

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date 01.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.191 of 2020

K.Jeganathan,
S/o.D.Kumarasamy,
R/o 2/177, Thilagar Avenue,
1st Main Road, Balaiah Garden,
Madipakkam, Chennai – 600 091. Petitioner

Versus

1. Mr.P.Sampath,
S/o.Late V.K.Parthasarathy,
R/o Plat No.A-118 B, Sector – 35, Noida,
Gautam Budh Nagar, Uttar Pradesh 201 307.

and also through -
General Power of Attorney Holder of Mr.P.Sampath
Mr.P.Srinivasan

S/o. Late V.K.Parthasarathy
R/o Flat No.105, Kailash Apartments, First Floor,
AD Block, Plot No.75 & 76, Shanti Colony,
5th Avenue, Anna Nagar, Chennai 600 040.

2. Mr.S.S.Mariappan,
Sr. Civil Judge (Retired)
No.6, M.T.H. Road DABC Complex, 3rd Floor,
Villivakkam, Chennai – 600 049.

[Second respondent impleaded as per Order dated

18.03.2020 in A.No.1198 of 2020 and time extended
as per Order dated 14.07.2020.]

. . . Respondents

PRAYER : Petition filed under Order 1 Rule 10(2) of C.P.C. R/w. Section 14(2) and Section 11(6) of Arbitration and Conciliation Act, 1996,

- a. To terminate the mandate of Mr.S.S.Mariappan
- b. Appoint an Independent Sole Arbitrator to resolve the dispute between the petitioner and respondents as per the loan agreements dated 30.01.2017, 05.02.2018, 08.02.2018.

For Petitioner : Mr.R.Julian

Respondents : Mr.Shivakumar

ORDER

This application has been filed to terminate the mandate of the sole arbitrator appointed by the respondent herein to adjudicate the dispute arose between the parties out of the loan agreement dated 31.10.2019.

2. The main contention of the applicant is that the arbitrator has been unilaterally appointed by the respondent. A party to the agreement would be disentitled for appointment of an arbitrator on his own and it would always be

available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator. Further it is his contention that applicability of Section 12 (5) of the Act cannot be waived of by the express agreement written after the dispute has arisen.

3. The respondent took a stand that the appointment of the arbitrator is in pursuant to the loan agreements entered between the parties and the parties have agreed to refer the dispute to the arbitrator. There is no violation of Section 12(5) of the Act. It is his contention that the petitioner is very much aware about the Amended Act. Further, he had entered into the contract and signed the contract. Besides, the learned arbitrator has also given a declaration dated 02.08.2019. Hence, it is his main contention that the learned arbitrator appointed by the respondent will not become ineligible to adjudicate the dispute.

4. The learned counsel appearing for the applicant has also submitted in his submissions that unilateral appointment is void under section 12(5) of the Act. Besides there is no express waiver of Section 12(5) of the Act and there is no agreement in written after the dispute raised between the parties. Challenging the

procedure under section 13 will not apply to the facts of this case and the remedy is given under section 12 of the Act to terminate the mandate of the arbitrator. He has also placed reliance upon the following judgments :

1. TRF Ltd. Vs. Energo Engineering Projects Ltd.

reported in **2017 (8) SCC 377**

2. Perkins Eastman Architects DPC and another

Vs. HSCC (India) Ltd. reported in **2019 SCC Online SC 1517**

3. Prodattur Cable TV Digi Services V. Sitti Cable

Network Ltd. reported in **2020 SCC Online Del 350** and

4. Bharat Broadband Network Ltd. Vs. United

Telecoms Ltd. reported in **2019 (5) SCC 755.**

5. The learned counsel for the respondent submitted that pursuant to the contract entered between the parties, as a dispute arose between them, an arbitrator has been appointed and infact the contract provides for appointment of the arbitrator and there is no unilateral appointment by the respondent. The amendment to Section 12(5) and Schedule VII of the Act do not take away the

right of appointment of one party to the arbitration agreement and the arbitrator has been appointed by the respondent. The learned arbitrator has also filed a declaration on 12.08.2019 and issued a notice for hearing to be held on 21.11.2019. Hence, it is his contention that in **Central Organization for Railway Electrification Vs. M/s.ECI-SPIC-SMO-MCKL (JV)** reported in **2019 SCC 1635**, the Honourable Supreme Court has even approved appointment of arbitrator from the panel of retired officers. Hence, it is his contention that once the contract provides for such appointment, it cannot be said that the arbitrator so appointed become de jure to perform his functions. Even in **Bharat Broadband Network Limited Vs. United Telecoms Limited** reported in **2019 (5) Supreme Court Cases 755**, the Apex Court has clearly stated that only in the event of violation of Section 12(5) read with Schedule VII of the Act, the arbitrator shall become ineligible to perform his functions. The above judgment also is not applicable to the facts of the present case. There is no ground to invoke Section 14 of the Act. Hence, prayed for dismissal of the application.

6. It is not disputed by both sides that the parties are governed by the agreements entered between them. It is relevant to extract the relevant clause in the agreements hereunder :

“Any dispute or difference concerning the interpretation, the terms and conditions of this agreement shall be decided by arbitration as provided for under the Arbitration and Conciliation Act, 1996 by sole Arbitrator to be nominated by the LENDER which shall be binding on the Borrower. Adjudication of any dispute in arbitration or otherwise shall be within the territorial limits of Chennai, in a Court of competent adjudication within the jurisdiction of Chennai.”

