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## International Arbitration Law Review

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### India: Supreme Court rules on apprehension of bias in arbitration

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**Legislation:**

Arbitration and Conciliation Act 1996 (India)

**Case:**

Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Pty Ltd unreported 24 July 2019 (Sup Ct (Ind))

**\*Int. A.L.R. 241 Introduction**

The Supreme Court of India, in the case of Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Ptv Ltd,<sup>1</sup> was recently faced with the question of whether there existed a reasonable apprehension of bias such that an arbitral award be set aside. In this case, the arbitrator who rendered the final arbitral award in the arbitration had been engaged and was acting as counsel of one of the parties in another litigation.

The Supreme Court interpreted the Arbitration and Conciliation Act 1996 (A&C Act) (as the present case applied the law as it stood prior to the Arbitration and Conciliation (Amendment) Act 2015 (Amendment Act)) to determine the arbitral award rendered by the appointed arbitrator should be set aside as the Appellants had a reasonable basis to doubt the arbitrator's ability to be independent and impartial in pronouncing the arbitral award.

**Facts**

The Respondent in the appeal had a cold storage facility in Nagpur. The Appellants had stored goods in the Respondent's facility in 2004. Disputes arose between the parties in 2006 as the Appellants claimed that the Respondent had failed to store its goods in an appropriate manner causing damage to the goods.

It was the Respondent's position that the parties were governed by an arbitration clause which was contained in the receipt issued for the storage of goods which required disputes to be referred to a particular arbitrator. Pursuant to the arbitration clause, the Respondent submitted its claims before the said arbitrator. The father of the Appellants and the Appellants issued letters to the arbitrator recording their objections to his appointment. The Appellants argued that the appointed arbitrator was the Respondent's counsel in another litigation. The arbitrator deemed the objections as inconsequential and passed the final award against the Appellants. **\*Int. A.L.R. 242**

The Appellants filed an application under s.34 of the A&C Act before the District Judge of Nagpur. The District Judge set aside the arbitral award noting that, inter alia, the arbitrator acted as the counsel for the Respondent in a previous case which was not disclosed by him as required under s.12 of the A&C Act. The Respondent appealed the decision of the District Judge before the Bombay High Court. The Bombay High Court recorded that the objections and legal notices to the appointment of the arbitrator were not raised by the Respondent, rather, they were raised by the Respondent's father. Thus, technically, this could not be considered an objection within the meaning of s.13 of the A&C Act.<sup>2</sup> The Bombay High Court further held that

"Even assuming that the objection raised by Bhaiyalalji Jain was an objection raised by a 'party', the objection/notice issued by Bhaiyalalji Jain to the arbitrator was extremely vague and the apprehension expressed therein could not have made any reasonable man believe that there was a likelihood of bias."<sup>3</sup>

The Bombay High Court further added that it was not the case of the Appellants that they were unaware of the

arbitrator's engagement as a counsel of the Respondent in a mesne profits case prior to signing the arbitration agreement. The Court concluded that the "question whether non-disclosure of these circumstances were likely to give rise to a justifiable doubt about the integrity and impartiality of the respondent no.4, does not arise for consideration in the facts and circumstances of the case".<sup>4</sup>

Aggrieved by the order of the Bombay High Court, the Appellants appealed it before the Supreme Court of India.

### Held

On the question of whether a challenge under s.13 of the A&C Act had been appropriately raised by the Appellants, the Supreme Court held that although the notice to the arbitrator was issued by the Appellants' father, he is not a "a rank outsider" and further, the Appellants have not disowned the notice. The Supreme Court further held one of the Appellants had also addressed a communication to the arbitrator requesting him to stop the proceedings since a petition had been filed in the High Court for the appointment of an independent arbitrator. Considering this, the Supreme Court held that the Bombay High Court's finding that these objections would not fall within the requirements of s.13 of the A&C Act was not justified.

The Supreme Court noted that the arbitrator had acted as a counsel for the Respondent in another dispute. Section 12(1) of the A&C Act, provides that "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". The Supreme Court held that this provision imposes an obligation of disclosure on the arbitrator. The Supreme Court held that: **\*Int. A.L.R. 243**

"Thus, as on 03.06.2006 when the claim was lodged before the learned Arbitrator both the events of, he being appointed as an Arbitrator and also as a counsel in another case had existed, which was well within the knowledge of Sri. S.T. Madnani and in that circumstance, it was the appropriate stage when he ought to have disclosed the same and refrained from entertaining the claim."<sup>5</sup>

The Supreme Court concluded that: "What is to be seen is whether there is a reasonable basis for the Appellants to make a claim that ... the arbitrator would not be fair, even if not biased ...".<sup>6</sup> The Supreme Court emphasised that no room should be given for such an apprehension in the minds of the parties, particularly in arbitration, as the parties get to choose an arbitrator in whom they have trust and faith, unlike in litigation where they have no choice in this regard.

