

Supreme Court Elaborates on Mandatory Nature of Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act, 1996



INTRODUCTION

On 22.01.2021, a three-judge bench of the Supreme Court of India consisting of Justices Indu Malhotra, Ajay Rastogi, and L. Nageswara Rao pronounced judgement in the matter between Haryana Space Application Centre (HARSAC) and M/s Pan India Consultants upholding the the mandatory and non-repealable nature of Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act, 1996 (Act) which deals with appointment/constitution of an arbitration tribunal.

BRIEF FACTS

HARSAC is a nodal agency for geographic information system (GIS) Application and Remote Sensing for the government of Haryana. In September 2010, HARSAC had invited Request for Proposal from qualified vendors for overall modernization of Land Record which included

digitalisation of cadastral maps, integration with records and management of old revenue documents. M/s Pan India Consultant (**Pan India**) was awarded the contract on 28.02.2011 and Service Letter Agreements were executed between the parties.

The deadline for completion of project was to be till 31.12.2011 which Pan India failed to meet. Two extensions were granted, first till 21.07.2013 and another one till 31.12.2013 to complete the work; Pan India failed to meet all such deadlines. Under these circumstances, HARSAC invoked the bank guarantee through its letter on 18.03.2014. However, this was challenged by Pan India before the High Court at Delhi and HARSAC was directed to keep the bank guarantees alive and both parties were encouraged to refer the dispute to arbitration.

HARSAC invoked the arbitration clause in the Service Letter Agreement and appointed the Haryana government Principal Secretary,

Anurag Rastogi as their nominee-arbitrator and Pan India appointed (retd.) Justice Rajiv Bhalla as their nominee arbitrator. The arbitral tribunal was constituted as of 14.09.2016.

On its 28th sitting, in August 2018, the tribunal has recorded that arguments were heard, and matter was reserved for award. However, an application was filed by Pan India to extend the period for passing the arbitral award. HARSAC opposed this application by stating that no sufficient cause was made out for reason of extension. In November 2019, the District Judge granted 3 months' extension to conclude arbitral proceedings for passing the award. A revision application was filed against this Order in the High Court of Punjab and Haryana stating that both parties had agreed for the proceedings to be completed by August 2018. The tribunal had failed to pronounce the award in the extended time. The High Court granted another extension of 4 months against which Order HARSAC moved to the Supreme Court.

The case before the Supreme Court stood after a period of 4 years had lapsed since the constitution of the committee and the tribunal had been unable to reach an award.

RULING

The Supreme Court, while deciding its verdict referred to Schedule VII of the Act which states as under:

“Arbitrator’s relationship with the parties or counsel ...5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.”

The Supreme Court pointed out that the appointment of the Principal Secretary, Govt. of Haryana as the nominee arbitrator of HARSAC would be invalid under Section 12(5) of the Act

read with Schedule VII, since the relationship of the arbitrator with the party falls within the category of arbitrators that shall be ineligible under Schedule VII. It opined that,

“Section 12(5) read with the Seventh Schedule is a mandatory and non-derogable provision of the Act. In the facts of the present case, the Principal Secretary to the Government of Haryana would be ineligible to be appointed as an arbitrator, since he would have a controlling influence on the Appellant Company being a nodal agency of the State”

Both parties consented to replace the existing tribunal by the appointment of a Sole Arbitrator to complete the arbitral proceedings. The Supreme Court, by the powers conferred to it under Section 29A(6) of the Arbitration and Conciliation Act, 1994 appointed its former judge, Justice Kurian Joseph as the substitute arbitrator who is to conduct the proceedings from the stage it has already reached. It was further stated that the award shall be passed within 6 months from the date of the receipt of this current Order.

SKV Comment...

With this verdict, the Court has made it amply clear that the appointment of Sole Arbitrator is subject to the declarations being made under Section 12 of the Act under which a declaration of independence, impartiality, and ability to devote sufficient time to complete the arbitration proceedings within 6 months must be provided by the appointed arbitrator(s).

Please find link to Judgment here