



[2024:RJ-JD:41566-DB]

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Civil Misc. Appeal No. 1516/2023

M/s Anik Industries Ltd., 610, Tulsiyani Chamber, Naraman Point, Mumbai Corporate Office 201, Mahakosh, House, 7/5 South Tukoganj, Indore (Madhya Pradesh) through Vijay Joshi, Assistant General Manager (Commercial)

----Appellant

Versus

M/s Shree Rajasthan Sintex Ltd., a Registered Company Under the Indian Companies Act 1956 having its Registered Office at SRSL House, Rashtriya Raj Marg No. 8 Pulla, Bhuwana Road, Udaipur and having its Office at Second Floor 439 Kalbadevi Road, Mumbai through its Manager (Commercial) Shri Kamal Chordiya.

----Respondent

For Appellant(s) : Mr.Deelip Kawadia, Adv.
Mr.Sidharth Mandawat, Adv.
For Respondent(s) : Mr.Sanjeev Johari, Sr. Adv. assisted by
Mr.Shubhankar Johari, Adv.
Mr.Lalit Parihar, Adv.

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI
HON'BLE MR. JUSTICE MUNNURI LAXMAN

Judgment**Judgment Reserved on : 23.09.2024****Judgment Pronounced on : 22.10.2024**

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[Per Hon'ble Mr. Justice Munnuri Laxman] :

1) The present Civil Misc. Appeal is directed against the order dated 18.03.2023 passed by the learned Judge, Commercial Court, Udaipur on the file of Civil Misc. Case No.38/2018 (C.I.S. No.38/2018), wherein and whereby the award dated 23.03.2015 passed by the Arbitral Tribunal was set aside.



2) The appellant herein is the claimant before the Arbitral Tribunal (hereinafter referred to as, "the Tribunal") and the respondent herein is the respondent before the Tribunal. For convenience, the ranks of the parties as were referred before the Tribunal is maintained.

3) The sum and substance of the case of the claimant is that it is engaged in the business of Coal Trading amongst other businesses. The respondent is having Industrial Plant at Dungarpur (Rajasthan). The claimant supplied coal for the respondent Industrial Plant for generation of power under various purchase orders placed by the respondent from time to time during the period of October 2009 and August 2010.

4) The respondent raised a dispute with regard to supply of 18,689 metric tons of coals worth of Rs.5,72,84,744/- with regard to quality of the coal supplied during the period of November 2009 to August 2010 with reference to eight purchase orders. The claimant had received Rs.4,54,54,061/- out of eight purchase orders and for the balance amount of Rs.1,18,30,683/-, the claim was filed before the Tribunal.

5) The respondent denied the claim set up by the claimant. According to the respondent, the coal supplied was of not upto the quality agreed between the parties; on account of supply of coal with the low quality, the respondent's industrial plant and machinery were damaged. The respondent assessed the damages of Rs.1,12,01,110/. The respondent has given debit of Rs.55,25,851/- out of due amount. It has withheld Rs.40,39,933/-. As the claimant was not ready to take such money on account of debit notes set up by the respondent, after



adjusting the above two amounts, an amount of Rs.16,41,326/- was claimed as damages in the counter-claim.

6) Before the Tribunal, no oral evidence was adduced by both the parties. The Tribunal was asked to decide the claim and counter-claim on the basis of the documentary evidence only. After hearing the respective counsel and by considering the evidence on record, the Tribunal partly allowed the claim of claimant granting Rs.40,39,903/- with interest @ 15% per annum from 15.02.2011 till realisation and dismissed the counter-claim of the respondent.

7) The respondent assailed the order award of the Tribunal before the Commercial Court, Udaipur under Section 34 of the Arbitration and Conciliation Act raising various grounds. During the pendency of such petition before the Commercial Court, Udaipur, the respondent raised additional ground of non-disclosure by one of the Arbitrator i.e. Mr. Ramesh Saboo about his affiliation with one of the sister-concern of the claimant-Company. The Commercial Court after considering the contentions and grounds raised by respondent has set aside the award on the ground of perversity in the findings of the Tribunal with regard to counter-claim, and also disqualification incurred by one of the Arbitrator on account of non-disclosure of his affiliation with the sister-concern of claimant-Company. Aggrieved by the same, the present appeal has been filed by the claimant.

8) Heard both the counsel for the parties and appeal was taken for final disposal at admission stage since the issue involved in the present appeal is short one.



9) In the light of arguments and grounds in the appeal, the following points emerges for consideration:

(i) Whether the findings of Tribunal in granting the part claim to the claimant and rejecting the counter-claim of the respondent suffers from any perversity.

(ii) Whether non-disclosure of one of the Arbitrator about his affiliation with the sister-concern results in any apparent bias so as to vitiate the award.

POINT NO:1

10) A close scrutiny of the award of the Tribunal reveals that the Tribunal with regard to claims made by the rival parties to the arbitration shortlisted the disputes to three purchase orders i.e. 1/10, 2/10 and 3/10. The total value of such a supply is Rs.55,25,681 + Rs.40,39,933=Rs.95,65,614/-. The Tribunal found that the coal supplied under the above three purchase orders suffers from inferior quality and upheld the claim of the respondent with regard to supply of inferior quality coal by the claimant. Such conclusion was reached basing on the laboratory reports placed by the respondent. The contention of the claimant that such inferior quality coal was result of improper storage facility, was rejected. The claim of the respondent with regard to substandard supply of coal was upheld. It was held that the respondent is rightly entitled for debit of Rs.55,25,681/- from the value of the coal supplied, which is proportionate to the percentage of inferior quality of coal found as per the Laboratory reports. The Tribunal also considered the admissions of the respondent in the counter-claim that the claimant did not come forward to receive the balance of 40,39,933/- on account of debit



of some amounts on account of inferior quality of coal and such amounts were payable to claimant. The claim of the claimant was partly allowed to the extent of such admission i.e. Rs.40,39,933/- and interest as stated herein above.

11) The counter-claim of the respondent was rejected on the ground that entire claim was based on the certificate of Chartered Engineer. The Tribunal found that the claimant had no access to the industry of the respondent to know the truthfulness of assessment of damage made by the Chartered Engineer to the machinery of the industry on account of supply of inferior quality of coal. The Tribunal also found that there is no other independent evidence other than the assessment of Chartered Engineer. The Tribunal has not accepted the damages on account of lack of independent corroborative evidence to the assessment made by the Chartered Engineer. Consequently, the respondent's claim was rejected.

12) An elaborate discussion has been made by the Tribunal and in fact, the original claim of respondent was with regard to supply of inferior quality of coal and the debits made by the respondent with regard to three purchase orders proportionate to the percentage of inferior quality found in the Laboratory reports, was upheld. The main reason for dismissal of counter-claim was on account of lack of independent corroborative evidence and the entire claim was based on the assessment of damages by Chartered Engineer of respondent, who is very interested. Further, the claimant was not given access to the damage part of industrial machinery. The Chartered Engineer's assessment was an interested evidence. For the said reasons, the Tribunal insisted for



corroborative evidence of independent assessment, which is lacking in the present case.

13) As seen from the impugned order in the present appeal, the Commercial Court without seeing the reasoned order of the Tribunal with regard to counter-claim simply found that the Tribunal has erred in not considering the counter-claim. The interference of the Commercial Court in the findings of the award would arise only in case such award suffers from perversity. Seeing from the appreciation of evidence on record while advertng to the counter-claim, the Tribunal considered the claim set up by the respondent, which is based on the Chartered Engineer assessment. The Tribunal found that there was no access to the claimant with regard to damaged industry and there is no independent corroborative evidence to the assessment made by the Chartered Engineer. Such findings are well reasoned findings and such findings do not suffer from any perversity. The Commercial Court was wrong in holding that the Tribunal has not considered the counter-claim in right perspective without appreciating the material on record. Therefore, such a finding of the Commercial Court is liable to be set aside and accordingly, is set aside.

