

ORDER

Jawahar Lal Gupta, J. (Oral)

(1) The petitioner had approached the State Government with a prayer for referring his claim for reinstatement of the Labour Court. The petitioner's request was declined,—*vide* order dated 6th June, 1994. A copy of this order has been produced as Annexure P 3 with the writ petition. The petitioner prays that the order be quashed.

(2) This case was listed for hearing before a Division Bench of this Court on 14th January, 1999. Their Lordships were pleased to direct that the counsel may explain the delay.

(3) No affidavit has been filed. However, it has been pointed out by Mr. J. K. Goel that in paragraph 14 of the petition it has been averred that the petitioner being an illiterate person, did not know that the order of the Government could be challenged before the High Court in a writ petition. It is only when he contacted his counsel in December, 1998 that he discovered about the availability of the remedy.

(4) After hearing the learned counsel we are satisfied that there is an inordinately long delay of more than four years in approaching the Court. We are not satisfied about the correctness of the explanation given by the petitioner. In any event, such an explanation, if accepted, would provide a defence to every illiterate person. The claim being highly belated, we find no ground to interfere with the order passed by the competent authority.

(5) Consequently, the writ petition is dismissed in limine.

R.N.R.

Before N. K. Agrawal, J

P.S.E.B., PATIALA THROUGH ITS CHAIRMAN,—Petitioner

versus

INDURE LTD. & ANOTHER,—Respondents.

C.R. No. 144 of 1999

12th October, 1999

Constitution of India, 1950—Art. 227—Arbitration and Conciliation Act, 1996—Ss. 5, 12 & 13—Removal of arbitrator—Serious

allegations levelled by Board against the arbitrator—Removal sought under Art. 227—Allegations cannot be examined under Art. 227—Appointment of Arbitrator can be challenged according to the procedure laid down under section 13—petition dismissed as not maintainable.

(Harike Rice Mills v. State of Punjab, 1997 (Supp.) Arb. L. R. 342 (D.B.) followed)

Held, that Section 12 of the Arbitration and Conciliation Act specifies the grounds for challenge and Section 13 lays down the procedure for challenge. In that view of the matter, the allegations put forward by the petitioner—Board do not require an examination in the present petition. Once the petition is held to be not maintainable in the light of the provisions of Section 13 of the 1996 Act, the allegations levelled against the arbitrator need no examination or finding.

(Para 20)

Deepak Sibal, Advocate,—*for the Petitioner.*

M. L. Sarin, Senior Advocate, (Ms. Hemani, Sarin, Advocate with him),—*for respondent No. 1.*

JUDGMENT

N. K. Agrawal, J.

(1) This is a petition by the Punjab State Electricity Board (for short, the Board) under Article 227 of the Constitution seeking the removal of respondent No. 2 Shri J. S. Grewal, as the arbitral tribunal at Patiala and for prohibiting him to act as the arbitral tribunal in respect of the disputes between the petitioner and respondent No. 1 M/s Indure Limited (for short, the 'contractor').

(2) The Board entered into a contract with the contractor on 7th March, 1990 for designing, manufacturing, erecting testing and commissioning the Ash Handling System for Units No. 5 and 6 of the Guru Gobind Singh Super Thermal Plant, Ropar. The contract for Unit No. 5 was to be completed and commissioned by 19th June, 1991 and for Unit No. 6 by 19th December, 1991. Extension for completion of work was granted and Unit No. 5 was thereafter commissioned by 31st August, 1992. Unit No. 6 was not, however, completed in time.

(3) A dispute arose between the Board and the contractor. In terms of the arbitration clause in the agreement, the dispute was referred to Shri J. S. Grewal as arbitrator.

(4) The Board has challenged the continuance of respondent No. 2 as arbitral tribunal on various grounds. It has been alleged that Shri J. S. Grewal was posted as the Chief Engineer and thereafter as Engineer-in-Chief in the service of the Board and he had shown favour and gave undue benefits to the contractor. Shri J. S. Grewal was appointed as arbitrator though he could not be appointed inasmuch as there were serious allegations against him. The Board has given many instances of favour extended by Shri Grewal to the contractor, M/s Indure Limited. It is stated that Shri Grewal, before having been appointed as the arbitral tribunal, had in the capacity of Chief Engineer in the Board from 1st March, 1989 to 17th July, 1990 and from 4th November, 1991 to 31st January, 1993 helped the contractor in the execution of the contract. The contract in question was awarded to the contractor on the recommendation of Shri Grewal and that too at a rate higher than the original offer. Shri Grewal also recommended that the Board should pay an additional amount of Rs. 17,00,000 to the contractor though that was not accepted by the Board. Further, on his recommendation, extension of time for the completion of the two Units in question was granted. Unit No. 5 was not commissioned till 31st August, 1992 and Unit No. 6 till 31st March, 1993 though the work was required to be completed in those Units by 19th June, 1991 and 19th December, 1991 respectively. The non-completion of the work in Unit No. 6 is the cause of one of the disputes between the Board and the contractor.

