(2024) 03 TEL CK 0024

High Court For The State Of Telangana:: At Hyderabad

Case No: Arbitration Application No. 56 Of 2020, Civil Revision Petition No. 743 Of 2020

M/S. RAXA Security Services Ltd.		APPELLANT
	Vs	
M/S. Smart Fence Integrated Security Pvt.Ltd.		RESPONDENT

Date of Decision: March 27, 2024

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 12, 13, 13(2), 14, 34

Hon'ble Judges: Alok Aradhe, CJ; Anil Kumar Jukanti, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

1. Mr. A.Venkatesh, learned Senior Counsel appears for the applicant in Arbitration Application No.56 of 2020 and the revision petitioner in C.R.P.No.743 of 2020.

Mr. Lasetty Ravinder, learned counsel appears for the respondent in Arbitration Application No.56 of 2020 and respondent No.2 in C.R.P.No.743 of 2020.

2. Civil Revision Petition is filed challenging the order dated 06.02.2020 in C.O.P.No.47 of 2019 passed by the learned Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, in dismissing the petition filed under Section 14 of Arbitration and Conciliation Act, 1996 seeking termination of mandate of respondent No.1 arbitrator.

3. Brief facts:

Facts as in C.R.P. No.743 of 2020 are being taken up for consideration.

3.1. Revision petitioner filed a petition under Section 14 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as, “the Act, 1996”) against the appointment of

Arbitrator, for termination of his mandate in C.O.P.No.47 of 2019 before the learned XXIV Additional Chief Judge, City Civil Court, Hyderabad.

3.2. The dispute between revision petitioner and respondent No.2 arose is in connection with work order dated 09.09.2014. The work order is in the nature of sub contract valued at Rs.10,58,00,000/- (Rupees Ten Crore Fifty Eight Lakhs only). The respondent No.2 raised several claims, a sum of Rs.5,78,25,708/- (Rupees Five Crore Seventy Eight Lakhs Twenty Five Thousand Seven Hundred and Eight only) with interest, sought Rs.100,00,00,000/- (Rupees One Hundred Crore only) towards loss of reputation, Rs.50,00,00,000/- (Rupees Fifty Crore only) towards intellectual property damages along with auxiliary reliefs in the statement of claim before the arbitrator i.e., the respondent No.1.

3.3. Revision petitioner denied the averments and claims made by the respondent No.2. It is alleged that the respondent No.1 arbitrator is both de jure and de facto incapable of adjudicating arbitration between revision petitioner and respondent No.2. On 23.02.2019, an application was filed before the arbitrator under Section 13(2) of the Act, 1996 challenging the mandate of the arbitrator on the ground that arbitrator has not made relevant disclosures in terms of amended Section 12 (Act 3 of 2016) read with Sixth Schedule and Seventh Schedule appended to the Act. It is averred that several factors show an element of bias in the manner of conduct of Arbitrator. The arbitrator and respondent No.2 filed separate counters and the arbitrator in his counter stated that ingredients of Section 14 of the Act, 1996 are not attracted and that the revision petitioner has not stated as to how the arbitrator is incapable of performing the functions of arbitrator and that the allegations to be false.

3.4. The trial Court while considering the pleadings of parties and after referring to judgments of various courts as well as Clause 26 of the agreement, held that having filed an application under Section 13 of the Act, 1996, the revision petitioner cannot invoke the jurisdiction of the Court under Section 14 of the Act, 1996. It was held that if only revision petitioner invoked Section 14 of Act, 1996 and not filed an application under Section 13 of Act, 1996, the Court below would have considered the application under Section 14 of Act, 1996 and further held that it cannot entertain an application under Section 14 of Act, 1996 and it is improper to make any comment on various allegations made by revision petitioner against the arbitrator. It is also held that grounds raised in petition under Section 14 of the Act, 1996 can be examined in a proceeding under Section 34 of the Act, 1996. The Court below finally held that it cannot terminate the mandate of the arbitrator. Hence, this petition.

4. Learned Senior Counsel appearing on behalf of revision petitioner invited our attention to the un-amended and amended Section 12 of the Arbitration Act. The amended Section 12 (Act 3 of 2016) is as follows:

“12. Grounds for challenge.—

4[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation1.— The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

1[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

Section 12 of the Act, 1996 is as follows:

"12. Grounds for challenge. - (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if- (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) He does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

4.1 It is submitted that the amended Section mandates the person to be appointed as arbitrator to disclose as specified in the form prescribed in the Sixth Schedule. It is further submitted that the appointment was made on a public holiday without causing any enquiries about the dispute and there is an element of collusion between the respondents and the adjudicatory process would not be fair.