POINT NO.2

14) The contention raised by the learned counsel for the appellant/claimant before this Court is that the learned Commercial Court was at fault in holding that the non-disclosure of affiliation by one of the Arbitrator i.e. Ramesh Saboo with the sister-concern of the claimant-Company has resulted in disqualification, which according to him, is not a correct. Such





ineligibility and disqualification was expressly stated in the Seventh Schedule of Amendment to the Arbitration and Conciliation Act, 1996 after 2015. Prior to the said Amendment Act, there was no existence of such specific circumstance, which would give rise to justifiable doubt as to his independence and impartiality.

15) In the present case, one of the Arbitrator was not an advisor or acted as a counsel to the parties to the arbitration proceedings. He has only filed Vakalatnama in the case pending before the concerned court representing the sister-concern of the claimant-Company. Such non-closure is not a circumstance, which would give rise to justifiable doubt as to his independence and impartiality of Arbitrator. The reason being that prior to the Amendment Act of 2015, there is no ineligibility with regard to existence of specific circumstances as referred in Fifth and Seventh Schedule after Amendment of 2015. The representation of one of the Arbitrator in one of the sister-concern of the claimant-Company is not the circumstance, which would disentitle him to incur ineligibility or disqualification per se.

16) The learned counsel for the claimant-appellant also submitted that the Apex Court in various judgments has upheld the appointment of Arbitrator, who is the employee of one of the parties to the arbitration proceedings. In the present case, one of the Arbitrator is not either employee or advisor or representing the parties to the proceedings but incidentally, he was representing only sister-concern of the claimant-Company, which is one of the affiliate of the Company, which is party to the proceedings. The specific circumstance of affiliation of the



Company was brought in by way of amendment in 2015, which makes such circumstance per se as an ineligibility to be appointed as an Arbitrator, which was not there prior to the Amendment. In fact, the courts were not accepting the apparent bias basing on the employment of one of the Arbitrator, who happened to be employee of one of the parties to the proceedings. According to learned counsel, the amended provisions do not apply to the present case since the arbitration proceedings are prior to the amended Act.

17) The learned counsel for the claimant-appellant also contended that the Tribunal constitution shows that it is three member Tribunal. The Presiding Arbitrator was Justice V.S.Kokje (Retd.) and other two Co-Arbitrators are Justice Panachand Jain, Retd. (Co-Arbitrator) and Ramesh Saboo (Co-Arbitrator) and there is unanimous conclusion from the Arbitral Tribunal and such a conclusion was arrived basing on the own admission of respondent with regard to withholding of awarded amount under the Tribunal. Further, the rejection of counter-claim was based on absence of independent evidence. Such findings cannot be interfered. The non-disclosure has no impact on the unanimous findings of the Tribunal and no actual bias has been caused. In fact, such affiliation was not recognized principle prior to the Amendment of 2015. In support of his case, the learned counsel for the claimant-appellant has relied upon the decisions of Apex Court rendered in the case of **Aravali Power Co. Pvt. Ltd. Vs. Era Infra Engineering Ltd.**, reported in (2017) 15 Supreme Court Cases 32 and in the case of **Indian Oil Corporation Ltd. & Anr. Vs. Raja Transport Pvt. Ltd.**, reported in (2009) 8 SCC 520.



18) The learned counsel appearing for the respondent has contended that there is suppression of material fact by one of the Arbitrator i.e. Ramesh Saboo with regard to his engagement in one of the litigation of sister-concern of the claimant-Company. Such a suppression is one of the circumstance, which creates doubt as to the independence and impartiality of the Arbitrator. Such suppression can be one of the ground to hold that the appointment of Arbitrator, Rameshm Saboo, suffer from disqualification. The Commercial Court rightly entertained his claim and rightly set aside the impugned order, which requires no interference.

