1 contended that as the arbitral award was not rendered within 1.5 years, the mandate of the arbitral tribunal stood terminated under Section 29-A of the Arbitration and Conciliation Act 1996 (**the Act**).
- The Respondent then filed an application under Section 29-A (4) of the Act and sought an extension of the time period for making the award. In its application, the Respondent stated that the award was ready to be pronounced, and the

¹ Civil Appeal No. 131 of 2021

entire fee had been paid to the tribunal by the Respondent. It contended that it was in fact the Appellant No. 1 who was in arrear of fees and thus delayed the proceedings. To the contrary, the Appellant No. 1 prayed that the application be dismissed since sufficient cause for granting extension was not made out. Nonetheless, the District Judge granted an extension of time of 3 months to the tribunal to conclude the arbitration proceedings.

- Aggrieved by the order of the District Judge extending the time period for passing the award, the Appellant herein filed a Civil Revision Petition before the Punjab and Haryana High Court for setting aside the said order. The learned Single Judge of the High Court, in light of the current pandemic, granted an extension of 4 months (**Impugned Order**).
- Aggrieved by the Impugned Order, the Appellant No. 1 filed present Special Leave Petition before the Hon'ble Supreme Court (**SC**).

FINDINGS OF THE COURT:

- The SC observed that even though a period of over 4 years had elapse since the constitution of the tribunal on September 14, 2016, the Award had not been pronounced so far. This was despite the tribunal recording that it was ready to pronounce the award on two separate occasions.
- Pertinently, while the dispute before the SC pertained to extension of time under Section 29-A of the Act, in the facts of the case, the SC took *suo motu* cognizance of contravention of Section 12(5) of the Act. The SC held that that the appointment of the Principal Secretary, Government of Haryana as the nominee arbitrator of the Appellant, which was a Nodal Agency of the Government of Haryana, would be invalid under Section 12(5) read with the Seventh Schedule of the Act.²
- The SC further ruled that Section 12(5) read with the Seventh Schedule was a mandatory and non-derogable provision of the Act. The Principal Secretary to the Government of Haryana would be ineligible to be appointed as an arbitrator, since he would have a controlling influence on the Appellant No. 1, being a nodal agency of the State of Haryana.
- Be that as it may, as the counsel for both parties during the course of hearing had consented to the substitution of the existing tribunal, in exercise of its powers under Section 29A(6) of the Act, the SC appointed a fresh sole arbitrator as the substitute arbitrator. The newly appointed sole arbitrator was to conduct the proceedings in continuation from the present stage of proceedings and pass the Award within a period of 6 months from the date of receipt of SC's present order.

ANALYSIS:

- The present judgement of the SC is of great significance. As mentioned above, neither party had ever objected to the appointment of any of the arbitrators on account of being ineligible as per Section 12(5) of the Act. Even though the arbitral proceedings were in existence for almost 4 years and were near completion, the SC, in a SLP arising from a petition arising under Section 29-A, took *suo motu* cognizance of the invalidity of appointing the Principal Secretary, Government of Haryana as an arbitrator.
- Since the introduction of Section 12(5) to the Act vide the Arbitration and Conciliation (Amendment) Act 2015, the SC has time and again held in favor of 'arbitrator neutrality'. The present judgement seems to be in furtherance of the same purpose, in as much as the SC looked into the aspect of ineligibility of appointment of an arbitrator, irrespective of the fact whether such objections were raised by any of the parties or the stage at which the arbitral proceedings presently were.

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² More particularly Item 5 of the Seventh Schedule. Section 12(5) of the Act provides that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, or counsel, falls within any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator.