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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 08.10.2024

\+ **O.M.P. (COMM) 485/2022 & I.A. 20548/2022**

FLFL TRAVEL RETAIL LUCKNOW PRIVATE LIMITED .....Petitioner

Through: Mr. Rajshekhar Rao, Sr. Advocate with Mr. D. Verma, Ms. Neha Sharma, Mr. Harshad Gada, Advocates with Mr. Darpan Mehta, VP, Development.

versus

AIRPORTS AUTHORITY OF INDIA & ANR. .....Respondents

Through: Mr. Arun Sanwal and Mr. Akshit Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner assails an award dated 11.08.2022 rendered by a learned sole arbitrator adjudicating disputes between the parties under a Concession Agreement dated 23.03.2018 ["the Agreement"].

A. Background facts:

2. The Agreement concerned a concession to develop, market, set up, operate, maintain, and manage retail outlets at various Category A and Category B airports, including the Chaudhary Charan Singh Airport at

Lucknow ["Lucknow Airport"]. It was entered into pursuant to a request for proposal issued by the respondent No. 1.

3. Disputes arose between the parties under the Agreement, and the petitioner claimed the following reliefs:

> *"a. That the Claimant be awarded a rebate/refund of the Concession Fee of Rs. 2,32,83,448.44 (Rupees Two Crore Thirty Two Lakh Eighty Three Thousand Four Hundred and Forty Eight and Forty Four Paise) towards the delay by the Respondent in obtaining the security clearance of the Locations, as per the particulars of claim set out in Exhibit C - 32 hereto;*
>
> *b. That the Claimant be awarded a rebate/refund of the Concession Fee of Rs.1,04,97,151/- (Rupees One Crore Four Lakh Ninety Seven Thousand and One Hundred and Fifty One Only) paid by the Claimant in respect of the Locations in and around Gate No.4 of the Airport for the period July 21,2018 to December 22, 2018, in terms of particulars of claim set out in Exhibit C-33 hereto;*
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> *c. That the Claimant be awarded a rebate/refund of the Concession Fee of Rs.61,66,708.53/- (Rupees Sixty One Lakh Sixty Six Thousand Seven Hundred and Eight and Fifty Three paise only) paid by the Claimant in respect of Locations inside the Visitors Area for the period between January 2019 to June 02, 2019 and August 10, 2019 to August 20, 2019 and January 20, 2020 to February 02, 2020 and May 25, 2020 to November 01, 2020, in terms of the particulars of claim set out in Exhibit C - 34 hereto;*
>
> *d. That the Claimant be awarded a rebate/refund of the Fixed Charge and Electricity Duty aggregating to Rs. 9,55,791/- (Rupees Nine Lakh Fifty Five Thousand Seven Hundred and Ninety One Only) paid by the Claimant to the Respondent in terms of the particulars of claim set out Exhibit C - 35 hereto;*
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> *e. That the Claimant be awarded a rebate of Rs. 2,56,437/- (Rupees Two Lakh Fifty Six Thousand Four Hundred and Thirty Seven Only) towards the Concession Fee paid by the Claimant for the period between July 21, 2018, to August 27, 2018, on account of delay in handing over of Locations identified as R-13, in terms of particulars of claim set out in Exhibit C- 36 hereto;*
>
> *f. That the invoices dated October 13, 2020, October 29, 2020, and February 10, 2021 (Exhibit C - 30), for the amount of Rs. 1,44,300/- (Rupees One Lakh Forty Four Three Hundred Only) raised by the Respondent against the Claimant be declared as null and void and cancelled and grant credit notes for the same.*

g. Cancellation of any interest and/or penalty levied by the Respondent on account of any of the above in terms of particulars of claim set out in Exhibit C-38 hereto;
h. Costs of this arbitration;
i. Such other and further reliefs that this Hon'ble Tribunal deems fit in the facts and circumstances of the case."

4. The claims were contested by respondent No. 1.

5. By the impugned award, the learned arbitrator awarded a total sum of approximately Rs. 20 lakhs alongwith interest, out of the petitioner's claims. The petitioner assails the award, inasmuch as the rest of its claims were rejected.

B. Scope of challenge:

6. I have heard Mr. Rajshekhar Rao, learned Senior Counsel for the petitioner, and Mr. Arun Sanwal, learned counsel for respondent No. 1, on the following two grounds:

a. Mr. Rao submitted that the award is vitiated by failure of the learned arbitrator to comply with Section 12 (2) of the Act, as he failed to disclose his appointment by the respondent No. 1 in another arbitration, during the pendency of the present arbitral proceedings; and

b. Mr. Rao argued that Section 24 of the Act had been violated by the learned arbitrator receiving documents and clarifications from the respondent after the order was reserved, which were not copied to the petitioner and were considered without giving the petitioner an opportunity to respond to the same.

