

Dispute Resolution Hotline

September 05, 2019

NO ROOM FOR EVEN PERCEPTION OF BIAS IN AN ARBITRATOR, SAYS SUPREME COURT

- Sets aside award on finding that there was a *perception of bias* with respect to the sole arbitrator who passed the award
- Observes that what is to be seen is whether there is a reasonable basis for a party to apprehend that in the circumstances the appointed arbitrator could possibly be unfair to them, even if not actually biased
- Holds that there is no room for even perception of bias in an arbitrator as the very basis of arbitration is parties being able to choose a judge in whom they have trust and faith

INTRODUCTION

The Supreme Court of India (“**Court**”) in *Vinod Bhaiyalal Jain (“Appellant”) & Ors. Versus Wadhvani Parmeshwari Cold Storage Pvt. Ltd. (“Respondent”) & Anr¹* had occasion to *inter alia* consider whether the Appellants were reasonable in objecting to an arbitrator on grounds of *perceived bias* given that the arbitrator had been legal counsel for one of the Respondents’ partners, and whether an award passed by such an arbitrator should therefore be set aside.

FACTUAL MATRIX

The Arbitration

The Appellant, being commission agents for agricultural products, had in 2004 engaged the services of the Respondent for cold storage of certain products. The very receipt issued in respect of storage of goods (“**Receipt**”) contained an arbitration clause *inter alia* requiring that disputes be referred to the sole Arbitrator, one Mr. S.T. Mandani, Advocate (“**Arbitrator**”).

When disputes arose between parties, the Respondents took a stand that given the arbitration clause in the Receipt, disputes be referred to the Arbitrator mentioned therein, and accordingly submitted their claim before him. The Appellants disputed both the very existence of the arbitration clause and the appointment of the Arbitrator stating that the said Arbitrator had been legal counsel for the Respondents in other cases and therefore could not act as an arbitrator in matters where the Respondents were a party.

Despite the objections of the Respondent, the Arbitrator proceeded with the matter in the Appellant’s absence and passed an award in favor of the Respondent in 2006 (“**Award**”).

Section 34 before District Court

Aggrieved by the Award, the Appellants filed a challenge under Section 34 of the Arbitration & Conciliation Act, 1996 (“**Act**”) before the District Judge, Nagpur particularly on grounds of the Arbitrator’s conduct. The learned District Judge noted that the Arbitrator had in fact acted as counsel for one of the Respondent’s partners, a fact which was not disclosed. It therefore found the Appellant’s objections to be justified, accordingly setting aside the Award.

Section 37 Before Bombay High Court

The Appellant appealed before the High Court of Bombay (“**BHC**”) under Section 37(1)(b) of the Act. The BHC was of the view that since the Arbitrator had been the Counsel of the Respondent’s partner and not the Respondent itself, the Appellants’ objections regarding the Arbitrator were not justified. It further observed that a fair-minded person would never have thought that the Arbitrator was biased merely because he had appeared as a lawyer for the party to arbitration in another case. Thus, it set aside the order of the District Judge and restored the Award.

Issue before Supreme Court

The Appellants appealed before the Court contending that (i) there was no consensus between parties regarding the arbitration clause printed on the receipt issued by the Respondent thereby questioning the validity of the arbitration clause; and that (ii) the Arbitrator ought not have acted as the Arbitrator since he was also the counsel for the Respondent in another case.

JUDGMENT

The Court observed that the Appellant itself had earlier relied upon the arbitration clause to file an application under Section 11 of the Act seeking appointment of an independent Arbitrator. The Court therefore found that the Appellant could not at this stage raise a contrarian contention regarding the validity of the arbitration agreement while having relied upon it in the past.

With respect to the second issue i.e. *potential perceived bias*, the Court noted from the facts that the Arbitrator was aware that he had previously acted for the Respondent as a Counsel and that this was not a case where the arbitrator had proceeded with the matter by oversight and without knowledge of potential conflict of interest. The

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Court further observed that despite taking note of initial objections of the Appellant regarding conflict of interest, he had chosen to proceed with the matter instead of staying his hands; that in any event disclosure of such a potential conflict of interest was a requirement under Section 12 of the Act.

Considering the above, the Court opined that even if the Appellant only had a perception of bias in the Arbitrator, that itself was a reasonable basis to make a claim that such an Arbitrator may not have been fair to them. Accordingly, the Court, while choosing not to venture into the merits of the claim and the award, allowed the Appeal and set aside the order of BHC, while restoring the order of the District Judge which had set aside the Award, with liberty given to parties to proceed with arbitration in accordance with law.

ANALYSIS

The Court has expounded a very critical principle in that there is no room for even a feeling or perception of bias particularly since the very basis of arbitration is that parties get to nominate a judge of their choice in whom they have trust and faith, unlike in the normal course of litigation where they don't have such a choice.

In the present case, given the insistence of a party on the appointment of an arbitrator despite a cloud over the arbitrator's independence, an award which was passed in 2006 was eventually set aside 13 years later in 2019. This exemplifies the importance of ensuring full disclosure regarding an arbitrator's potential conflict of interests and agreement between parties in the choice of an independent arbitrator. If any party has a reasonable basis for having any apprehension regarding the arbitrator's impartiality, parties would be better placed to sort such issues out at the outset itself.

Independent and impartiality being critical to the arbitral process, the 2015 amendments to the Arbitration & Conciliation Act, 1996 have added the Fifth and the Seventh Schedule and attempted to strengthen the process of disclosures by the arbitrators. These add definitive grounds under which disclosures become necessary.

— **Siddharth Ratho & Sahil Kanuga**

You can direct your queries or comments to the authors

¹ Civil Appeal No.6960 of 2011

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