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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 14th November, 2018

+ O.M.P. (COMM) 427/2018 & IAs 13902/2018 & 15509/2018
LT COL H.S. BEDI (RETD) & ANR.

..... Petitioners

Through: Mr.Sandeep Sethi, Sr. Adv. with
Mr.Ashim Vaccher, Adv.

versus

STCI FINANCE LIMITED

..... Respondent

Through: Mr.Rajshekhar Rao,
Mr.Abhishek Aggarwal,
Mr.Abhinav Mukhi &
Mr.Sameer Dawar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioners challenging the Arbitral Award dated 14.09.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Loan Agreement dated 28.09.2013 executed between the parties.

2. The limited ground of challenge to the Arbitral Award is on the constitution of the Arbitral Tribunal. It is contended by the learned senior counsel for the petitioners that the Sole Arbitrator was not appointed in accordance with the Arbitration Agreement between the

parties and therefore, all proceedings conducted by him culminating in the Impugned Award are a nullity. He has placed reliance on the Judgment of the Supreme Court in ***Dharma Prathishthanam v. Madhok Construction (P) Ltd.***, (2005) 9 SCC 686 in support of this contention. The learned senior counsel for the petitioners submits that the Arbitration Agreement between the parties required the disputes to be referred to a Sole Arbitrator and incase of any disagreement between the parties on the appointment of the Sole Arbitrator, for it to be referred to a three member Arbitral Tribunal. As the petitioners did not concur on the appointment of a Sole Arbitrator, the disputes should have been referred to a three member Arbitral Tribunal. The petitioner should have filed an application under Section 11 of the Act seeking appointment of a Sole Arbitrator. He places reliance on the Judgment of the Supreme Court in ***Datar Switchgears Ltd. v. Tata Finance Ltd. and Another***, (2000) 8 SCC 151, to contend that the petitioners could have, infact, appointed its nominee Arbitrator till the filing of the petition under Section 11 of the Act by the respondent. He submits that in any case, the respondent has not been given the power to unilaterally appoint a Sole Arbitrator.

3. On the other hand, the learned counsel for the respondent submits that the Arbitration Agreement between the parties contemplates appointment of a Sole Arbitrator for adjudicating the disputes that may arise between the parties in relation to the Loan Agreement. It is only incase of a disagreement on the name of the Sole Arbitrator that the Arbitration Agreement provides for the reference of the disputes to a three member Arbitral Tribunal. In the present case, the petitioners

never expressed their disagreement on the name of the proposed Arbitrator and therefore, the occasion for the appointment of a three member Arbitral Tribunal never arose. Relying upon the Judgment of the Karnataka High Court in ***Basai Steels Pvt. Ltd. and Ors. v. Gobins India Engineering Pvt. Ltd and Ors.***, MANU/KA/1006/2017, he submits that Section 11 of the Act is, infact, to be invoked by the party who disagrees with the suggested name of the Arbitrator. It was, therefore, for the petitioners to have filed an application under Section 11 of the Act incase the petitioners disagreed on the name of the proposed Arbitrator. As far as the Judgment of the Supreme Court in ***Dharma Prathishthanam*** (Supra) is concerned, he submits that the said Judgment would not be applicable as it relates to Section 8 of the Arbitration Act, 1940, which is distinct from Section 11 of the Act.

4. I have considered the submissions made by the learned counsels for the parties.

5. The Arbitration Agreement between the parties is contained in Clause 21.10(ii) of the Loan Agreement and is reproduced hereinbelow:-

“21.10 Jurisdiction / Arbitration

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(ii) Arbitration:

(a) If any dispute or difference arises between the Parties hereto during the subsistence of this Agreement or thereafter, in connection with the validity, interpretation, termination, implementation or alleged breach of any provision of this Agreement or regarding any question relating hereto the Parties hereto shall endeavour to settle such dispute or difference

amicably. In the event that they are unable to agree to an amicable solution to the dispute or difference within a period of 30 (thirty) days, from rising of the dispute or difference, such dispute or difference shall be by arbitration of a sole Arbitrator or in case of disagreement as to the appointment of the sole Arbitrator, to three (3) arbitrators, out of which STCI shall appoint one Arbitrator and the Borrowers shall appoint the second arbitrator and the third arbitrator shall be appointed by the two appointed arbitrators. The cost of arbitration shall be shared equally.

