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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 13th December, 2017
Pronounced on: 18th December, 2017

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O.M.P. (T) (COMM.) 106/2017 & IA No.14824/2017

D.K. GUPTA & ANR.

..... Petitioners

Through : Mr.Shashank Garg, Advs. and
Ms.Aakansha Kaul, Advs. for P-1
Mr.Ashish Virmani, Adv. for P-2

versus

RENU MUNJAL

..... Respondent

Through : Mr.Sanjeev Narula and Mr.Ajay
Sondhi, Advs.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is filed seeking termination of mandate of the learned arbitrator, on the plea the respondent is ineligible to act as an arbitrator, in terms of Schedule VII of the amended Arbitration and Conciliation Act, 1996 and as a *sequitur*, is also ineligible to even appoint/nominate an arbitrator in terms of the judgment of the Supreme Court in *TRF Ltd. v. Energo Engineering Projects Ltd.*, (2017) 8 SCC 377. It is urged since the ineligibility of the purported arbitrator is a *de jure* ineligibility which goes to the root of the appointment of the arbitrator, the instant petition has been filed as the arbitrator lacks the inherent jurisdiction to proceed any

further. It is alleged the plea of inherent lack of jurisdiction can be raised at any stage, and even at the stage of execution.

2. The learned counsel for the petitioner has referred to the following paragraphs in *TRF Ltd.* (supra) to press his point :-

“11. We have referred to both the provisions to appreciate the change in the fundamental concept of grounds for challenge. The disclosures to be made by the arbitrator have been made specific and the disclosures are required to be made in accordance with the Sixth Schedule to the amended Act. The Sixth Schedule stipulates, apart from others, the circumstances which are to be disclosed. We think it appropriate to reproduce the same:

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54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it

differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

3. Learned counsel for the petitioner then referred to the agreement dated 2nd September, 2013 between the parties especially Clause 8.9.4 which is noted as under:-

“8.9 Arbitration

xxxx xxxx

8.9.4 The arbitration shall take place before Sole arbitrator, to be appointed by the Lender. The arbitral award shall be rendered in English Language.”

4. It is argued clause 8.9.4 above of the agreement gives a right to the lender to appoint an arbitrator and hence she has appointed Mr. Justice Dilip Raosaheb Deshmukh (Retd.), who per *TRF*(supra) has now become ineligible to act, hence his mandate be terminated.

5. It is also alleged though the declaration has been made by the learned arbitrator but is not confirming to VIth Schedule of the Arbitration and Conciliation Act, 1996, as amended, inasmuch as the learned arbitrator has not disclosed as to his previous experience, including experience with arbitrations; number of ongoing arbitrations, especially where respondent is involved etc. It is thus argued per *TRF Ltd.* (supra) if the lender is ineligible so would be her nominee arbitrator and hence the arbitrator has become *de jure* ineligible to perform his functions and be removed.

6. Before proceeding further, let me here refer to the arbitration clause in *TRF Ltd.* (supra) which runs as under :

“33. Resolution of dispute/arbitration

xxx

(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of Buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.”

7. A bare perusal of the clause above would reveal the sole arbitrator appointed was a Managing Director of the buyer viz its employee and hence per VIIth Schedule was not eligible and hence if the Managing Director was ineligible, so was the person nominated by the Managing Director.

8. However the arbitration clause pertaining to this case is on a different note. Here an arbitrator so appointed is not an employee of a party to the agreement. The arbitration clause herein rather gives a choice to one of the parties viz a lender to appoint an arbitrator. Thus perhaps is a striking difference between the two arbitration clauses viz., clause 33 of *TRF Ltd.* (supra) and clause 8.9.4 of the agreement dated 02.09.2013 herein. In *TRF Ltd.* (supra) the Managing Director of the buyer, being an employee of the buyer in a way represents the buyer itself, which is not the case here. Admittedly there exist no bar under the Act which restrains a party to appoint an Arbitrator. Rather section 11(2) of the

Arbitration and Conciliation Act, 1996 empowers the parties to agree on a procedure for appointment of an arbitrator, which exactly is the situation here. Section 11(2) is reproduced as under:-