Overtuning the judgment of the Bombay High Court, the Supreme Court set aside the arbitral award and restored the judgment of the Principal District Judge dated 6 November 2006.

### Comments

Considering the factual circumstances, the Supreme Court set aside the arbitral award as (1) the arbitrator should have made a disclosure of his conflict to the parties as per s.12 of the A&C Act; and (2) the parties had a reasonable basis to make a claim that the arbitrator would not be unbiased in rendering the arbitral award. Through this judgment, the Supreme Court has re-emphasised that appointing an independent and impartial arbitrator is vital to a valid arbitration proceeding.

Prior to the Amendment Act, courts did not have statutory guidance as to what would constitute justifiable doubts as to the independence and impartiality of an arbitrator. The 246th Law Commission Report on the Amendments to the A&C Act acknowledged this lacuna and suggested a comprehensive reform to address the issue of neutrality of arbitrators. The recommendation was based on the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines),<sup>7</sup> which would serve as a guide to determine whether circumstances exist which give rise to such justifiable doubts.

The IBA Guidelines were then incorporated by the Amendment Act into the A&C Act in the form of the Fifth and Seventh Schedules. The A&C Act as it stands today clearly specifies that an arbitrator must disclose "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".<sup>8</sup>

The Fifth Schedule, supplementary to s.12(1)(b) of the A&C Act, contains an extensive list of grounds to guide parties and arbitrators as to circumstances which **\*Int. A.L.R. 244** give rise to justifiable doubts to the independence and impartiality of arbitrators. The Seventh Schedule, read with s.12(5) of the A&C Act, provides instances which directly result in the ineligibility of a person from being appointed as an arbitrator unless the parties had expressly waived the applicability of the provision in writing after the agreement was entered. This position has also been upheld by the Supreme Court recently in the case of Bharat Broadband Network Ltd v United Telecoms Ltd.<sup>9</sup>

In factual scenarios similar to the present case before the Supreme Court, arbitrators can be guided by Entry 20

of the Fifth Schedule (which is an adoption of Entry 3.1.1 in the Orange List of the IBA Guidelines) which clarifies that arbitrators should consider making a disclosure if, within the past three years, he or she has served as a counsel for one of the parties in an unrelated matter.

If the arbitrator continues to be engaged by one of the parties, he or she would automatically be ineligible by operation of Entry 2 of the Seventh Schedule unless the parties had expressly waived its applicability in writing after the agreement was entered. Entry 2 read with s.12(5) of the A&C Act provides that an arbitrator shall be ineligible if "[t]he arbitrator currently represents or advises one of the parties or an affiliate of one of the parties". This entry is similar to Entry 1.1 of the Non-Waivable Red List of the IBA Guidelines which provides that: "[t]here is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration".

Therefore, judicial precedent and statutory amendments in India have developed positively to ensure that the fairness, neutrality and impartiality of arbitrators are central and essential to each arbitration proceeding. The Supreme Court's judgment in the present case will certainly provide a significant guidance for the arbitration-related court proceedings, also for those commenced prior to the Amendment Act.

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Int. A.L.R. 2019, 22(4), 241-244

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1. Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Pvt Ltd, Civil Appeal No.6960 of 2011 dated 24 July 2019.
  2. Section 13 of the A&C Act provides the procedure for challenging an arbitrator by the parties.
  3. Paragraph 10 of the First Appeal No.187 of 2007 dated 30 and 31 August 2007.
  4. Paragraph 13 of the First Appeal No.187 of 2007 dated 30 and 31 August 2007.
  5. Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Pvt Ltd, Civil Appeal No.6960 of 2011 dated 24 July 2019 at [8].
  6. Vinod Bhaiyalal Jain, Civil Appeal No.6960 of 2011 dated 24 July 2019 at [9].
  7. IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on 23 October 2014.
  8. Section 12(1) of the Arbitration and Conciliation Act 1996.
  9. Bharat Broadband Network Ltd v United Telecoms Ltd, Civil Appeal No.3972 of 2019 with Civil Appeal No.3973 of 2019 dated 16 April 2019.