
THE TEST FOR APPARENT BIAS AND ARBITRATOR'S DUTY OF DISCLOSURE

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ABSTRACT

Nemo in propria causa judex, esse debet, i.e., no one should be made a judge in his own cause, is popularly known as the rule against bias. The author of the present research paper has made an attempt to analyse the development of legal jurisprudence with respect to independence and biasness of arbitrators in India. The research paper analyses the recent amendments and case laws with latest legal position of Indian courts on several key issues. The paper also analyses the issue of likelihood of bias in government appointed arbitrators and how the decision of the Indian courts have evolved from stressing on the proof of 'actual bias' to now, 'apparent bias' for an arbitrator to be removed or arbitral award to be set aside.

The paper also studies the position of law in U.K., U.S.A., Australia and Russia with respect to duty of disclosure and if it is an independent ground for the removal of an arbitrator.

Keywords- Duty of disclosure, apparent bias, actual bias, arbitration.

Introduction

In India, Arbitration is slowly becoming a favored mechanism for any dispute resolution. In the last few years, India has focused extensively on attracting foreign investors to invest in the country and they prefer arbitration over litigation as the latter is time consuming.

However, merely having a codified law governing Arbitration is not enough and what require in any jurisdiction is the independence, impartiality and neutrality of the arbitration proceedings. For that the first and most critical aspect till date across India as well as other several other jurisdiction remains the importance of impartial judgement of the arbitrator and the need for arbitrator to disclose any present or past relationship with any of the parties, counsels, or if interested in the outcome of the case and if such interest involved is financial, professional or business or of any other kind which may raise doubt with respect to impartiality and independence of the arbitrator.

Background

In India, the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as 'Act') which replaced the earlier Arbitration Act, 1940 is inspired from the UNCITRAL Model Law for International Commercial Arbitration. The latter was drafted in 1985 after a strong need for a uniform code to deal with arbitration cases at an international level was felt. UNCITRAL model under Article 12 provides for grounds on which an appointment of arbitrator can be challenged. Apart from qualification, lack of independent and impartiality is one of the grounds for challenging the arbitrators.

The Amendment

Surprisingly, there was no specific law under the 1996 Act which ensured the arbitrator appointed by the parties is indeed unbiased. The amendment to the Arbitration and Conciliation Act, 1996 in 2015, adopted the guidelines and practices as set out by the International Bar Association on conflict of interest which were aimed at ensuring neutrality of the arbitrators. Also, the fifth schedule was inserted, which laid down the situation which would give rise to justifiable doubts with respect to independence of arbitrators.

Ineligibility And Justifiable Doubts: The Difference

While the Fifth Schedule (read with Section 12(1)(a)) lists the various instances giving rise to

“justifiable doubts as to the independence and impartiality” of an arbitrator, the Seventh Schedule (read with Section 12(5)) of the Arbitration and Conciliation Act relates to instances which directly result in the “ineligibility” of a person from being appointed as an arbitrator, but the parties still have an option to waive the applicability of the provision.

Government appointed Arbitrators

- **Test of Bias**

The bias in a case can be looked into from a perspective of a common intelligent man and without an iota of doubt its determination may differ from case to case.¹ It has been held in multiple cases that it is not the suspicion but the real likelihood of bias which has to be present in a situation.² The standard of proof to prove bias is based on availability of cogent evidence.³

However, in many cases, the challenge is to prove the actual bias which in turn would lead to disqualification the arbitrator.⁴

- **Real Likelihood of Bias in Government appointed arbitrators?**

The 1996 Act stipulates that it is the duty of the court to appoint independent arbitrators in case the parties fail to do so. Surprisingly, in several earlier cases, the Supreme Court of India has held in several cases⁵ that in contract with any government corporation or statutory body or govt. company, practice of appointing the employee⁶ of such governmental organizations as an arbitrator is not ipso facto a ground to raise a presumption of bias on such employee’s part.

However, later in the case of Denel Proprietary Ltd.⁷, the Supreme Court of India deviated from past precedents and held that in a case where the arbitrator is the Managing Director of a party, he clearly will not be in a position to act impartially.

Again, in another case⁸, the Supreme Court held that as a normal course of routine the court

¹ Halsbury’s Law of England, 4th Edition, vol.2, p. 282, para 551.

² Mineral Development Ltd. v. State of Bihar, AIR 1960 SC 468.

³ Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant, (2001) 1 SCC 182.

⁴ Ladli Construction Company Pvt. Ltd. v. Punjab Police Housing Corporation Ltd. and ors., (2012) 4 SCC 609.

⁵ Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520.

⁶ Ace Pipeline Contract v. Bharat Petroleum, (2007) 5 SCC 304.

⁷ Denel Proprietary Ltd. v. Bharat Electronics Ltd. and anr, (2010) 6 SCC 394

⁸ Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence, (2012) 2 SCC 759

would adhere to the terms laid down in the agreement under Section 11(6), however, in certain circumstances the Chief Justice is not restricted from appointing an independent arbitrator other than the named arbitrator.

Hence, what can be observed is that over the period of time there has been a complete change in the thought process of the courts in India with respect to arbitrator who is also an govt. employee being appointed for adjudicating the dispute as there is a likelihood of bias. It was in the case of *M/S Singh Builders Syndicate*⁹, the court even advised the government and statutory bodies to phase out arbitration clauses which name employees as arbitrators.

