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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.319 OF 2019

Mangalam Chaudhary Company.)
A Sole proprietary concern, Proprietor,)
through its Proprietor J.P. Chaudhary,)
having its address at Post Mahi, Taluka)
Vedgam, District Banaskantha,)
Gujarat – 385 210.) ...Petitioner

....Versus....

Hindustan Construction Company Ltd.)
A company incorporation under the)
Companies Act, 1956 and having its office)
at Hincon House, 11th Floor, 247 Park,)
Lal Bahadur Shasri Marg, Vikhroli (West))
Mumbai – 400 083, Through its Managing)
Director having address at : “HINCON”)
House, L.B.S. Marg, Vikhroli (West))
Mumbai – 400 083.) ...Respondent

Mr.Kedar J. Patil for the Petitioner.

Mr.Piyush Raheja with Ms.Manasvi Shah & Mr.Rjutruraj V. Bankar i/b
M/s.Lex Legal & Partners for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 11TH SEPTEMBER, 2019.

ORAL JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996, the petitioner has impugned the award dated dated 8th October, 2018 thereby rejecting the claims made by the petitioner with costs quantified at Rs.3,01,147/- with interest at the rate of 12% p.a. from the date of passing of the award till realization.
2. The respondent was awarded the contract for the

construction of a road by the Government of Gujarat at Gujarat Highway Package – GSHP – 6 Project of SH41 from Mahsana to Palanpur. The respondent in turn awarded the said contract in favour of the petitioner for part of the work by a work order dated 14th May, 2003. Dispute arose between the parties. The petitioner raised a demand for various amounts from the respondent. The respondent appointed an arbitrator under clause 17 of the contract entered into between the parties. The matter proceeded with before the learned arbitrator appointed by the respondent. In view of the allegations made by the petitioner against the first arbitrator, learned arbitrator resigned. The respondent thereafter appointed second arbitrator to adjudicate upon the dispute filed by the petitioner. Learned second arbitrator also resigned. The respondent thereafter appointed the third arbitrator on 3rd November, 2017. On 18th November, 2017, the petitioner through its advocate's letter to the learned arbitrator raised an objection that the respondent could not appoint the learned arbitrator unilaterally who might be associated with the respondent in the past or present as the dispute was required to be referred to an independent, unbiased and unassociated person. The petitioner refuses to give a consent to the appointment of the third arbitrator in the said letter.

3. Learned third arbitrator thereafter held a meeting on 27th November, 2017. None appeared for the petitioner before the learned arbitrator. In the said meeting, the learned arbitrator gave directions and directed the petitioner to remain present in the next

proposed meeting proposed to be held on 15th December, 2017. Learned arbitrator also in paragraph 4 of the minutes of meeting made disclosure under section 12 of the Arbitration & Conciliation Act 1996, that there were no circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Learned arbitrator disclosed that in past three years, he was appointed as the sole arbitrator on one occasion by the respondent company.

4. The matter was adjourned from time to time by the learned arbitrator to enable the petitioner to remain present and to proceed with the matter. The petitioner however, did not remain present before the learned arbitrator. The respondent was present all through out before the learned arbitrator. Learned arbitrator accordingly considered the claim and rendered an award rejecting the claims made by the petitioner with costs.

5. Learned counsel appearing for the petitioner invited my attention to some of the correspondence exchanged between the petitioner and the learned arbitrator and would submit that the learned arbitrator was not appointed by the Managing Director and Chairman of the respondent and thus his appointment under the arbitration clause was not valid. It is submitted that no disclosure was made by the learned arbitrator under section 12 (1) of the Arbitration & Conciliation Act, 1996. In support of this submission, learned counsel invited my attention to the letter dated 18th November, 2017 addressed by the petitioner through its advocate to the learned

arbitrator.