(5) It is further alleged by the Board that Shri J. S. Grewal, functioning as Chief Engineer with the Board, had permitted the acceptance of the goods worth Rs. 2 crores from the contractor without inspection and testing. It is done against the condition contained in clause 23 of the contract. It was in total violation and breach of the condition. It is further alleged that Shri Gurbachan Singh Gill, son-in-law of Shri Grewal, was an employee of the contractor and was the contractor's man in-charge of the entire project at the site. Shri Gill had worked as Resident Engineer for the contractor from 4th March, 1991 to 28th September, 1992.

(6) It is also alleged that Shri Grewal as Chief Engineer recommended and permitted the supply of cheaper motors by the

contractor thereby allowing excess payment of Rs. 6 lacs to the contractor. TEFC type motors were to be supplied but the contractor supplied CACA type motors which were cheaper in price. The dispute with regard to the excess payment has also been referred to Shri Grewal as arbitrator.

(7) Shri Deepak Sibal, learned counsel for the Board, has argued that when the dispute arose between the Board and the contractor, Shri Grewal had retired as Chief Engineer and he was appointed as an arbitrator as under Clause 26 of the contract dated 7th March, 1990. He has argued that it was incumbent upon Shri Grewal, when approached to be appointed as arbitrator, to disclose in writing the circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Shri Sibal has pointed out that sub-section (1) of Section 12 of the Arbitration and Conciliation Act, 1996 (for short, the 1996 Act) requires an arbitrator to disclose in writing any circumstances which are likely to give rise to doubts as to his independence or impartiality. The said provision casts a duty upon a person who is approached for appointment as an arbitrator. Since Shri Grewal was already associated with the execution of the project and his son-in-law was in the employment of the contractor, he had definitely an interest in the matter. He should have, therefore, disassociated himself and should not have accepted the appointment as an arbitrator. Even after his appointment, he was under a legal duty under sub-section (2) of section 12 to disclose in writing to the parties any such circumstances.

(8) It would be useful to read section 12 :—

“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 independences 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.”

Shri Sibal has, in the light of the aforesaid provision, vehemently argued that the circumstances in which the contract was given and in which the son-in-law of the arbitrator had worked as an employee of the contractor, it was only appropriate on the part of the arbitrator to have withdrawn from the assignment. An application was moved by the Board in this behalf before Shri Grewal giving therein the facts which raised justifiable doubts against his impartiality. Shri Grewal rejected the objections and continued the arbitration proceedings. Several letters, (Annexure P-2, P-3 and P-4) were filed by the representatives of the Board before Shri Grewal protesting against the manner in which minutes of the meetings of the arbitral tribunal were recorded. It was then specifically pointed out through the letters (Annexures P-5 and P-6) that the Board may not get a fair award from Shri Grewal as an arbitrator.

(9) Shri Deepak Sibal has argued that the Board has felt constrained to approach this Court under Article 227 of the Constitution for the removal of Shri Grewal as arbitrator as the dispute referred to him involved a sum of Rs. 9 crores. It is clear that Shri Grewal had direct or indirect interest in the contract awarded to M/s Indure Limited. It was on the recommendation of Shri Grewal that the contract was, after short-listing the applicants, granted to the contractor, M/s Indure Limited, and thereafter extensions of time for completion of the project were allowed from time to time. It is also explained that Shri Grewal gave a performance certificate pertaining to the Units No. 3 and 4 to M/s Indure Limited so that the contractor may be able to secure other contracts also. It was another instance of showing favour to M/s Indure Limited. Shri Sibal has, therefore, urged this Court to remove Shri Grewal as arbitrator because the Board apprehended that the award would go in favour of the contractor. A claim for Rs. 9 crores has been filed by the contractor against the Board before the arbitrator.

(10) Shri Deepak Sibal has placed reliance on a decision of the Supreme Court in *International Airport Authority of India v. K. D. Bali and another* (1). That was a case under the Arbitration Act, 1940. It has been observed therein that there must be purity in the administration of justice as well as in the administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. Shri Sibal has, on the strength of these observations, argued that Shri Grewal had not acted fairly while accepting the appointment as an arbitrator.