(b) The arbitration proceedings shall be governed by the provisions of (Indian) Arbitration and Conciliation Act, 1996. The place of the arbitration shall be Mumbai. The proceedings of arbitration shall be in the English language.”

6. A reading of the above Clause would indicate that the parties have agreed to refer their disputes for adjudication to a Sole Arbitrator and in case of a disagreement as to the appointment of the Sole Arbitrator, to a three member Arbitral Tribunal.

7. In the present case, the respondent vide its letter dated 11.05.2016, while invoking the Arbitration Agreement between the parties, proposed the name of a Sole Arbitrator to be appointed. The notice further states as under:-

“13.....

That Our Client tried to settle the matter in terms of the Agreement, however, since Our Client and you the Addressees could not arrive at a settlement, Our Client has invoked the arbitration clause and in terms of Clause 21.10(ii) appoints Mr. Justice R.C Chopra (Retd.), as an Arbitrator for adjudication of disputes.

By the present notice, you, the above Addressees are hereby called upon to accord your consent/disagreement to the proposed Arbitrator within 30 days of receiving this notice. In case of a disagreement the arbitration clause provides for appointment of 3 arbitrators, out of which Our Client shall appoint one Arbitrator, you shall appoint the second arbitrator and the third arbitrator shall be appointed by the two appointed arbitrators. In case Our Clients do not receive a response within 30 days of receipt of Notice, it shall be construed that you have accorded your consent towards appointment of Mr. Justice R.C. Chopra (Retd), as a Sole Arbitrator for adjudication of disputes.”

(Emphasis supplied)

8. A reading of the above notice would show that the respondent was aware that it requires the consent of the petitioners for the appointment of the proposed Arbitrator. However, it on its own put a condition on the petitioners that incase the petitioners do not respond to the notice, it shall be construed that they have consented to the name of the Sole Arbitrator to be appointed as such. This was a unilateral condition being put by the respondent on the petitioners without any backing in the Contract or in Law.

9. The petitioners did not respond to the above notice and the proposed Arbitrator, vide his letter dated 21.11.2016, entered upon the reference. The petitioners immediately challenged the mandate and the jurisdiction of the Arbitrator by filing an application under Section 16 of the Act. The same was, however, dismissed by the Arbitrator vide his order dated 24.05.2017, *inter alia* observing as under:-

“15. The receipt of the aforesaid Notice dated 11.05.2016 is not disputed by the Respondents. It is also not disputed that they did not send any reply to the said Notice conveying their disagreement or naming 2nd Arbitrator for constitution of 03-member Arbitral Tribunal. To my mind by not conveying their disagreement to the name of the Sole Arbitrator and by not nominating 2nd Arbitrator to convey their intention to constitute a multi-member Arbitral Tribunal, the Respondents implicitly agreed to the named Arbitrator to act as Sole Arbitrator for adjudication of the disputes between the Parties. The Respondents had therefore impliedly agreed to the named Arbitrator to act as Sole Arbitrator.”

10. The Arbitrator has thereafter proceeded to pass the Impugned Award.

11. In ***Dharma Prathishthanam (Supra)***, the Supreme Court was faced with a similar situation where the failure of the appellant therein to respond to the notice invoking arbitration was considered by the Arbitrator as consent on his appointment. The Supreme Court considered this issue in detail and held as under:-

“7. An arbitrator or an Arbitral Tribunal under the Scheme of the 1940 Act is not statutory. It is a forum chosen by the consent of the parties as an alternate to resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the Court is settlement of the dispute by a Tribunal of the own choosing of the parties. Further, this was not a case where the arbitration clause authorized one of the parties to appoint an arbitrator without the consent of the other. Two things are, therefore, of essence in cases like the present one: firstly, the choice of the Tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator.

