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O.P.No.422 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :10.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.P.No.422 of 2021
and A.No.1954 of 2021

Sundara Vadivel.P

..... Petitioner

Vs

1.M/s Kotak Mahindra bank Ltd.,
5th Floor, Samson Towers,
402 I, Pantheon Road,
Egmore, Chennai - 600 008.

2. C.Prasanna Venkatesh

...Respondents

Prayer: Petition filed under Section 14(2) of the Arbitration and Conciliation Act, 1996 to terminate the mandate of the 2nd respondent in Arbitration Case No.KBSET 1707 of 2020 and the disputes arising out of the loan agreement SPLN 63255601 dated 29.02.2020.

For Appellant : Ms.Abitha Banu
For 1st Respondent: Mr.N.S.Sivakumar



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ORDER

This petition has been filed under Section 14(2) of the Arbitration and Conciliation Act, 1996, seeking for termination of the Arbitral Tribunal on the ground that the Arbitrator has been appointed by the first respondent on its own, which is in violation of the latest decision of the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC and Another vs HSCC (India) Ltd*** reported in ***2019 SCC Online 1517.(Arbitration Application No.32 of 2019 dated 26.11.2019)***.

2. Learned counsel for the petitioner drew the attention of this Court to the following paragraphs in the aforementioned judgment:

" 22.

(vii) If circumstances exist, giving rise to justifiable doubts as to the circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."



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23. Sub Para (vii) of aforesaid paragraph 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court. It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its report No.246. Paragraphs 53 to 60 under the heading "Neutrality of Arbitrators" are quoted in the judgment of this Court in Voestapline Schienen Gmbh vs Delhi Metro Rail Corpn Ltd. while paras 59 and 60 of the report stand extracted in the decision of this Court in Bharat Broadband Network Limited vs United Telecoms Limited. For the present purposes, we may rely on paragraph 57, which is to the following effect:-



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" 57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles - even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed."



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3. In the aforementioned decision also, one of the parties to the Arbitration agreement, has appointed an Arbitrator and the Hon'ble Supreme Court has struck it down on the ground that it will raise justifiable doubt as to the independence and impartiality of the Arbitrator and therefore, the Hon'ble Supreme Court appointed a neutral Arbitrator.

4. In the case on hand also, admittedly, the first respondent has appointed the second respondent as an Arbitrator. The petitioner has entered into a loan agreement with the first respondent, under which, there arose disputes between the parties. The first respondent has appointed the second respondent as Arbitrator for adjudicating the arbitral dispute. Since the decision of the Hon'ble Supreme Court, referred to supra, squarely applies to the facts of the instant case also, the appointment of an Arbitrator, by the first respondent, under the loan agreement between the petitioner and the first respondent, is bad in law. Hence, the appointment of the second respondent as an Arbitrator by the first respondent is set aside by this Court and the Arbitral Tribunal,



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comprising of the second respondent as an Arbitrator, is terminated by this Court under Section 14 of the Arbitration and Conciliation Act, 1996.

5. Even though counter has been filed by the respondents denying the allegations of the petitioner that the second respondent is not an independent arbitrator, the said contention cannot be accepted by this Court in view of the admitted fact that the second respondent was appointed as an Arbitrator only by the first respondent, which cannot be done legally in view of the latest decision of the Hon'ble Supreme Court in the case of *Perkins Eastman Architects DPC and Another vs HSCC (India) Ltd* reported in *2019 SCC Online 1517*, referred to supra.

6. Without casting any aspersion against the second respondent with regard to his integrity and only in view of the decision referred to supra by the learned counsel for the petitioner, this application is allowed as prayed for.



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7. After dictating the order, both the counsels, on instructions, agree for the appointment of Mr.N.C.Ramesh, learned Senior Counsel as an Arbitrator. Accordingly, Mr.N.C.Ramesh, learned Senior Counsel, is appointed as Arbitrator, who shall decide the dispute between the parties under the loan agreement dated 29.02.2020.

8. Mr.N.C.Ramesh, learned Senior Counsel, the sole Arbitrator, after issuing notice to the respective parties, shall fix his remuneration as per the Schedule of fees, prescribed under the Arbitration and Conciliation Act, 1996 and its Rules and complete the arbitration.

9. Registry is directed to serve a copy of this order to Mr.N.C.Ramesh, learned Senior Counsel.



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10. With the above direction, O.P.No.422 of 2021 is allowed. No costs. Consequently, connected miscellaneous application is closed.

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sr/rgi

Index: Yes/No

Speaking Order: Yes/No



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ABDUL QUDDHOSE.,J

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