6. Learned counsel also placed reliance on section 12(5) of the Arbitration Act and would submit that since the learned arbitrator was not qualified to be appointed as an arbitrator in view of the case of the learned arbitrator falling under the Seventh Schedule, his appointment was illegal. It is submitted that since the appointment of the third arbitrator was on 3rd November, 2017, the provisions of section 12 duly amended by the Amendment of 2015 was applicable to the learned arbitrator which came into effect from 23rd October, 2015. It is submitted by the learned counsel that though the respondent had obtained no dues certificate from the respondent under duress and coercion, the learned arbitrator over looked this aspect and rejected the claims made by the petitioner.

7. Mr.Raheja, learned counsel for the respondent on the other hand would submit that under clause 17 of the contract which recorded the arbitration agreement, power to appoint vests in the appointing authority mentioned therein. He invited my attention to the letter addressed by the petitioner itself and would submit that the petitioner had admitted that under clause 17 of the Standard Conditions of the Work Order, learned arbitrator could be appointed by the company itself or by the Managing Director or the Chairman. He submits that the objection raised by the petitioner was at most under section 12(5) of the Arbitration Act in the letter addressed by the petitioner's advocate on 18th November, 2017.

8. Learned counsel for the respondent invited my attention to the minutes of the first meeting held by the learned arbitrator and would submit that in the said meeting itself, the learned arbitrator had disclosed under section 12(1) of the Arbitration Act that he was only appointed once by the respondent as an arbitrator in last three years. There was no circumstances which would give rise to justifiable doubts as to his independence or impartiality. He submits that the remedy of the petitioner, if any, to challenge the appointment of the learned arbitrator was under section 13 of the Arbitration Act which the petitioner admittedly failed to exercise.

9. It is submitted by the learned counsel that since the arbitral award in this case has commenced prior to 23rd October, 2015, reliance placed by the learned counsel for the petitioner on section 12(5) of the Arbitration Act duly amended would not apply to the facts of this case. He strongly placed reliance on section 87 inserted by Arbitration & Conciliation (Amendment) Act, 2019 and would submit that in view of section 87, section 12(5) would not apply to the facts of this case.

10. It is submitted by the learned counsel that the learned arbitrator has not proceeded with the matter *ex-parte* but has after giving ample opportunities to the petitioner to remain present formulated the points for determination and considered the statement of claim filed by the petitioner and the documents relied

upon and has rendered various findings of fact while rejecting the claims made by the petitioner which are not perverse.

11. It is submitted that since the petitioner remained absent before the third arbitrator, and remained absent before the first arbitrator for the purpose of cross-examination, the learned arbitrator considered the evidence already placed on record by the petitioner and held that the petitioner had failed to prove that “No Claim Certificate” signed by the petitioner was under duress or coercion and rightly rejected the said plea raised by the petitioner.

12. Learned counsel for the petitioner in rejoinder submits that the petitioner had also addressed a letter to the learned arbitrator on 1st February, 2018 through its advocate and had pressed in service section 12 read with 7th Schedule of the Arbitration & Conciliation (Amendment) Act, 2015. He submits that since the learned arbitrator has not disclosed his interest in the matter, he was disqualified. Learned counsel also invited my attention to some of the grounds raised in the arbitration petition and would submit that in view of section 12 (1)(a) read with Seventh Schedule of the Arbitration & Conciliation Act, 1996, learned arbitrator was disqualified and was not competent to make any award.

13. It is not in dispute that the arbitral proceedings were initiated pursuant to the notice of demand raised by the petitioner and for invocation of the arbitration agreement prior to 23rd October, 2015.

The first two arbitrators were appointed prior to 23rd October, 2015. The petitioner had participated in the arbitral proceedings before the first arbitrator and also examined a witness. The witness of the petitioner however, did not choose to remain present for the purpose of further cross-examination. In view of the allegations made by the petitioner against the first arbitrator, the first arbitrator resigned. The respondent thereafter appointed the second arbitrator who also resigned. Insofar as the appointment of the third arbitrator is concerned, he was appointed by the respondent on 3rd November, 2017. A perusal of the correspondence exchanged between the respondent and the petitioner indicates that it was the case of the petitioner itself that the learned arbitrator could be appointed either by the respondent or the Managing Director and the Chairman of the respondent.

