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**Court :** Delhi

**Decided On :** Oct-20-2009

**Reported in :** 166(2010)DLT94

**Judge :** Manmohan, J.

**Acts :** [Arbitration and Conciliation Act, 1996](#) - Sections 2 to 43; [Evidence Act, 1872](#); [Code of Civil Procedure \(CPC\) , 1908](#)

**Appeal No. :** O.M.P. 604/2009

**Appellant :** Mindmill Software Ltd.

**Respondent :** Paragon Construction (India) Pvt. Ltd.

**Advocate for Def. :** Abijat and ; Princy Ponnann, Adv.

**Advocate for Pet/Ap. :** Jagjit Singh, Adv

**Disposition :** Petition dismissed

**Judgement :**

**Manmohan, J.**

1. With the consent of parties, matter is taken up for final disposal.

2. The present objection petition has been filed under Section 34 of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as 'Act, 1996') challenging the Award dated 14th September, 2009 passed by the Sole Arbitrator.

3. Mr. Jagjit Singh, learned Counsel for the petitioner-claimant submitted that the Arbitrator had not conducted the arbitral proceedings in a fair and impartial manner. In this context, Mr. Jagjit Singh referred to the application filed by the petitioner-claimant under Section 12 of Act, 1996 which reads as under:

it has been recently learnt by Claimant that the Arbitral Tribunal is party to all such contracts resting by and between Respondent Company with various owners. There has been definite commercial understanding/vested consideration by and between Respondent and Arbitral Tribunal, in the past, present and is for future in definite period. Some details of executed and contract under execution are:

(i) Greek Embassy at New Delhi;

(ii) Qatar Embassy at New Delhi;

(iii) Palestinian Embassy at New Delhi;

Dealings between respondent and Arbitral Tribunal are in sacrificing factum of impartiality or independence or fairness.

4. Mr. Jagjit Singh further submitted that Award was without jurisdiction because it was in conflict with Sections 12 and 13(4) of Act, 1996. He stated that the Arbitrator had not afforded full opportunity to the petitioner-claimant to present its case and hence the Award deserves to be set aside. According to Mr. Jagjit Singh the Arbitrator should have first disposed of the application filed under Section 12 by the petitioner-claimant and then after a gap of some time proceeded for final hearing on merits. Mr. Jagjit Singh placed reliance on the observations of the Supreme Court in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported in : (2003) 5 SCC 705. The portion of the aforesaid judgment relied upon by Mr. Singh is reproduced hereinbelow:

8. In the aforesaid Sub-clause (v), the emphasis is on the agreement and the provisions of Part I of the Act from which parties cannot derogate. It means that the composition of the Arbitral Tribunal should be in accordance with the agreement. Similarly, the procedure which is required to be followed by the arbitrators should also be in accordance with the agreement of the parties. If there is no such agreement then it should be in accordance with the procedure prescribed in Part I of the Act i.e. Sections 2 to 43. At the same time, agreement for composition of the Arbitral Tribunal or arbitral procedure should not be in conflict with the provisions of the Act from which parties cannot derogate. Chapter V of Part I of the Act provides for conduct of arbitral proceedings. Section 18 mandates that parties to the arbitral proceedings shall be treated with equality and each party shall be given full opportunity to present his case. Section 19 specifically provides that the Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian [Evidence Act, 1872](#) and parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. Failing any agreement between the parties subject to other provisions of Part I, the Arbitral Tribunal is to conduct the proceedings in the manner it considers appropriate. This power includes the power to determine the admissibility, relevance, the materiality and weight of any evidence. Sections 20, 21 and 22 deal with place of arbitration, commencement of arbitral proceedings and language respectively. Thereafter, Sections 23, 24 and 25 deal with statements of claim and defence, hearings and written proceedings and procedure to be followed in case of default of a party.

xxxx xxxx xxxx xxxx11. The aforesaid provisions prescribe the procedure to be followed by the Arbitral Tribunal coupled with its powers. Power and procedure are synonymous in the present case. By prescribing the procedure, the Arbitral Tribunal is empowered and is required to decide the dispute in accordance with the provisions of the Act, that is to say, the jurisdiction of the Tribunal to decide the dispute is prescribed. In these Sections there is no distinction between the jurisdiction/power and the procedure....

12. Hence, the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is de hors the said provisions, it would be, on the face of it,

illegal. The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.

13. ...In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

5. On the other hand, Mr. Abhijat, learned Counsel for the respondent stated that even prior to filing of the Section 12 application, the petitioner-claimant had been aware of the professional/business relationship between the Arbitrator and the respondent. In this context, Mr. Abhijat referred to the bid document which stipulated that each architect who wanted to bid would have to provide information of contracts satisfactorily completed by him for similar works.

6. According to Mr. Abhijat, the Section 12 application had been filed belatedly to 'cover up' the petitioner-claimant's lapses in not completing the pleadings and not leading evidence in support of its claims. In this context, Mr. Abhijat pointed out that though the petitioner-claimant had filed its claim on 5th July, 2008 and respondent had filed its counter-claim on 14th August, 2008, petitioner-claimant had neither filed any evidence in support of its claim nor any reply to the counter-claim of respondent prior to the passing of the impugned Award.