19) In support of his contention, the learned counsel for the appellant has relied upon the decisions of Apex Court rendered in the case of **Vinod Bhaiyalal Jain & Ors. Vs. Wadhvani Parmeshwari Cold Storage Pvt. Ltd.**, reported in (2020) 15 SCC 726 and in the case of **V.K.Dewan & Company Vs. Delhi Jal Board & Ors.**, reported in (2010) 15 SCC 717.

20) The undisputed facts show that the arbitration proceedings in the present case were commenced prior to the Amendment Act of 2015. The unamended Section 12 of the Arbitration and Conciliation Act, 1996 reads 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.”

21) Subsequent to the amended Act, the following amendment was made to Section 12 of the Act of 1996, which reads as under:-

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,—

- (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.

Explanation 1.—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.

[(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.]”

22) Two Schedules were introduced to the Arbitration and Conciliation Act specifying the existence of relationship of the Arbitrator with the parties to the proceedings and the circumstance, which gives rise to justifiable doubts as to his independence and impartiality. Such specific circumstances were not found in the old Act of 1996. A reading of old provision makes it clear that a duty was caused upon the Arbitrator to disclose in writing any circumstances likely to give rise to justifiable doubt as to his independence and impartiality. Such a duty is continuous one from the appointment to the conclusion of arbitral proceedings. If a circumstance exists, it gives a ground for challenge to the continuation of arbitrator.

23) Under the new provision, there is a specific reference of ineligibility in the circumstances referred under the Seventh Schedule. This means per se there is an ineligibility if there exist any circumstance, which is specifically referred in the Seventh Schedule. Such a per se ineligibility, which has been statutorily





recognized under the amended provision, was not in existence under the old provision. If the disclosure is made as required under the old and new Act, the party may challenge the Arbitrator or waive any of the future objections. However, under the new provision, there is a per se ineligibility, if there exist any of the specific circumstance referred in the Seventh Schedule. However, the parties in writing can waive such a disqualification. The effect of non-disclosure depends upon nature of facts and circumstances, which are undisclosed. The non-disclosure per se is not a ground to incur disqualification or ground of annulment under old provision. The non-disclosed information is relevant to assess relevancy and magnitude of non-disclosed information. In case, non-disclosed facts and circumstance is a material, it may result disqualification or annulment. The various decisions of the Apex Court carves out difference between independence and impartiality of the Arbitrator. There can be a situation where an arbitrator may be independent but lack impartiality or vice versa. The impartiality is a more subjective concept when compare to independence. The independence is more objective concept, which may be straightforwardly ascertained by the parties at the outset of the arbitration proceedings in the light of the disclosures made by the arbitrator, whereas partiality would likely to arise during the arbitral proceedings.

24) The UK Court of Appeal, in the case of **Director General of Fair Trading Vs. Proprietary Association of Great Britain & Ors.**, [Case No.C/2000/3582], decided on 21.12.2000 has made a distinction between 'actual bias' and 'apparent bias'. 'Actual bias' demonstrates a situation where a judge has been