14. Be that as it may, learned arbitrator had disclosed his interest in the first arbitral meeting itself under section 12(1)(a) of the Arbitration & Conciliation Act, 1996. A perusal of the minutes of the said meeting dated 27th November, 2017 clearly indicates that the learned arbitrator had made it clear that there was no justifiable doubts as to his independence or impartiality. Learned arbitrator also disclosed that he was appointed in the last three years by the respondent as a sole arbitrator once only. The petitioner could challenge the appointment of the learned arbitrator on the grounds set out in section 13 of the Arbitration & Conciliation Act, 1996 within the time prescribed in the said provision. The petitioner admittedly

did not file any such application and refused to participate in the arbitral proceedings without any justification. The petitioner thus cannot be allowed to urge this ground at this stage under section 34 of the Arbitration Act.

15. Insofar as the provisions of section 12(1)(a) of the Arbitration & Conciliation Act, 1996 pressed in service by the petitioner in the correspondence as well as in the arbitration petition is concerned, in view of disclosure made by the learned arbitrator that he was not appointed more than once in last three years as the sole arbitrator and in view of the petitioner not having followed the challenge procedure under section 13, the learned arbitrator was not disqualified under section 12(1)(a) read with 7th Schedule of the Arbitration & Conciliation Act, 1996. Even otherwise the disclosure made by the learned arbitrator did not fall under any of the grounds giving rise to justifiable doubts as to independence or impartiality of the learned arbitrator falling under Fifth or Seventh Schedule.

16. In my view, since the arbitral proceedings had commenced prior to 23rd October, 2015, in view of section 87 inserted by Arbitration & Conciliation (Amendment) Act, 2019 which states that unless otherwise parties agree, the amendments made to the Arbitration Act by the Arbitration (Amendment) Act, 2015 would not apply to the arbitral proceedings commenced before the commencement of the Arbitration & Conciliation (Amendment) Act, 2015, the amended provisions of section 12(5) amended on 23rd

October, 2015 would not apply to the facts of this case. Fifth and Seventh Schedule accordingly were not applicable to the facts of this case at all. In view of section 43 read with section 21, arbitral proceedings had commenced when the request for appointment of arbitrator was received by the respondent in the year 2007. Arbitral proceedings were not commenced in 2017 when the third arbitrator was appointed. In my view the parties to this case were thus governed by unamended provisions as were in force prior to 23rd October 2015. Supreme Court in case of Rajasthan Small Industries Corporation Ltd. vs. Ganesh Containers Movers Syndicate (2019) 3 SCC 282 has held that the provisions of Amendment Act, 2015 shall not apply to the arbitration proceedings commenced in accordance with the provision of section 21 of the Arbitration & Conciliation Act, 1996 before the commencement of the Amendment Act, 2015 unless the parties otherwise agree.

17. A perusal of the record clearly indicates that the learned arbitrator gave ample opportunities to the petitioner to remain present and to proceed with the matter. The petitioner remained absent before the learned arbitrator. Though the petitioner was absent, the learned arbitrator framed various issues set out in paragraph 30 of the arbitral award and after considering the pleadings, documents and the evidence led by the parties has rendered various findings of fact. It is held by the learned arbitrator that the petitioner had failed to prove that there was any coercion or undue influence upon the petitioner for signing “No Claim Certificate”.

18. If the argument of the learned counsel for the petitioner is accepted that the arbitral proceedings was commenced on 3rd November, 2017, the same would be contrary to section 43 read with 21 of the Arbitration & Conciliation Act, 1996 and in that event all the claims of the petitioner which were for the period prior to 2007 would be *ex-facie* barred by law of limitation.

19. In my view the petition is devoid of merit and is accordingly dismissed. There shall be no order as to costs.

(R.D. DHANUKA, J.)