C. Relevant chronology:

7. The factual background, to the extent necessary for disposal of this petition, is reflected in the following chronology of events:

S. No.	Date	Event
1.	25.08.2020	Disputes having arisen between the parties, the petitioner invoked arbitration under clause 22 of the General Terms and Conditions of the Agreement.
2.	01.02.2021	In view of the amended provisions of the Act, the respondent sought the consent of the petitioner to nominate Mr. Rajesh Bhandari, retired Executive Director (Finance) of the respondent, as the arbitrator.
3.	02.02.2021	The petitioner consented to the appointment of the learned arbitrator.
4.	02.02.2021	The learned arbitrator made a declaration in the form of the Sixth Schedule of the Act, disclosing his prior experience working with the respondent, and that he had acted as an arbitrator in an earlier dispute between the respondent and a third party. He also disclosed, *inter alia*, that he had no other ongoing arbitrations.
5.	15.02.2021	First meeting held by the learned arbitrator, in which both parties participated.
6.	04.06.2022	Hearing was concluded and parties were directed to file written submissions on or before 20.06.2022.
7.	13.06.2022/15.06.2022	The learned arbitrator was appointed as an arbitrator by the respondent in another arbitration, to which the petitioner is not a party. No written intimation of such appointment was made to the petitioner.[1]
8.	22.06.2022	Written submissions were filed by both parties.
9.	30.06.2022 and 11.07.2022	E-mails sent by the learned arbitrator to both parties, seeking further clarifications.

[1] Pursuant to an order dated 06.12.2022, the learned arbitrator [respondent No. 2] has filed an affidavit dated 04.02.2023, in which it is stated that he had informed the petitioner telephonically about the appointment sometime in the third week of June, 2022. The petitioner has categorically denied having been so informed and has filed an affidavit dated 09.03.2023, to this effect.

10.	15.07.2022	The respondent forwarded certain documents to the learned arbitrator. These included alert messages issued by the Bureau of Civil Aviation Security ["BCAS"] and the Ministry of Home Affairs, collected from Lucknow Airport and some other airports. The petitioner was not copied on this e-mail.
11.	06.08.2022	These documents were forwarded to the petitioner by the learned arbitrator and comments were sought by 09.08.2022.
12.	10.08.2022	Counsel for the petitioner requested the learned arbitrator for time until "*early next week*" to respond to the documents. No response was received to this e-mail.
13.	11.08.2022	The impugned award was made by the learned arbitrator, and was dispatched to the parties on 12.08.2022.
14.	13.08.2022	The petitioner made an application under Section 13(2) of the Act, with regard to the appointment of the learned arbitrator by the respondent in a second arbitration.
15.	16.08.2022	The application was dismissed. It was stated in the order that the award had already been made on 11.08.2022. The petitioner contends that it learnt of the award having been made only by virtue of this order, which was transmitted to the parties by e-mail, and that it received the impugned award later on the same day.

D. Analysis:

I. Re: Violation of Section 12 of the Act:

8. Section 12 of the Act, set out below, deals with the grounds upon which an arbitrator can be challenged under Section 13 of the Act:

> *"**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."

9. The applicability of Section 12 is guided by the Fifth and Seventh Schedules to the Act. The Fifth Schedule enumerates grounds which give rise to justifiable doubts as to the independence and impartiality of arbitrators. The entries at serial Nos. 22 and 24 of the Fifth Schedule are relevant to the present case:

> *"22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.*
> *xxx xxx xxx*
> *24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties."*

10. In the facts of the present case, the validity of the initial appointment of the arbitrator is not under challenge. However, Mr. Rao's argument is that the respondent's subsequent appointment of the same arbitrator, in another arbitration, ought to have been disclosed to it.

11. The purpose behind Section 12 of the Act and the Fifth Schedule have been explained by the Supreme Court in *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*[2], thus:

> *"20.* ***Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings.*** *Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)*
> *"45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although*

[2] (2017) 4 SCC 665.

the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."

xxxx xxxx xxxx

25. ***Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary.*** *In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list."*[3]

12. The purpose of Section 12 of the Act is, thus, to preserve the independence and impartiality of the arbitral tribunal. Complete and comprehensive disclosure by arbitrators, of factors which may cast doubt upon their independence or impartiality, is necessary to ensure informed consent for submission of disputes to a private tribunal. This is of significance, as the very legitimacy of arbitration is founded upon the principles of party autonomy and consensual submission to the jurisdiction of the arbitral tribunal. Such an obligation, as reflected in

[3] Emphasis supplied.