*“11. Appointment of arbitrators - ...
(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.”*

9. When there exists no prohibition in the Act for a party to appoint an arbitrator, then a lender or a buyer, per any agreement, may have a right to choose an arbitrator, as even noted in para 17 of *TRF* (supra) as under : -

*“17. First we shall address the issue whether the Court can enter into the arena of controversy at this stage. It is not in dispute that the Managing Director, by virtue of the amended provision that has introduced sub-section (5) to Section 12, had enumerated the disqualification in the Seventh Schedule. It has to be clarified here that the agreement had been entered into before the amendment came into force. The procedure for appointment was, thus, agreed upon. **It has been observed by the designated Judge that the amending provision does not take away the right of a party to nominate a sole arbitrator, otherwise the legislature could have amended other provisions.** He has also observed that the grounds including the objections under the Fifth and the Seventh Schedules of the amended Act can be raised before the Arbitral Tribunal and further when the nominated arbitrator has made the disclosure as required under the Sixth*

Schedule to the Act, there was no justification for interference. That apart, he has also held in his conclusion that besides the stipulation of the agreement governing the parties, the Court has decided to appoint the arbitrator as the sole arbitrator to decide the dispute between the parties.”

10. Moreso, the petitioner’s challenge to ineligibility of the learned Arbitrator, even otherwise, is not maintainable at this belated stage in view of **proviso** to Section 12(5) which runs as under :

“Grounds for challenge. -

(5) xx xxx

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

11. The proviso clarifies the applicability of sub section 5 of Section 12 can be waived by an express agreement in writing. The procedural order No.1, dated 23.09.2016 records *at the very outset, the learned counsel for the parties acting on instructions from the parties stated that they have no objection on any ground whatsoever to his appointment as a sole arbitrator.* The learned Arbitrator has declared he has no interest in any of the parties or in the subject matter of the dispute.

12. Admittedly the petitioner has filed pleadings under their signatures/documents; has been appearing before the learned Arbitrator in conduct of the arbitral proceedings and has never

raised such objections till at the fag end of the proceedings and thus has no right now to allege the arbitrator has become ineligible.

13. In *Bharat Braodband Network Ltd. V. United Telecoms Ltd.* MANU/DE/4062/2017 decided by the coordinate Bench of this Court it was held :

“In the present case, in my opinion the three conditions that have been laid down by the Supreme Court in TRF Ltd. (supra) were fulfilled. The petitioner, knowing fully well that the arbitrator suffered from an ineligibility in terms of Section 12(5) of the Act proceeded to nominate him as a Sole Arbitrator after the disputes had arisen between the parties and the Respondent concurred in such appointment and even proceeded to file its Statement of Claim before the Arbitrator. Though it was contended that the appointment was made before the decision in TRF Ltd., this would not help the petitioner inasmuch as TRF Ltd. (supra) only applied Section 12(5) of the Act to the facts of the case therein. Petitioner cannot claim ignorance of Section 12(5) of the Act when it had proceeded to appoint the arbitrator and then turn around to challenge the appointment once it finds that the arbitration proceedings are not taking the direction it would like.

16. The appointment was accepted by the respondent who even proceeded to file the Statement of Claim before such arbitrator, without objections to his appointment or jurisdiction. Therefore, the disputes having arisen between the parties, both parties

waived the applicability of Section 12(5) of the Act. The appointment being in writing and the filing of the Statement of Claim without any reservation also being in writing, in my opinion, in the facts of the case, the same would amount to an express agreement in writing as required under proviso to Section 12(5) of the Act.”

14. In view the law above and also the facts being different than of TRF (*supra*) no case for termination of the mandate of Mr.Justice Dilip Raosaheb Deshmukh (Retd.), is made out on a plea he has now become ineligible by virtue of an amendment. Nevertheless, since the petitioner insists on a declaration strictly in compliance of VIth Schedule of the Act, the learned arbitrator should file the same before proceeding further.

15. Copy of the order be given *dasti* to learned counsel for the parties.

16. The petition along with the pending application is disposed of.

YOGESH KHANNA, J

DECEMBER 18, 2017

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