

ORDER SHEET

AP 179 of 2020
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

SOHAN MINERALS AND MINING COMPANY
PRIVATE LIMITED
VS
STEEL AUTHORITY OF INDIA LIMITED

BEFORE:
The Hon'ble JUSTICE DEBANGSU BASAK
Date: 25th March, 2021.

(Via Video Conference)

Mr. Rohit Das,
Ms. Kishwar Rahman, Advs.
...for the petitioner
Mr. Supriya Basu, Sr. Adv.
Ms. Nicky Choudhury, Adv.
Ms. Sanchari Chakraborty, Adv.
Mr. Soumik Chakraborty, Adv.
...for the respondent

The Court: The present application is under Section 11(6) read with Sections 12, 14 and 15 of the Arbitration and Conciliation Act, 1996.

Learned advocate for the petitioner submits that, the parties were referred to arbitration where the learned Arbitrator is a retired employee of the respondent. On the petitioner coming to know of the judgment of the Supreme Court reported at **2019 SCC Online SC 1517 (Perkins Eastman Architects DPC & Anr. vs HSCC (India) Ltd.)** the petitioner applied before the learned Arbitrator questioning his appointment. Such application was rejected by an order of the learned Arbitrator on February 29, 2020. Thereafter, the petitioner approached this Court under Sections 11(6), 12, 14 and 15 of the Act of 1996.

Learned advocate appearing for the petitioner relies upon **(2019) 5 SCC 755 (Bharat Broadband Network Limited vs. United Telecoms Limited)** and submits that, since the learned Arbitrator is a retired employee of the respondent, and since the arbitration agreement allows the General Manager of the respondent to appoint the Arbitrator, the same is hit by Section 12(5) of the Act of 1996. The petitioner did not waive the objection to the appointment by an expressed agreement in writing subsequent to the disputes having arisen between the parties in terms of the proviso to Section 12(5) of the Act of 1996. Therefore, the learned Arbitrator is de jure incapable of proceeding with the arbitration. He submits that, therefore an arbitrator be appointed to arbitrate the dispute between the parties.

Learned senior advocate appearing for the respondent submits that, the petitioner participated in the arbitration proceeding unconditionally. The judgment of **Perkins Eastman Architects DPC & Anr. (supra)** was delivered on November 26, 2019. The petitioner did not approach the Arbitrator immediately thereafter. He refers to the minutes of the meeting of the Arbitrator. He submits that, the pleadings in the arbitration are complete. The respondent as the claimant examined the first witness and that such witness is under cross-examination. The plea therefore sought to be taken now is without any basis.

Learned senior advocate appearing for the respondent submits that, the learned Arbitrator made a disclosure which is page 312 of the petition. Such disclosure was made on July 12, 2019. The first reaction to that of the petitioner is a mail dated July 22, 2019 where the petitioner wanted

adjournment in the arbitration. He refers to the subsequent correspondence of the petitioner to the Arbitrator. He submits that despite the petitioner being represented by an advocate in the arbitration, the point under Section 12(5) was never raised by the petitioner till the filing of the application on January 3, 2020. Learned Arbitrator is competent to decide on his jurisdiction. Learned Arbitrator rejected the plea raised by the petitioner. The petitioner therefore is required to wait till the award. The present application is therefore not maintainable.

Learned senior advocate appearing for the respondent relies upon Section 76 of the Act of 1996. He submits that, the petitioner by the letter dated June 2, 2018, stated that, in the event the respondent failed to communicate the conclusion and/or termination of the conciliation proceeding within seven days of the receipt of the letter, the petitioner will reserve the right to treat the non-communication as termination. He submits that, respondent required the department to send a panel of arbitrators which the department did. A panel of three arbitrators were sent from which the present arbitrator was selected by the respondent. Therefore, according to him, there is no infirmity in the appointment of the Arbitrator.

Bharat Broadband Network Limited (Supra) considers the provisions of Section 12 to 15 and 17 of the Act of 1996 and is of the following view:-

“**14.** From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 [“the Amendment Act, 2015”], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any

circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time-limit laid down in Section 13(2). What is important to note is that the Arbitral Tribunal must first decide on the said challenge, and if it is not successful, the Tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.”

15. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non-obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, *subsequent* to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may *after* disputes have arisen between them,

waive the applicability of this sub-section by an “express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become *de jure* unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being *de jure* unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4

of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.”

