Priyanka Communications India Pvt Ltd Vs Tata Capital Limited

Court: Bombay High Court

Date of Decision: Feb. 4, 2025

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11, 12, 13, 14, 14(1)(a), 14(2)

Hon'ble Judges: Somasekhar Sundaresan, J

Bench: Single Bench

Advocate: Atul Damle, Premlal Krishnan, Nadeem Shama, Rehmat Lokhandwala, Hrishikesh Nadkarni, Siddharth Seshadri, Rohan Savant, Mayur Bhojwani, Aauam Mehta, Manilal Kher Ambabal & Co

Final Decision: Dismissed

Judgement

Somasekhar Sundaresan, J

2. The material on record brought to bear by the Petitioner, essentially covers the disclosure made by the Learned Sole Arbitrator on November 11,

2024, setting out the nature of relationships between the Learned Sole Arbitrator with affiliates of the Respondent. These disclosures are essentially

about a few matters where the Learned Sole Arbitrator had represented some affiliates of the Respondent. The Petitioner has also brought to bear a

range of other past representations, which would lead to the factual matrix that would enable the Petitioner to invoke the Fifth Schedule of the Act i.e.

to raise justifiable doubts as to independence and impartiality of the arbitrator. The Petitioner filed an application under Section 13 of the Act

requesting the Learned Sole Arbitrator to recuse from the proceedings. The Learned Sole Arbitrator rejected the application.

3. This Petition seeks that the Court should substitute the Learned Sole Arbitrator on the premise that the arbitrator is conflicted. However, one would

need to have specific regard to the scope of jurisdiction of this Court. Section 14(1)(a) of the Act inter alia enables this Court to interfere during the

course of arbitral proceedings where the arbitrator becomes de jure or de facto unable to perform his functions. Under Section 14(2) of the Act, only

controversies about the grounds referred to in Section 14(1)(a) would give a party aggrieved access to the jurisdiction of the Court to substitute the

arbitrator. In other words, only where questions arise as to whether the arbitral tribunal is truly de jure unable or de facto unable to perform as

arbitrator, this Court would have jurisdiction to replace the arbitrator.

4. It is now well declared law that to attract the element of being de jure unable to perform, the arbitrator ought to be under a legal incapacity that

renders him ineligible to act as an arbitrator. For example, where an individual acting as an arbitrator is elevated as a judge, he would be de jure unable

to act despite being physically able to act. Likewise, where the arbitrator becomes incapacitated, say due to an illness, he would become de facto

unable to perform even if there were no legal incapacity making him ineligible to act.

5. The Seventh Schedule lists the situations in which an arbitrator would become ineligible to perform. Eligibility would go to the root of the matter. If

an arbitrator is rendered ineligible to function as such under the Seventh Schedule, he would be de jure unable to act as an arbitrator. Doubts and

controversies in interpreting whether he is de jure unable to act would give jurisdiction to this Court under Section 14 of the Act.

6. In the instant case, evidently, the arbitrator does not attract any of the ineligibility conditions listed in the Seventh Schedule. Items 1 and 2 of the

Seventh Schedule are pressed into service. These read as follows:-

ArbitratorÃ¢â‚¬â„¢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.

[Emphasis Supplied]

7. It will be seen from a plain reading of the foregoing that for Item 1, to be ineligible, the arbitrator ought to have a relationship with any party to the

arbitration, whether past or present, but in the capacity as an employee, consultant, advisor or of any other business relationship. As for Item 2, to be

ineligible, the arbitrator ought to currently represent one of the parties or an affiliate of one of the parties. There is a time element in Item 2 of there

being a current ongoing relationship, and consciously the legislature has not brought in past representations or advisory relationships within the scope of

Item 2 (unlike Item 1 where present and past business relationship, are both alluded to).

8. The allegation by the Petitioner is not that the Learned Sole Arbitrator is currently representing the Respondent or its affiliates. The Petitioner has

had past representations for affiliates of the Respondent, as a Counsel who is briefed by law firms and attorneys. In these circumstances, neither of

the two Items of the Seventh Schedule are attracted.

9. The past representations of a party or an affiliate of a party as a lawyer, would require the arbitrator to make disclosures under Section 12 of the

Act read with the Fifth Schedule, which the Learned Sole Arbitrator has done. Such disclosures would enable a party to raise doubts about the

independence and impartiality of the arbitrator, but the statutory scheme of the Act, would enable the party questioning the independence and

impartiality of the arbitrator only when (and if) a challenge is required to be mounted under Section 34 of the Act after the passing of the final award.