7. Mr. Abhijat submitted that under Section 12(1) of Act, 1996, the Arbitrator has to disclose only such information if it constitutes a ground which would give rise to justifiable doubt about his impartiality. Mr. Abhijat submitted that keeping in view the fact that petitioner-claimant was all throughout aware about the professional/business relationship between the Arbitrator and respondent, there was no need for the Arbitrator to inform petitioner- claimant each and every time

the Arbitrator entered into a contract with the respondent. In this context, Mr. Abhijat relied upon paragraphs 40 and 41 of judgment rendered by this Court in National Thermal Power Corporation Ltd. v. Wig Brothers (Builders & Engineers) Ltd. reported in 2009(2) Arb. LR 238 (Delhi). The said paragraphs read as under:

40. I am also unable to agree with the submission of Mr. Bhat that when the arbitrators were appointed they had to disclose in writing that no grounds exist that would give rise to justifiable doubts about their independence or impartiality. Section 12(1) of the Arbitration Act provides that disclosure has to be given by the arbitrators only if there exist grounds which would give rise to justifiable doubts about his independence or impartiality. The Arbitration Act does not provide that when no such ground exists, the arbitrator has to give a written declaration in the negative that no such grounds exist. The interpretation suggested by Mr. Bhat would amount to rewriting Section 12 and cannot be accepted.

41. Section 12(3) of the Arbitration Act sets out the grounds on which a challenge can be made to the arbitrator or the Arbitral Tribunal. Under Section 12(3) of the Arbitration Act, a challenge can be made only if one or both of the two grounds set out in the said Section has been fulfilled. In the application filed by the petitioner, before the Arbitral Tribunal, under Sections 12 and 13 of the Arbitration Act, the grounds raised by the petitioner were that it had justifiable doubts about the independence of the Arbitral Tribunal in view of the manner in which it was constituted. The words 'justifiable doubts as to the independence or impartiality' in themselves do not confer any right. A mere reproduction of the said words does not give rise to any justifiable doubts about the independence or impartiality of the Arbitral Tribunal, but such bias or partiality has to be shown from the records with reference to specific instances. This Court is unable to comprehend as to how can the manner, in which the arbitral tribunal had been constituted, in itself gave rise to any justifiable doubts about the independence and impartiality of the arbitral tribunal. None of the grounds raised by the petitioner in its application under Sections 12 and 13 of the Arbitration Act, were permissible in view of the phraseology of Section 12(3) of the Arbitration Act and the said application was therefore, rightly rejected by the Arbitral Tribunal.

8. Having heard the parties, I am of the view that the petitioner-claimant was aware from day one of all the facts as well as the credentials of the respondent and the Arbitrator. In fact, the Arbitrator in his Award has stated that the petitioner-claimant had even visited the sites of the respondent to verify itself the correctness of the respondent's credentials.

9. Moreover, this Court can take judicial notice of the fact that normally an architect and a contractor work as a team and execute a number of projects together. This fact assumes significance in view of the admitted position that petitioner-claimant had appointed respondent as a contractor on the recommendation of the arbitrator, namely, architect (para 3 of the objection petition).

10. Moreover, on a conjoint reading of Sections 12 and 13 of Act, 1996, I am of the view that an arbitrator who is connected with either of the parties can still be appointed as an Arbitrator, provided both the parties are aware of the said professional/business relationship. In fact, in the present case, the Architect was appointed as the Arbitrator even though he had executed a contract and was receiving fees from the petitioner-claimant. Consequently, the petitioner-claimant cannot at this stage raise a grievance under Sections 12 and 13 of the Act, 1996.

11. As far as the argument that the Award was in conflict with Section 13 of the Act, 1996 is concerned, I am of the view that if Sub-section 4 is read with Sub-section 5, it is apparent that if the Arbitrator decides to proceed with the arbitration after he rejects an application filed by either of the parties under Section 13, then the only way to challenge the same is by way of proceedings under Section 34 of Act, 1996. In my opinion, reading of Section 13 does not mandate that the Arbitrator should first reject the Section 12 application and then after a gap of time proceed to hear the arguments. Moreover, Mr. Jagjit Singh's interpretation would neither result in promoting the object of the Act nor in safeguarding the rights of any of the parties as the stage for challenging the order passed in Section 12 application is only after the Award has been rendered.

12. I am also in agreement with the respondent's arguments that in the present case Section 12 application had been filed by petitioner-claimant to 'overcome its

lapse' of not completing its pleadings and not filing its evidence. This is apparent from the petitioner-claimant's own application dated as late as 17th June, 2009 wherein petitioner-claimant for the first time tried to discontinue the Arbitrator's mandate on an entirely different ground. The relevant portion of the petitioner-claimant's application reads as under:

5. You were appointed as our Architect and you have received payments for your professional work from us. We have apprehension that M/s. Paragon may attribute motive or bias to you in case you decide the Arbitration case in our favour.

13. In an additional affidavit filed today in Court, the petitioner-claimant has taken a ground that the Arbitrator did not take into consideration his own certificate dated 5th November, 2007 wherein he had certified deductions of Rs. 4,95,887.02/- from respondent-contractor's bill on account of money to be spent on strengthening of raft. However, from the perusal of the Award, I find that Arbitrator has awarded a sum of Rs. 2,00,000/- to petitioner-claimant under the head of 'strengthening of raft' even though no amount had actually been spent by petitioner-claimant under this head, despite lapse of nearly two years.

14. I may mention that I have perused the Award and I am of the view that the Arbitrator's award is just and fair. In my opinion, it certainly cannot be called 'excessive' by any standard.

15. Consequently, present objection petition is dismissed but with no order as to costs.

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