‘Actual bias’ and ‘Apparent bias’

Illustrations:-

- An example of ‘Actual bias’ is a situation where the adjudicator is partial and his decision will be influenced by prejudice.
- On the other hand, in a case where there is a reasonable apprehension that the adjudicator may be biased is an example of ‘Apparent bias’

As discussed earlier, it was because the India Courts earlier were interested in cases of ‘Actual bias’ that a government employee was allowed to be the arbitrator merely because that’s what the agreement between the parties indicated and there was no proof of ‘actual bias’ though ‘apparent bias’ may be present.

However, today the Courts have consistently held that the test is not of ‘actual bias’ but whether in the given situation there is a possibility of bias. It was in the case of *Director General of Fair trading*¹⁰, wherein the UK Court made a distinction between ‘Actual bias’ and ‘Apparent bias’

Judicial Rulings

In India, the substantial progress was made in the development of jurisprudence and to ensure that the arbitration proceedings are impartial with the introduction of fifth schedule and seventh

⁹ *Union of India v. M/S Singh Builders Syndicate*, (2009) 4 SCC 523.

¹⁰ *Director General of Fair-Trading v. The Proprietary Association of Great Britain* [(2001) 1 WLR 700, decided on December 21, 2001 (Court of Appeal)].

schedule to the Arbitration act, highlighting the circumstances and relationships which may render the arbitrator ineligible to act.

Landmark/Important judicial precedents are now being discussed below which discusses the decision of the court in specific circumstances-

Whether former employee of an organization is disqualified to act as an arbitrator?

A distinction is made by the courts between serving and former employees of the organization. While the former would be de jure ineligible¹¹, the latter would not be.¹²

However, if it is found that the so former employee is involved in the issue in dispute then his appointment may be challenged and he would be ineligible as held in *Afcons Infrastructure Ltd. v Rail Vikas Nigam Limited*.¹³

The case of HRD Corporation v. GAIL (INDIA) Ltd.¹⁴

Without an iota of doubt any person falling under the category of schedule 7, is ineligible to adjudicate an arbitral-proceedings. However, the court in the above case held that even if the disclosures made by such person is within the limits of the fifth schedule thus, making him eligible but it gives rise to reasonable suspicions, then the impartiality or integrity of the person can be question under Section 13 of the Act

Position in other Jurisdictions

- **In UK**

The landmark ruling of Halliburton Co. v. Chubb Bermuda Insurance Ltd.¹⁵

The above long-awaited ruling of the UK Supreme Court addressed the issue of arbitrator's duties of disclosures in English-seated arbitrations. The court in the above case held that multiple appointments in arbitrations concerning the same or overlapping subject matter with only one common party do not of themselves give the appearance of bias.

¹¹West Haryana Highways Projects Pvt. Ltd. v. National Highways Authority of India ,(2017) 242 DLT 44.

¹² M/s. Voestalpine Schienen GMBH v Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665

¹³ Afcons Infrastructure Ltd. v Rail Vikas Nigam Limited, 2017 SCC OnLine Del 8675

¹⁴ HRD Corporation v. GAIL (INDIA) Ltd, Civil Appeal No. 11126 of 2017

¹⁵ Halliburton Co. v .Chubb Bermuda Insurance Ltd, [2020] UKSC 48

However, it is still the duty of the person to disclose multiple subsequent appointments which might have given rise to justifiable doubts as to his impartiality.

It is required under the Section 33 of the Arbitration Act, 1996 to disclose circumstances “*which would or might reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias in English-seated arbitrations*”. However, in the present case or any case for instance where there is duty of disclosure as under the law and the person accepts subsequent appointments and fails to disclose may lead to appearance of bias.

However, in the above case, the court did not set out the arbitral award nor did it removed the appointment of the arbitrator in the present case. Implying English law is less stringent on disclosure requirements vis a vis other jurisdictions including India.

- **In United States**

In US to it has been held that failure to disclose relationship with one of the parties may lead to appearance of bias, even though the nature of such relationship may in itself not would have given rise to such an appearance.¹⁶

- **In Australia**

In Australia, the failure to disclose is not an independent ground for removal of an arbitrator or setting aside of an award.¹⁷, however, in certain circumstances it may provide a basis for reasonable apprehension of bias and thus resulting in removal of the arbitrator.

- **In Russia**

The arbitral award was set aside in a case¹⁸ on the sole basis of non-disclosure by an arbitrator in circumstances where the non-disclosure was held to give rise to subjective doubts as to the arbitrator’s independence and impartiality.

¹⁶ CrowConstr. Co. v. Jeffrey M. Brown Assoc., 264 F.Supp.2d 217 (US District Court for the Eastern District of Pennsylvania 2003)

¹⁷ Gascor (Trading as Gas & Fuel) v. Ellicott & ors. [1997] 1 V.R. 332 (Supreme Court of Victoria).

¹⁸ Decree of the Moscow District Federal Arbitrazh Court of 26 July/13 Aug. 2008 (No. KG-A40/6775- 07, Case No. A40-4577/07-8-46, A40-4582/07-8-47)

Thus, the Decision of the courts in these jurisdictions can be said to be similar to that of in India except UK.¹⁹

Conclusion

Nemo in propria causa judex, esse debet, i.e., no one should be made a judge in his own cause, is popularly known as the rule against bias. For India, to present itself as a favorable destination of investment for foreign investors and also for Indian companies to work in partnership with the government it is important to ensure that the in the agreement between the parties though it may reflect that the government can appoint the arbitrator for the adjudication of the dispute- it must be ensure that the liberty must be provided under the law and Indian courts to deviate from the agreed procedure if there is a reasonable apprehension of bias.

¹⁹ Olivia Valner, *The Test for Apparent Bias and Arbitrators' Duties of Disclosure Following Halliburton v. Chubb: Welcome Clarification, but Questions Remain*, 38 Journal of International Arbitration, 3 359-376, 2021.

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