Section 12(2) of the Act, does not get exhausted by a pre-reference disclosure, but enures *"throughout the arbitral proceedings"*.

13. Based on this understanding, I am of the view that the learned arbitrator, in the present case, was required to disclose to the petitioner, the fact of his appointment by the respondent in a subsequent case. The arguments had concluded, and the award was reserved. At this stage, the respondent nominated the learned arbitrator to adjudicate another dispute. I am unable to accept that such an appointment, while the award in the petitioner's case remained reserved, is exempted from disclosure on any ground.

14. In this context, reference may be made to the judgment of the Supreme Court in *Union of India & Ors. v. Sanjay Jethi & Anr.*[4], cited by Mr. Rao, wherein the authorities on determination of an allegation of bias, have been summarised thus:

> *"51. The principle that can be culled out from the number of authorities fundamentally is that* ***the question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination.*** *While dealing with the plea of bias advanced by the delinquent officer or an accused a court or tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy of interdiction in such matters, for* ***the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being coram non judice****. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. It is to be kept in mind that* ***what is relevant is actually the reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias.*** *To adjudge the attractability of plea of bias a tribunal or a court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not*

[4] (2013) 16 SCC 116.

to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition."[5]

15. In the present case, I am unable to find the petitioner's apprehension imaginary. It is not, in my view, an unduly cynical perception, having regard to the appointment being made during the pendency of the present proceedings, when the award stood reserved.

16. The learned arbitrator, in his affidavit dated 04.02.2023, has stated that the petitioner was informed of his subsequent appointment by telephone, in the third week of June 2022. As noted above, the petitioner has categorically denied this factual assertion. The question is, in any event, irrelevant as Section 12(1) and Section 12(2) both require the disclose to be made "*in writing*". A telephonic disclosure, which is the only case pleaded, thus, would not suffice. Mr. Sanwal sought to draw sustenance from the closing words of Section 12(2) of the Act, *"unless they have already been informed of them by him".* He argued that the learned arbitrator's assertion, of telephonic communication of his appointment, exempted him from a written disclosure, as the petitioner had already been informed of his second appointment by respondent No. 1. This reading of the section does not commend to me at all. It would permit arbitrators in all cases to make verbal disclosures, or claim to have made verbal disclosures, and thus bypass the express statutory requirement of a written disclosure.

17. Mr. Sanwal also cited the judgment of a coordinate bench in *Bharat Foundry & Engineering Works & Ors. v. Intec Capital Ltd. &*

[5] Emphasis supplied.

Anr.[6]. The case concerned four arbitration proceedings between the same parties, in which the same arbitrator had been appointed. The Court rejected the challenge based on lack of disclosure under Section 12, holding that a concrete foundation must be laid for doubting the independence and impartiality of the arbitrator. I am of the view that the judgment is distinguishable, as the case concerned the same parties, and the parties challenging the award were, thus, well aware of the arbitrator's appointment in other related proceedings. The Court, in *Bharat Foundry*[7], categorically found that the appellants therein had deliberately opted not to appear in the arbitral proceedings, despite service by the arbitrator and the proceedings therefore proceeded *ex-parte* against them. Further, the arbitrator in that case had taken the view that he was exempt from disclosure requirements as he belonged to a specialised pool of arbitrators in terms of Explanation 3 of the Seventh Schedule of the Act. Such is not the case in the present case.

18. Mr. Sanwal's final argument, on this point, also reflected in the affidavit filed by the learned arbitrator, was that the petitioner had failed to challenge the arbitrator within the period of 15 days after becoming aware of the circumstances of challenge, as required by Section 13(2) of the Act. This too is based upon the learned arbitrator's assertion that he had orally informed the petitioner of his second appointment. I have held that such verbal disclosure is insufficient. I also find no contemporaneous evidence of such disclosure. The learned arbitrator has stated in his subsequent affidavit dated 13.03.2023, that he had made a declaration to

[6] 2022 SCC OnLine Del 3578.
[7] Ibid., paragraph 26.

the respondent No. 1 in respect of his second appointment on 15.06.2022. However, in the order dated 16.08.2022, disposing of the petitioner's application under Section 13 of the Act, there is no mention of such telephonic disclosure to the petitioner. On the materials placed on record, I do not find any reason to accept that the petitioner was aware of the appointment, until after the award was made. For the same reason, Mr. Sanwal's reliance upon the Division Bench decision of this Court in *Bhasin Infotech & Infrastructure Pvt. Ltd. v. Ahmad Main & Anr.*[8] (to which I was a party) is also misconceived.