7. The declaration dated 02.08.2019 issued by the arbitrator has been filed in the typed set. In the declaration, though he has stated that no previous case engaged on behalf of the claimant, the nature of on going arbitrations precisely has not been given by him. He has given approximately 100 + cases and he has not given exact number of cases being handled by him.

8. Though the contract provides appointment of arbitrator by the Lender, in the judgment of the Apex Court in **TRF Ltd. Vs. Energo Engineering Projects Ltd.** reported in **2017 (8) SCC 377**, it has been held as follows :

“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.” (emphasis supplied)

9. Similarly, a very reading of the judgment in **Perkins Eastman Architects DPC V. HSCC (India)** reported in **2019 SCC Online SC 1517** makes it clear that the appointment of sole arbitrator unilaterally by one of the parties would be ineligible by operation of law. In **Central Organization for Railway Electrification Vs. M/s.ECI-SPIC-SMO-MCKL (JV)** reported in **2019 SCC 1635**, the Apex Court has held that even retired officers from the railway can be appointed as arbitrator since the parties are governed by the contract. The Apex Court has permitted such appointment, taking note of the modified General Conditions of the Contract which was amended later even after the Amended Act. Such contract was approved by the Apex Court mainly on the ground that since the respondent has given an option to select two names out of the panel, consisting of four names, the appointment of the arbitrator by the claimant can be counter

balanced by the power of choice given to the respondent. The Apex Court taking note of the both parties right to chose the arbitrator from the panel prepared by the railways and the General Conditions of the Contract, approved such appointment. Therefore, the facts of the judgment cannot be applied to the present case.

10. Whereas, in **Perkins Eastman Architects DPC Vs. HSCC (India)** reported in **SCC OnLine SC 1517**, the Apex Court has held as follows :

“21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute

resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution.”

11. In the light of the judgment of the Apex Court as only one party has right to appoint sole arbitrator, it will always have an element of exclusivity in determining or charting the course for dispute resolution.

12. Further, apart from the fact that the declaration given by the arbitrator also indicate that he is handling more than 100 cases, this Court is of the view that though the very appointment itself can be challenged and when there is violation

of Section 12(5) of the Act, it has to be decided only by the Court and not under section 13 as challenged before the same Arbitrator.

13. In such view of the matter, this Court hold that as the arbitrator has been appointed unilaterally contrary to the settled position of law, as per the dictum of the Honourable Supreme Court, the arbitrator has become de jure to perform his functions.

14. Accordingly, it is ordered as follows:

- i) the appointment of the arbitrator Mr.S.S.Mariappan is terminated.
- ii) Mr.V.Ramamurthy, District Judge [Retd.], No.4A, AURA Apartments, No.16, Boobly Raja Salai, K.K.Nagar, Chennai – 600 078 is appointed as the Arbitrator to enter upon reference and resolve the dispute.

iii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order.

iv) That the learned Arbitrator appointed herein shall be at liberty to fix his remuneration and other incidental expenses, which shall be borne by the parties equally.

15. This Original Petition is ordered accordingly, leaving the parties to bear their own costs.

Index : Yes / No
Internet: Yes
Speaking/non speaking order

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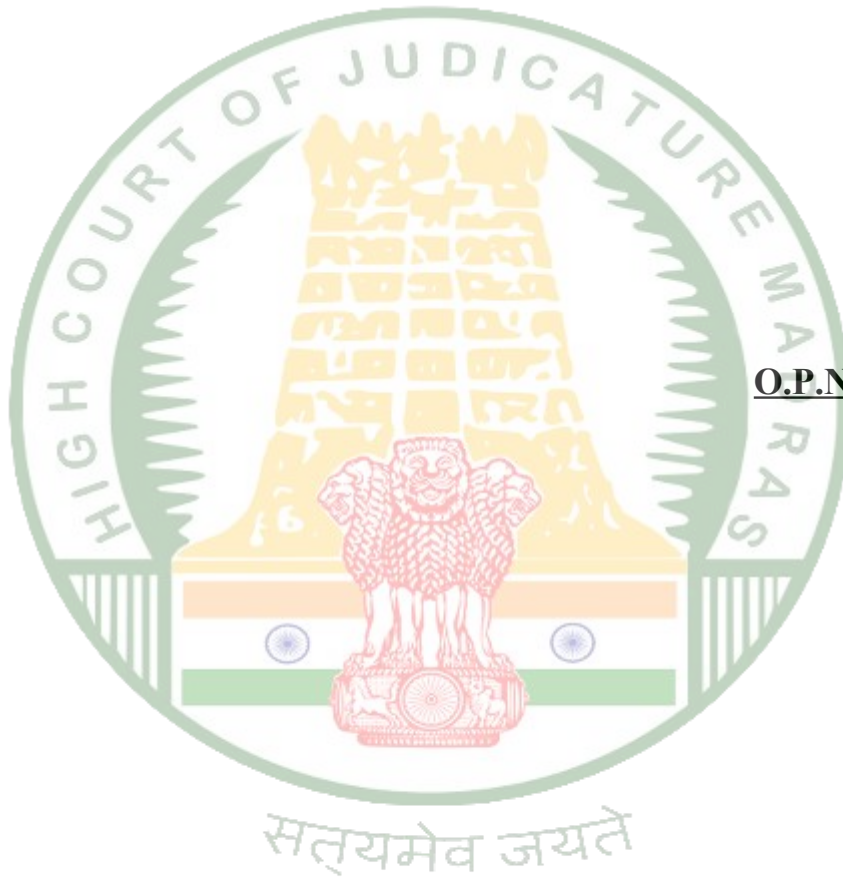
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N. SATHISH KUMAR, J.

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