(11) Shri Sibal has also placed reliance on another decision of the Supreme Court in *M/s. Sundaram Finance Ltd. v. M/s NEPC India Ltd.* (2). That was a case in which a different aspect of the question of appointment of arbitrator was considered under the 1996 Act. The question there was, however, entirely different and is not relevant to the facts of the present case.

(12) The contractor, M/s. Indure Limited, has filed reply, Shri J. S. Grewal, though arrayed as respondent No. 2 in the present petition, has not chosen to file any reply.

(13) Shri M. L. Sarin, learned counsel for respondent No. 1, has argued that the present petition filed by the Board should be dismissed in view of Section 5 of the 1996 Act.

(14) It will be useful to read Section 5 :—

“5. *Extent of judicial intervention* :

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part.”

(15) It is further argued by Shri Sarin that the appointment of an arbitrator should be challenged only if it is permissible under sections 12 and 13 of the 1996 Act. Section 13 lays down the procedure for challenging an arbitrator.

(1) AIR 1988 S.C. 1099

(2) AIR 1999 S.C. 565

(16) Section 13 reads as under :—

“13. *Challenge procedure* :

- (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.
- (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.
- (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
- (4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.
- (5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.”

(17) Shri Sarin has contended that an award may be challenged on any ground in accordance with the provisions of section 34 only. Since an elaborate procedure has been laid down in section 13, the Board has no right to come to this Court with the aid of Article 227 of the Constitution. If the Board is allowed to challenge the appointment of Shri Grewal ignoring the provisions of section 13, that would amount to negating the express provision of law. Reliance is placed by Shri Sarin on a Division Bench decision of this Court in *Harike Rice Mills v. State of Punjab* (3). A similar challenge to the appointment of a person as an arbitrator arose there. It was held that sub-sections (4) and (5) of section 13 do not permit a party to challenge the appointment immediately. Such a party has to wait and challenge the appointment only after the arbitral award has been made.

(18) Shri Sarin has also argued that all the allegations made by the Board are without basis. Further, the facts that Shri Grewal was working as the Chief Engineer with the Board and was associated with the sanction of the contract were within the knowledge of the officers of the Board when Shri Grewal was appointed as an arbitrator after his retirement. The Board did not raise any objection at that time. Moreover, the challenge, as earlier put forward by the Board before Shri Grewal, has already been rejected by Shri Grewal by a speaking order. The Board was well aware of the grounds now being taken in this petition. Shri Grewal is a retired Engineer-in-Chief of the Board and is on the Board's panel of arbitrators. Now, the Board is estopped from challenging his appointment as arbitrator. The Board is, however, at liberty to challenge the award under section 34 of the Act.

(19) It is further argued by Shri Sarin that the contract was not actually given to M/s Indure Limited on the recommendation of Shri Grewal. Other allegations are also denied. It is pointed out that there were pre-contract discussions and then specifications were changed. Revised offer was submitted on 20th January, 1990 by the contractor in the light of the new specifications. The Board, however, wrongly accepted the earlier offer dated 29th July, 1989. Letter of intent was wrongly issued to the contractor in terms of the lapsed offer. Thus, the contractor was made to suffer a loss of Rs. 17 lakhs. Shri Grewal discussed all the points raised by the Board in his order (Annexure P-6) and has rejected all the allegations.

(20) On a consideration of the matter, it is found that the question of law raised by Shri Sarin about the maintainability of the present petition under Article 227 of the Constitution has substance. As stated earlier, a Division Bench of this Court has, in *M/s Harike Rice Mills (supra)*, already considered a similar issue and has taken a view with regard to the stage at which appointment of an arbitrator can be challenged by an aggrieved party. Since the Division Bench of this Court has taken a view in the matter, I feel bound by that view. Section 12 specifies the grounds for challenge and section 13 lays down the procedure for challenge. In that view of the matter, the allegations put forward by the petitioner-Board do not require an examination in the present petition. Once the petition is held to be not maintainable in the light of the provisions of section 13 of the 1996 Act, the allegation levelled against the arbitrator need no examination or finding.

(21) In the result, the petition filed by the Board under Article 227 of the Constitution is dismissed with the observation that it is not

maintainable in the light of the provisions contained in section 13 of the 1996 Act. The Board is at liberty to challenge the award at the appropriate stage as provided under section 13 read with Section 34 of the 1996 Act and also challenge at that time the appointment of the arbitrator, if so advised. No costs.

R.N.R.