19. I am fortified in this conclusion by the judgment of the Supreme Court in *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*[9] and the Division Bench of this Court in *Ram Kumar v. Shriram Transport Finance Co. Ltd*.[10], both of which deal with Section 12 of the Act. It may be noted that the Division Bench of this Court, interpreting Section 12(1) of the Act, has held that the requirement of disclosure is mandatory and not at the discretion of the arbitrator[11]. The same position would, in my view, obtain with regard to the duty of continuous disclosure in Section 12(2) of the Act.

20. The judgment in *Ram Kumar*[12] also disposes of a second point taken in the affidavits filed by the respondents and the written submissions tendered by Mr. Sanwal, i.e., that the subsequent appointment of the learned arbitrator in another arbitration was made by a different department of the respondent, and the department which was

[8] 2019 SCC OnLine Del 7764.
[9] (2019) 5 SCC 755.
[10] 2022 SCC OnLine Del 4268.
[11] Ibid., paragraphs 19, 22-24.

concerned with the present proceedings was unaware of such appointment. I am unable to accept this narrow reading of the disclosure provision. The respondent No. 1 is undoubtedly a large organization, but still a single entity. In any event, the requirement of disclosure extends not just to several appointments by the same party, but also by "*an affiliate of one of the parties*". The practical problem posed by treating a large organization in this way – that one department may not know about the appointments made by another - is a red herring, as the duty of disclosure, as held in *Ram Kumar*[13], is upon the arbitrator, and not upon the litigant.

21. For the aforesaid reasons, I am of the view that the petitioner's challenge on the ground of a violation of Section 12 of the Act, is liable to succeed.

II. Re: Non-supply of documents to the petitioner:

22. The objection with regard to non-supply of documents to the petitioner, is based upon Section 24(3) of the Act, which reads as follows:

> *"24. Hearings and written proceedings.—*
> *xxxx xxxx xxxx*
> *(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."*

23. The Supreme Court, in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*[14], has held that when a party has not had an opportunity to comment or make submissions on evidence furnished by the other side

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[12] Supra (note 10).
[13] Supra (note 10).
[14] (2019) 15 SCC 131, paragraphs 49-57.

under Section 18 of the Act, a ground for setting aside an award under Section 34(2)(a)(iii) of the Act is made out[15]. This has been reiterated in *PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*[16].

24. The documents in question, in the present case, were circulars issued by BCAS with regard to closure of the visitors' area of Lucknow Airport. The Agreement being for the operation of retail outlets in the visitors' area, it was contended by the petitioner that it was entitled to a rebate for the period of closure. The period of closure was a matter of dispute, with regard to which the learned arbitrator sought clarification. The circulars, which were placed on record, have concededly been referred to in the award.

25. These documents, received by the learned arbitrator from the respondent on 15.07.2022, were forwarded to the petitioner only three weeks later, on 06.08.2022. The learned arbitrator required a response by 09.08.2022. It is stated in the application filed by the petitioner under Section 13 of the Act, that this effectively gave the petitioner only one working day to respond to the documents, as 06.08.2022, 07.08.2022 and 09.08.2022 were holidays (Saturday, Sunday and *Muharram*

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[15] Section 34(2)(a)(iii) of the Act reads as follows:
"34. Application for setting aside arbitral award.—
xxx xxx xxx
(2) An arbitral award may be set aside by the Court only if—
xxx xxx xxx
(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—
xxx xxx xxx
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or…"

[16] 2021 SCC OnLine SC 508, paragraph 43.

respectively). The petitioner's request for additional time of approximately one week did not elicit a response.

26. I am inclined to agree with the petitioner's submission on this ground also. Section 24(3) of the Act reflects a facet of natural justice, that a party must be given the materials supplied by the other party to the arbitral tribunal, and have an opportunity to respond. Respondent No. 1 failed to adhere to this principle when it did not mark the e-mail in question to the petitioner. The learned arbitrator forwarded the documents to the petitioner almost three weeks after he received them, but did not consider it necessary to grant the petitioner more than one working day to consider the documents and respond. Such a procedure is unjustifiable, particularly when the documents in question were of over 30 pages, and encompassed several circulars[17].

27. The facts discussed above reveal a violation of Section 18 of the Act, which requires parties to be given a full opportunity to present their case. The award is, therefore, vitiated on this ground also.

E. Conclusion:

28. For the reasons stated, the petition is allowed, and the impugned award dated 11.08.2022 is set aside. The parties are at liberty to take such remedies as available to them under law. There will, however, be no order as to costs.

29. The pending application also stands disposed of.

PRATEEK JALAN, J

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[17] Document No.14 of the petitioner's list of documents.