At no intermediate stage can this Court interfere with the arbitral proceedings on the ground of the Fifth Schedule being attracted.

10. Items 1 and 2 of the Seventh Schedule have fallen for detailed consideration by the Supreme Court inH RD Corporation (Marcus Oil and

Chemical Division) vs. GAIL (India) Ltd. Ã¢â‚¬" (2018) 12 SCC 471. Paragraph 22 of the judgment, which would be instructive, is extracted below:

Ã¢â‚¬Å“22. Shri Divan has pressed before us that since on a legal issue between GAIL and another public sector undertaking an opinion had been given by Justice

Lahoti to GAIL in the year 2014, which had no concern with respect to the present matter, he would stand disqualified under Item 1 of the Seventh Schedule.

Items 8 and 15 were also faintly argued as interdicting Justice Lahoti's appointment. Item 8 would have no application as it is nobody's case that Justice Lahoti

Ã¢â‚¬Å“regularlyÃ¢â‚¬ advises the respondent. And Item 15 cannot apply as no legal opinion qua the dispute at hand was ever given. On reading Item 1 of the Seventh

Schedule, it is clear that the item deals with Ã¢â‚¬Å“business relationshipsÃ¢â‚¬. The words Ã¢â‚¬Å“any otherÃ¢â‚¬ show that the first part of Item 1 also confines

Ã¢â‚¬Å“advisorÃ¢â‚¬ to a Ã¢â‚¬Å“business relationshipÃ¢â‚¬. The arbitrator must, therefore, be an Ã¢â‚¬Å“advisorÃ¢â‚¬ insofar as it concerns the business of a party. Howsoever

widely construed, it is very difficult to state that a professional relationship is equal to a business relationship, as, in its widest sense, it would include

commercial relationships of all kinds, but would not include legal advice given. This becomes clear if it is read along with Items 2, 8, 14 and 15, the last item

specifically dealing with Ã¢â‚¬Å“legal adviceÃ¢â‚¬. Under Items 2, 8 and 14, advice given need not be advice relating to business but can be advice of any kind. The

importance of contrasting Item 1 with Items 2, 8 and 14 is that the arbitrator should be a regular advisor under Items 2, 8 and 14 to one of the parties or the

appointing party or an affiliate thereof, as the case may be. Though the word Ã¢â‚¬Å“regularlyÃ¢â‚¬ is missing from Items 1 and 2, it is clear that the arbitrator, if he is

an Ã¢â‚¬Å“advisorÃ¢â‚¬, in the sense of being a person who has a business relationship in Item 1, or is a person who Ã¢â‚¬Å“currentlyÃ¢â‚¬ advises a party or his affiliates in

Item 2, connotes some degree of regularity in both items. The advice given under any of these items cannot possibly be one opinion given by a retired Judge on a

professional basis at arm's length. Something more is required, which is the element of being connected in an advisory capacity with a party.

Since Justice Lahoti has only given a professional opinion to GAIL, which has no concern with the present dispute, he is clearly not disqualified under Item 1.Ã¢â‚¬â€‹

[Emphasis Supplied]

11. From a plain reading of the foregoing, it would be clear that for the rigours of either Item 1 or 2 to be attracted by a lawyerÃ¢â‚¬â„¢s representation,

there ought to be a current representation of a party to the dispute or any affiliate of such party. The role played by the Learned Sole Arbitrator with

affiliates of the Respondent is not in the nature of being a regular advisor. Representation in court, briefed by law firms, is what the material brought to

bear by the Petitioner, bears out. There is no current representation of the Respondent or any affiliate of the Respondent, by the Learned Sole

Arbitrator. Neither has the Petitioner brought to bear any material to indicate current representation nor do the disclosures made by the Learned Sole

Arbitrator point to such current representation. The Petitioner relies on past representations. The best case that the Petitioner may make would bring

the matter within the ambit of the Fifth Schedule and not the Seventh Schedule.

12. Consequently, at this stage of the arbitration proceedings, there is no scope for me to effect any intervention as prayed for by the Petitioner. The

recourse for implications of the Fifth Schedule does not lie under Section 14 of the Act. Consequently, this Petition is without merit and deserves to be

dismissed.

13. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this CourtÃ¢â‚¬â„¢s website.