GOVERNMENT OF HARYANA PWD HARYANA (B AND R BRANCH) V. G.F. TOLL ROAD PRIVATE LIMITED AND OTHERS (2019) 3 SCC 505

Supreme Court of India; 2-judge bench, Abhay Manohar Sapre & **Indu Malhotra** JJ; decided on 03 January 2019

Former employment (around ten years before) with a party to an arbitration is not a ground for disqualification of an arbitrator

(A) THE ARBITRATION CLAUSE—ARBITRATION BY BOARD OF THREE; EACH PARTY TO APPOINT ONE. THE STATE APPOINTED A FORMER EMPLOYEE

The contract between the parties provided a resolution of disputes by a board of three arbitrators. Both parties were to select one nominee each, and the "third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration ("Council").

Disputes arose, and both parties nominated one arbitrator each. The State nominated a former employee who had retired around ten years ago. Both G.F. Toll and the Council objected urging there would be "justifiable doubts with respect to his integrity and impartiality to act as an arbitrator."

(B) APPOINTMENT BY THE COUNCIL

The State requested thirty days to substitute its nomination, but the Council informed it had already made an appointment on behalf of the State (and also appointed the presiding arbitrator).

(C) STATE'S CHALLENGE DISMISSED

The State "filed an application under Section 15 [ACA]" and an application under Section 16 ACA asking the tribunal to rule on its jurisdiction.

The District Court rejected the application concluding that the matter should be raised before the tribunal. The High Court dismissed the revision petition.

(D) THE SUPREME COURT'S DECISION

The court considered two issues: (i) the manner of substitution of State's nominee arbitrator; and (ii) appointment of a former employee.

1. Procedure for Substitution of Arbitrator

The court concluded that the appointment by the Council of State's nominee arbitrator was unjustified and contrary to the Rules of the Council itself because: -

(i) Firstly, the High Court failed to take note of Section 15(2) ACA, which requires that the procedure for appointment of a substitute arbitrator must be the same as that of the appointment of the original arbitrator. This is so even if the agreement does not expressly provide for it [citing to *ACC Ltd.* v. *Global Cements Ltd.*, (2012) 7 SCC 71]. But here, in any case, the agreement specifically provided a procedure.

(ii) Secondly, therefore, the Council could not have filled the vacancy unless the State showed no intention of doing so. The Council could not have usurped the State's jurisdiction to appoint a substitute arbitrator before thirty days (the time requested by State to make a substitution).

2. Appointment of a Former Employee—Not Prohibited Under ACA

The court concluded that the State's former employee was not disqualified from acting as an arbitrator.

a. The test of bias

First, the court examined the argument of bias and noted the test to be applied, that is, whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the arbitrator was, in fact, biased.

It referred to two judgments: a judgment of "House of Lords" (sic Court of Appeal) in *Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.*, (2000) 1 All ER 65 (CA), where the court had observed that greater the passage of time between the event relied on and the objection, the weaker the objection will be (other things being equal); and, *Porter* v. *Magill*, (2002) 2 AC 357, where while dealing with the "real danger" test for bias it was held that "[t]he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

The court concluded that the fact that the arbitrator was in the employment of the State of Haryana over ten years ago made the allegation of bias untenable. It also later said the mere allegation is not enough.

b. No prohibition under the ACA; interpretation of Item 1 of Fifth/Seventh Schedule

The court then noted that the ACA does not disqualify a former employee from acting as an arbitrator if there are no justifiable doubts as to his independence and impartiality.[14]

Though the court said pre-2015 Amendments governed the case, it examined the arguments based on the 2015 Amendments too. It considered Entry 1 of the Fifth 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*." (emphasis in the judgment)

It then concluded that: -

(i) The words "is an" and "any other" in Entry 1 of the Fifth Schedule indicates that neither should the arbitrator be a present or current employee, consultant or advisor of the party nor should it have a past or present business relationship with the party.

(ii) The word "other" used in Entry 1 indicates that it covers a relationship other than that of an employee, consultant, or advisor, but cannot be widened to mean former employees.

Eventually, the mandate of the three-member tribunal was terminated because the parties mutually agreed to have their dispute resolved by a sole arbitrator.

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[14] This is a reference to Section 12(3) of the ACA before the 2015 Amendments:
"(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.
(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".