Bharat Broadband Network Ltd. (supra) on consideration of the authorities on the subject is of the view that, if an Arbitrator being *de jure* unable to perform his function as he falls within any of the categories mentioned in Section 12(5) read with Seventh Schedule, the parties may apply to the Court, which will then decide on whether his mandate has terminated or not.

In the facts of the present case, the petitioner contends that the Arbitrator appointed is hit by the provisions of Section 12(5) of the Act of 1996. The Court is, therefore, required to decide whether the mandate of the Arbitrator stands terminated or not.

The Arbitrator made a disclosure which states that, the Arbitrator is a retired employee of the respondent.

The relevant clause of the arbitration agreement between the parties is as follows:-

“14.2. Appointment of Arbitrator: In the event of failure of conciliation, that dispute will be referred to an arbitral tribunal comprising a sole arbitrator to be appointed by the Director (RM&L) or the Director’s designated representative in respect of award of contract as follows:

When a party sends a Notice for Arbitration to the said authority, within a period of thirty days, a panel of three names suggested by the said authority, will be forwarded to the party demanding arbitration. The

party shall choose one of those persons, who will be appointed as the Sole Arbitrator.

In the event the party fails to intimate one of those persons within fifteen days from the date of intimation of the three names then said authority will be at liberty to appoint any one out of the said three persons as the Sole Arbitrator.

The Arbitrator(s) shall hear the cases independently and impartially and shall not represent the interest of any party. The Arbitrator shall, from the time of his appointment and throughout the arbitral proceedings and without delay, disclose to the parties in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. However, merely because he is or has been an employed by one of the parties, it shall not be disqualification for a person to be an arbitrator.”

It is not in dispute that the Arbitrator was appointed by the Director (RM&L) of the respondent. The Arbitrator, as noted above, is a retired employee of the respondent, as appearing from the disclosure made by the Arbitrator.

Perkins Eastman Architects DPC and Another (supra) takes into consideration **TRF Limited Vs. Energo Engineering Projects Limited** reported in **(2017) 8 SCC 377** and is of the following view:-

“**26.** The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in *Walter Bau AG* and the discussion on the point was as under:-

“9. While it is correct that in Antrix and Pricol Ltd., it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix, appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd., the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is *ex facie* valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a *fait accompli* to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is *non est* in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not

maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd., is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law.”

27. It may be noted here that the aforesaid view of the Designated Judge in Walter Bau AG was pressed into service on behalf of the appellant in TRF Limited and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed:-

“**32.** Mr. Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in Walter Bau AG, where the learned Judge, after referring to Antrix Corpn. Ltd., distinguished the same and also distinguished the authority in Pricol Ltd. v. Johnson Controls Enterprise Ltd. and came to hold that: (Walter Bau AG case, SCC p. 806, para 10) “10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. ...”

33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore.”

28. In TRF Limited, the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was

decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the Judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the Applicants.”

In the facts of the present case, therefore, the appointing authority suffers a disqualification under Section 12 of the Act of 1996. The Arbitrator suffers a disqualification under Section 12(5) of the Act of 1996 in view of the ratio of **Perkins Eastman Architects DPC and Another** (supra), The respondent cannot be permitted to present a *fait accompli* in the facts of the present case.

The correspondence exchanged between the parties do not establish that the petitioner waived its objection by express agreement. Participation in the arbitration proceeding *per se* does not qualify as an express agreement in writing to waive the objection under Section 12 (5) of the Act of 1996 by participating in the arbitration proceeding.

The appointment of the Arbitrator being *de jure* bad, is required to be declared as so. This, however, is not a reflection on the competence or the impartiality of the Arbitrator in any manner whatsoever.

Since there exists an arbitration agreement and since the disputes are required to be referred to arbitration in view of the arbitration agreement between the parties, it would be appropriate to appoint Chief Justice Bhaskar Bhattacharya (Retired) as the Arbitrator in terms of the arbitration agreement between the parties.

Learned Arbitrator is at liberty to fix his remuneration which is to be shared equally by the parties. The parties will bear the cost and expenses of the arbitration in equal shares.

The parties are at liberty to inform the learned Arbitrator of this order.

It will be open to the learned Arbitrator to proceed from the stage reached in the previous arbitration.

AP 179 of 2020 is disposed of accordingly.

(DEBANGSU BASAK, J.)