Both should be based on consent given either at the time of choosing the Arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The Law of Arbitration does not make the arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.

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12. On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. In case of arbitration without the intervention of the court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the court and proceed to act unilaterally. A unilateral appointment and a unilateral reference — both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the

party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edn., p. 104)—

“An arbitrator is neither more nor less than a private judge of a private court (called an Arbitral Tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; ... He is private insofar as (1) he is chosen and paid by the disputants, (2) he does not sit in public, (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy, (4) so far as the law allows he is set up to the exclusion of the State courts, (5) his authority and powers are only whatsoever he is given by the disputants' agreement, (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with.”

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*25. Failure to give consent or to appoint an arbitrator in response to a notice for appointment of an arbitrator given by the other party provides justification to the other party for taking action under sub-section (2) of Section 8 of the Act and then it is the court which assumes jurisdiction to appoint an arbitrator as held by the High Court of Orissa in *Niranjan Swain v. State of Orissa*.*

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27. In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside dehors the provisions of

Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon. This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice.

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31. Three types of situations may emerge between the parties and then before the court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language, then the parties and the court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of the law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise. Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them beforehand; the consent is already spelled out and binds the parties and the court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the court and seek an order of reference to the arbitrator appointed by the parties. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference — both shall be by

the consent of the parties. Where the parties do not agree, the court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to the respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of court for appointment of an arbitrator and an order of reference of disputes to him. It is the court which only could have compelled the appellant to join in the proceedings.”

12. A reading of the Judgment clearly shows that unless the Arbitration Agreement itself provides for and empowers one of the parties to the Agreement to appoint an Arbitrator, the Arbitrator can be appointed only with the concurrence and consent of both the parties. Any unilateral appointment of an Arbitrator would be void *ab initio*. Mere inaction by a party called upon by the other one to act cannot lead to an inference as to implied consent or acquiescence of such party to such appointment of Arbitrator.

13. I cannot agree with the submission of the learned counsel for the respondent that the position would change under the 1996 Act. Sub-Section(2) to sub-Section (6) of Section 11 of the Act are reproduced hereinunder:-

“11. Appointment of arbitrators.—(1) xxxxxx.

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

(3) Failing any agreement referred to in sub-section (2), in an

arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

14. Sub-Section 4 and 6 of Section 11 of the Act are preconditioned on the failure of the party to act in accordance with the appointment procedure as required by the Arbitration Agreement. The failure of a party to act, therefore, only empowers the other party to approach the Court by way of an Application under Section 11 of the Act and no

further. It is a party not in breach of the Arbitration Agreement or either of them in case of mutual failure to arrive at a consensus, who can or would file an application under Section 11 of the Act. A party to the Agreement, unless otherwise agreed in advance, cannot deem consent of the other out of failure to act. The Act has given a consequence and remedy on such failure of a party to act. Therefore, unless obligated by the Contract or by the Statute, such failure cannot be construed as consent to the appointment as proposed by the other party.

15. The Arbitration Agreement between the parties also provides for the consequence of a disagreement between the parties on a Sole Arbitrator. It does not, however, provide for the mode in which such disagreement has to be expressed. There is also no time limit specified in the Agreement which was conveying such disagreement. Therefore, unless expressly consented, such disagreement has to be inferred.

16. The Judgment of the Karnataka High Court would also not apply to the facts of the present case inasmuch as unlike in that case, the petitioners had challenged the jurisdiction of the Arbitrator by filing an Application under Section 16 of the Act at the very inception of the arbitration proceedings. The petitioners therefore, never waived their challenge or acquiesced in the appointment of a Sole Arbitrator.

17. In view of the above, as the appointment of the Arbitrator and reference of the disputes to him are void *ab initio*, his Impugned Award cannot be sustained and is set aside. The parties shall bear their own costs.

18. The parties will be free to initiate any legal proceeding to seek enforcement of their rights in accordance with law.

NAVIN CHAWLA, J

NOVEMBER 14, 2018/rv