4.2 It is submitted by learned Senior Counsel for revision petitioner that Clause 26 of work order is unilateral with a right vested in the respondent No.2 to appoint the arbitrator making him de jure incapable. Reliance has also been placed on the judgment of Perkins Eastman Architects DPC & another v. HSCC (India) Ltd. (2020) 20 SCC 760 to buttress the contention that such clauses/terms are invalid and appointments can be made only with mutual consensus of the parties. It is submitted that the fact that the appointment of arbitrator was made on 25.12.2018 at 11:07 p.m. and the arbitrator gave the consent in two hours without making any disclosures as mandated under amended Section 12 (Act 3 of 2016) is suffice to establish that arbitrator is de jure incapable of arbitrating the matter and his appointment is violative of amended Section 12 of the Act. It is further submitted that the arbitrator has not disclosed his experience as an arbitrator and it is also submitted that there is nothing on the record to show that he has been apprised with regard to the subject dispute. It is also submitted that in spite of the revision petitioner filing the Board resolution authorizing its representative, an observation was made by the arbitrator that resolution was not placed on record.

4.3 It is submitted that application under Section 13(2) of the Act, 1996 was filed raising grounds as to the independence and impartiality of arbitrator and that the learned Judge ought not to have dismissed the petition on ground of being not maintainable. It is also submitted that even if a party to a dispute raises a challenge under Section 13 of the Act, 1996, it would still be entitled to maintain an application under section 14 of the Act, 1996, if there are grounds to establish that the arbitrator is de jure and de facto incapable to adjudicate the dispute de hors the grounds raised in an application under Section 13 of the Act, 1996.

5. It is submitted by learned counsel for respondent No.1 that the appointment of arbitrator is neither violative of amended Section 12 (Act 3 of 2016) nor the clause/term 26 of the work order agreement. It is submitted that as per Clause 26 any party can appoint an arbitrator, hence, the appointment is not bad in law. It is submitted that the contention that arbitrator is de jure and de facto incapable is without any basis. It is further submitted that the learned Judge has dealt the issues raised by revision petitioner and has rightly dismissed the petition. It is also submitted that reliance placed upon Supreme Court judgment in Perkins Eastman Architects DPC (supra) is misconceived as the facts in this case are different.

5.1. It is submitted that the revision petitioner could have challenged the same under Section 34 of the Act, 1996 as held by the learned Judge. The learned counsel has supported the order of the learned Judge and submitted that there is no infirmity in the order, needs no interference and is a reasoned order.

6. We have considered the rival submissions and have perused the record. A perusal of the order indicates that the revision petitioner has raised various grounds in the application filed before the learned Judge. Specific grounds were pleaded with respect to the de jure incapacity i.e., unlawful appointment, non disclosure of information as mandated by the statute, de facto incapacity of arbitrator. It is trite to take note of the fact that the arbitrator did not choose to disclose in writing the requirements as mandated under Sixth Schedule and Seventh Schedule of Act, 1996. Absence of such disclosure is violative of amended Section 12 (Act 3 of 2016). When such non disclosure was brought to the notice of the Court, the Court should have atleast made an attempt to arrive at the findings after seeking a reply from the arbitrator with respect to the grounds which have been specifically raised and contended rather than relying upon the statements of respondent No.2. The amended Act, 2016 contemplates that disclosure should be made by the arbitrator as per the Sixth Schedule. In view of the clear requirement under law, the arbitrator must and should have complied.

7. A perusal of Sixth Schedule and Seventh Schedule under amended Section 12 (Act 3 of 2016) would indicate that the arbitrator should disclose the details as specified in the Schedules. The Schedules are as follows:

“THE SIXTH SCHEDULE:

Name:

Contact details:

Prior experience (including experience with arbitrations):

Number of ongoing arbitrations:

Circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to your independence or impartiality (list out):

Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months (list out):

THE SEVENTH SCHEDULE:

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.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator’s law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income there from.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income there from.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator’s direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.— For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a

relevant fact to be taken into account while applying the rules set out above."

8. It is pertinent to note that no such disclosure has been made by the arbitrator on his own volition. When the statute requires an act to be done in a particular manner, the act is required to be done in the manner prescribed under the statute. Non-disclosure would amount to non-compliance.

9. A perusal of clause/term 26 of work order indicates that appointment of arbitrator has to be made by both parties and not unilaterally. Clause/term 26 of the work order is as follows:

"Clause 26:

Clause 26 of the agreement (work order) reads as follows:

Arbitration in the event of any dispute arises out of this work order which could not be settled through conciliation between higher official, shall be referred to sole arbitrator appointed by us in accordance with Arbitration & Conciliation Act, 1996".

10. A reading of the clause indicates that appointment of arbitrator is to be made by both the parties. Admittedly the arbitrator was appointed on Christmas day i.e., 25.12.2018 at 11:00 p.m. and the arbitrator has consented in two hours. This Court is of the view that the learned Judge has erred in coming to a conclusion that the issues could have been raised in a petition under Section 34 of the Act, 1996.

11. For the aforementioned reasons, order passed by learned Single Judge cannot be sustained. It is accordingly set aside. However, liberty is granted to both the parties for appointment of an arbitrator in terms of Clause/term 26 and on such appointment, the arbitrator shall disclose the details as required under Sixth Schedule and Seventh Schedule of the Act.

12. Accordingly, the Arbitration Application and the Civil Revision Petition are disposed of.

Miscellaneous applications pending, if any, shall stand closed.