influenced by partiality or prejudice in reaching conclusions. Whereas, the 'apparent bias' denotes existences of reasonable apprehension that the judge may have been or may be biased. The test is whether actual bias in a given circumstance exist, for that it requires onerous standard of proof, however, if the circumstances which would create room for justifiable apprehension of bias, then there is actual bias. The concept of apparent bias would arise in a situation where the existence of the circumstances which would create a justifiable apprehension of bias in the minds of the parties to the proceedings. The concept of apparent bias is not recognized by the Apex Court prior to the Amendment Act. On account of such non-recognition, to give more credibility to the arbitration proceedings, the Law Commission has proposed the amendment to the proceedings, which resulted 2015 Amendment Act incorporating specific instances of circumstances, which would given reasonable apprehension to the third party that judge may have been or may be biased, which constitutes apparent bias. The facts in cases of **Aravali Power Co. Pvt. Ltd.** (cited supra), **Indian Oil Corporation Ltd.** (cited supra) and other judgments (cited supra) show that an employee of the parties to the proceedings was considered to be not a circumstance, which would give rise to a reasonable apprehension of bias. If such is a view of the Apex Court prior to the Amendment Act, the position of Ramesh Saboo, Advocate was not worse than the employee. Ramesh Saboo was only engaged as a counsel in one of the case during the proceedings of arbitration. Such engagement was not with reference to the parties proceedings but affiliate of one of the parties i.e. the claimant-





Company, which is the sister concerned company. The concept of affiliation with the affiliate company was specifically introduced in the Amendment Act of 2015. There was no such concept prior to the amendment. The engagement of sister-concern of the claimant-Company in one of the legal battle of sister-concern with the third party is better than the position of an employee, who is employed with one of the party to the proceedings. This means the concept of apparent bias was not a recognized principle under old provision that led to the introduction of Sub-Section (5) of Section 12 and Fifth & Sixth Schedule to the Arbitration and Conciliation Act, 2015.

25) The reliance of the learned counsel for the respondent upon the decision rendered in the case of **V.K.Dewan & Company** (cited supra) shows that it is a case where one of the Arbitrator was appointed as its consultant during the pendency of arbitral proceedings. In the said background, the Court held that such a circumstance would give rise to a reasonable apprehension that arbitrator may have been or may be biased. Such appointment gives scope for advises with reference to the matter in dispute In the present case, the engagement of one of the Arbitrator was not a direct party to the proceedings but it is a sister-concern company. Another decision relied upon by the learned counsel for the respondent is in the case of **Vinod Bhaiyalal Jain** (cited supra), wherein one of the Arbitrator was engaged counsel with one of the parties to the proceedings and in the said background by placing reliance on **V.K.Dewan & Company's case** (supra), the Apex Court set aside the appointment of Arbitrator.





26) In the present facts and circumstances of the case, the appointment of one of the arbitrator as a legal counsel to one of the case of the sister-concern of the claimant-Company is not worse than allowing an employee to engage to act as an arbitrator. This principle of apparent bias by virtue of the affiliation of arbitrator with the parties to the proceedings on the basis of employment and/or engagement was not a recognized principle by the Apex Court in view of the judgments rendered in the case of Aravali Power Co. Pvt. Ltd. and Indian Oil Corporation Ltd. (cited supra). Though there is non-disclosure of information as was required under Section 12 of Arbitration and Conciliation Act, such a non-disclosure is not a material fact or circumstance, which would invalidate the appointment of Ramesh Saboo, Advocate as an arbitrator. The reason is that the amount awarded is admitted amount withheld by the respondent. Another important aspect of the present case is that there is a unanimous decision of the Arbitral Tribunal and the award of the Tribunal clearly reflects well considered award. Every aspect of the dispute was referred and answered. In fact, the claim of the respondent with regard to inferior quality of coal was accepted by the Tribunal and the counter-claim was only rejected on the basis of lack of independent corroboration. These findings clearly show the absence of lack of independence and impartiality. The majority view of the Tribunal is taken into consideration, even if the view of the Arbitrator Ramesh Saboo is discarded, still the award holds good. In the said background of the facts, we find that the impugned order of the Commercial Court requires to be set aside.





[2024:RJ-JD:41566-DB]



[CMA-1516/2023]

27) In the result, the civil misc. appeal is allowed. The impugned order dated 18.03.2023 passed by the learned Judge, Commercial Court, Udaipur is set aside.

28) All pending interlocutory applications, if any, shall stand disposed of.

(MUNNURI LAXMAN),J

(DR. PUSHPENDRA SINGH BHATI),J

NK/-