

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA
COMMERCIAL JURISDICTION

2017-HC-DEM-CIV-FDA-125

In the matter of Section 13 of the
Arbitration Act, Chapter 7:03 of the Laws
of Guyana.

-and-

In the matter of an application by AZAD
MEERZA trading under the name and
style, Falcon Transportation and
Construction Services of Lot 108 Meten-
Meer-Zorg, West Coast Demerara, for
Appointment of an Arbitrator.

BETWEEN:

AZAD MEERZA trading under the name
and style, Falcon Transportation and
Construction Services of Lot 108 Meten-
Meer-Zorg, West Coast Demerara.

Applicant

-and-

The Attorney General of Guyana

Respondent

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Gary Ramlochan for the Applicant

Ms. Collene Liverpool and Ms. Utioka John for the Respondent

Delivered April 20th 2018

DECISION

FACTS:

The Applicant, Azad Meerza and the Ministry of Agriculture entered into a contract on August 6th 2009 to perform certain construction works which contract provided for the settlement of disputes by an Adjudicator and in the event that the Adjudicator's decision was not accepted by both parties to the contract then for the dispute to be settled by arbitration.

Sometime in 2011 disputes arose between the Applicant and the Ministry of Agriculture and the adjudication process was employed, however, the Ministry of Agriculture did not accept the decision of the Adjudicator.

As a result the parties agreed to have the disputes settled by arbitration and an Arbitration Tribunal was appointed on March 28th 2013 by agreement.

The Arbitration Tribunal consisted of the Chairman Mr. George Howard, and members, Mr. Paul Sarran and Mr. Clairmont Marshall.

The tribunal proceeded to examine evidence, however, before, a decision was made, Mr. George Howard resigned on October 10th 2014 and at that stage the Applicant objected to Mr. Paul Sarran as a member of the Tribunal.

On November 25th 2014, Mr. Clairmont Marshall appointed Mr. Edward Gonsalves as a member of the Tribunal.

The Ministry of Agriculture did not nominate a replacement.

Mr. Clairmont Marshall and Mr. Edward Gonsalves proceeded to adjudicate on the claim without further participation from the Ministry of Agriculture and awarded

the Applicant the sum of \$176,285,299.55 (one hundred and seventy six million two hundred and eighty five thousand two hundred and ninety nine dollars and fifty five cents).

The Applicant then instituted High Court Action 2015-HC-DEM-CIV-SA-340 seeking leave of the Court to enforce the award as a judgment pursuant to section 13 of the Arbitration Act; CAP 7:03 of the Laws of Guyana.

That application was refused by Justice Holder who found that the Arbitration Panel was not properly constituted at the time of making the award.

The Applicant then instituted High Court Action 2016-HC-DEM-CIV-CD-132 seeking ***“An Order of the High Court pursuant to Section 6 of the Arbitration Act, Chapter 7:03 of the Laws of Guyana, that the Court appoint an Arbitrator for the Respondents, to constitute the full complement of three Arbitrators as agreed by the Applicant and Respondents, presently consisting of Mr. Clairmont Marshall and Mr. Edward Gonsalves, to consider disputes arising out of a contract executed on the 6th day of August 2009, between the Applicant and the Respondents , pursuant to the Agricultural Export Diversification Program LO:1929-SF/GY Canal Polder Control Structures and Access Road.”***

In that High Court Action despite the specificity of the relief sought, on April 12th 2016 Justice Persaud ordered ***“that the Applicant and the Respondents do nominate an Arbitrator of their choice and that the said nominees for Arbitrators do present themselves on Friday the 22nd day of April 2016 at 9:30 a.m. before***

the Honourable Mr. Justice Rishi Persaud with a view to nominating a third Arbitrator or Court appointed Arbitrator.”

On April 22nd 2016 the Applicant presented Mr. Edward Gonsalves and following several further hearings the Court proceeded to appoint Mr. Leon Rutherford as the second Arbitrator on June 8th 2016 in default of the Respondent presenting a nominee.

Mr. Edward Gonsalves and Mr. Leon Rutherford then met and appointed Mr. Maurice Veacock as the third Arbitrator and Chairman of the Board of Arbitrators and that Arbitration Tribunal then proceeded to consider the claims of the Applicant and awarded the sum of \$179,946,850.00 (one hundred and seventy nine million nine hundred and forty six thousand eight hundred and fifty dollars) to the Applicant in February 2017.

The Applicant then instituted this Action applying to the Court under section 13 of the Arbitration Act, CAP 7:03 for leave of the Court to enforce that award as a judgment.

ISSUES:

The Respondent submits to the Court that Mr. Edward Gonsalves having served on “the previous arbitration tribunal which made an award against the Respondent could not properly be considered to be independent and impartial” and on this basis

asks the Court to set aside the award under section 12 of the Arbitration Act; CAP 7:03.

The parties seem to have agreed by virtue of their submissions that this is the major issue in this application.

The fact is there are fundamental flaws in the formation of the “Board of Arbitrators” that made the instant award.

LAW:

The Arbitration Act; CAP 7:03 of the Laws of Guyana

ANALYSIS:

Justice Holder having ruled that the Arbitration Tribunal constituting Mr. Clairmont Marshall and Mr. Edward Gonsalves was improperly constituted necessarily, by extension, invalidated the award made by that Tribunal.

In keeping with the contract, the parties to the contract were then required to sit and determine whether they were going to again attempt to have the disputes settled by arbitration and in those circumstances proceed to or at least attempt to appoint **another** Arbitration Tribunal.

However, instead of doing that the Applicant made an illogical and ill advised application (High Court Action 2016-HC-DEM-CIV-CD-132) to have the Court appoint a third Arbitrator to an Arbitration Tribunal that had already handed down its decision.

That application could not legally have been granted for the obvious reason that that Arbitration Tribunal's tenure had come to an end.

The application ought to have been dismissed.

Nevertheless, the Court continued to entertain the Action, apparently as an application to appoint a new Arbitration Tribunal despite the fact that there was no such application made in the Action nor any evidence that the parties consented in any manner or form to designate the Court the Appointing Authority to appoint an Arbitration Tribunal.

It is also noted that there is no Order of Court specifically appointing Mr. Edward Gonsalves as an Arbitrator.

As stated before the Ministry of Agriculture nor the Respondent herein did not participate in this process nor the subsequent consideration of the claims by the purported Court appointed Arbitration Tribunal.

It is noted also that the rubric of this Action embodies an application for "Appointment of an Arbitrator".

In these circumstances the Court finds that the Arbitration Tribunal that made the award was improperly convened and therefore any award made by that Tribunal is consequently invalid.

CONCLUSION:

The Court finds that the arbitration award has been improperly procured having been determined by an improperly formed/ appointed Arbitration Tribunal and is therefore set aside pursuant to section 12 of the Arbitration Act; CAP 7:03.

This Application is refused in its entirety with costs to the Respondent in the sum of \$200,000.00.

Justice N. A. Singh