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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 21st January, 2021

+ O.M.P. (T) (COMM.) 86/2020 & I.A. 12304/2020

M.K.JAIN & ORS.

..... Petitioners

Through: Mr. Akhil Sibal, Sr. Adv. with
Mr. Vipul Wadhwa, Ms.
Deboshree Mukherjee and Mr.
Aditya Rajgopal, Advs.

versus

ANGLE INFRASTRUCTURE PVT. LTD. Respondent

Through: Mr. Siddharth Das, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% (Video-Conferencing)

1. By this petition under Section 14(1)(a) read with section 14(2) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), the petitioners question the legitimacy of the appointment of the arbitrator (who happens to be a learned retired Judge of this Court), by the respondent, to arbitrate on the disputes between the petitioners and the respondent. Consequently, the petition prays for a declaration that the mandate of the learned arbitrator stands terminated under section 14(1)(a) of the 1996 Act, as the learned arbitrator has been rendered *de jure* incapable of acting in the said capacity.

2. The issue in controversy being limited, detailed allusion of the facts may conveniently be eschewed, and a brief recital thereof would suffice.

3. The dispute arises out of a Memorandum of Understanding (hereinafter referred to as “MoU”) dated 16th August, 2018, executed between the petitioners and the respondent. Under the said MoU, the petitioners invested ₹ 8,38,91,000/- in the respondent company. As security against the said investment, the respondent allotted nine apartments to the petitioners in its Florence Estate project. Additionally, two apartments were allotted to the petitioners by M/s Venta Realtech Private Limited, as the confirming party to the agreement.

4. The petition alleges that there was default, on the part of the respondent, in fulfilling the obligations under the MoU, whereupon the petitioners sought to invoke the aforesaid security. At this stage, it is alleged that the petitioners came to learn that the security interest created by the respondent, on the aforesaid nine apartments was illegal and void, as the respondent was bound to allot the said apartments only to Central Government employees.

5. Aggrieved thereby, the petitioners terminated the MoU on 1st November, 2019 and claimed, from the respondent, refund of the invested amount.

6. The respondent, *vide* reply dated 6th November, 2019, denied the allegation levelled by the petitioners and sought reference of the

dispute, that had thus arisen between the petitioners and the respondent, to arbitration, suggesting, for the said purpose, the names of two learned arbitrators. It may be noted, in this context, that clause XVI of the MoU, which provides for reference of intersay disputes to arbitration, reads thus;

“In the event of any dispute arising out of or in connection with this MoU, the same shall in the first instance be resolved by mutual discussions and negotiations. If such differences cannot be resolved within ten days of the notice of such difference, then the disputes shall be referred to arbitration. The seat and venue of arbitration shall be New Delhi.”

7. It appears that, on 19th November, 2020, the respondent having failed to receive any response from the petitioners to the aforesaid communication dated 6th November, 2019, went ahead and proceeded to appoint a learned retired Judge of this Court as the sole arbitrator to arbitrate on the disputes.

8. The learned arbitrator, *vide* communication dated 20th November, 2020, consented to her appointment and, thereafter, on 23rd November, 2020, wrote to the petitioner, fixing hearing in the matter on 3rd December, 2020.

9. On receiving the said communication, the petitioner wrote, to the learned arbitrator on 25th November, 2020, objecting to her appointment and relying, *inter alia*, for the said purpose, on the judgment of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Pvt. Ltd***¹. It was also contended, in

¹ 2019 SCC Online SC 1517

the said communication, that the respondent had no right to unilaterally appoint an arbitrator to arbitrate on the disputes.

10. The learned arbitrator has, very fairly, not proceeded substantially with the arbitral proceedings, keeping in mind the pendency of the present petition before this court.

11. Pleadings in this petition have been completed and the matter has been finally heard with consent of learned counsel. Mr Siddharth Das, learned counsel for the respondent, places reliance on the judgment of the Hon'ble Supreme Court in ***Central Organisation for Railways Electrification v. M/s ECI-SPIC-SMO-MCML (JV)***² to support the appointment of the learned arbitrator, unilaterally by the respondent on the petitioners having failed to respond to the notice dated 6th November, 2019 (*supra*).

12. Mr. Akhil Sibbal, learned senior counsel for the petitioners on other hand submits that, apart from the fact that the respondent could not, even as per the arbitration agreement between the parties or the judgment of the Hon'ble Supreme Court in ***Central Organisation for Railways Electrification***², have proceeded to appoint the learned sole arbitrator unilaterally, the said appointment was also in the teeth of Section 12(5) of the 1996 Act read with the Seventh Schedule thereto and the judgment of Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Pvt. Ltd.***¹

² 2019 SCC OnLine SC 1635

13. Having heard learned counsel for both parties, I am of the considered opinion that the appointment of the learned arbitrator by the respondent, *vide* communication dated 19th November, 2020, cannot sustain in law.

14. I hasten to add that, in so opining, I am proceeding on the basis of the statutory provisions and the law laid down by the Hon'ble Supreme Court in that regard, and do not intend, in any manner to reflect on the impartiality or integrity of the learned arbitrator, who is a respected retired Judge of this court.

15. The law must, however, have its say.

16. The reliance by Mr. Das, on the judgment of the Hon'ble Supreme Court in ***Central Organisation for Railways Electrification***², in my view, is somewhat misplaced. The appellant Central Organisation for Railway Electrification (hereinafter referred to as "CORE"), in the said case, maintained a panel of arbitrators, to arbitrate on disputes between CORE and contractors engaged by it. A dispute arose between CORE and the respondent contractor before the Supreme Court (hereinafter referred to as "the contractor"). CORE required the contractor to select an arbitrator out of the panel maintained by it, and, for the said purpose, suggested the names of five arbitrators, all of whom happened to be retired judicial officers, out of which the contractor was asked to select one. The contractor challenged the said proposals as being in violation of the law laid down in ***Perkins Eastman Architects***¹. The Supreme Court held that

its earlier decisions in *Perkins Eastman Architects DPC*¹ and *Bharat Broadband Network Limited v. United Telecoms Limited*³ merely disentitled a person, falling within the Seventh Schedule to the 1996 Act, from either acting as arbitrator or appointing an arbitrator and that this disability would not extend to a situation in which such person maintained a panel of disinterested arbitrators out of which the opposite party was directed to select one. In the facts before it, the Supreme Court found that the arbitrator, whose names were suggested by CORE were all retired judicial officers and that, therefore, the contractor could not legitimately oppose the request of CORE, for choosing one of said one persons from the panel of arbitrators to arbitrate on the disputes.

17. The judgement in *Central Organisation for Railways Electrification*², quite obviously, does not examine the issue in controversy in the present case at all. The submission, of Mr. Das, that, by virtue of the judgment in *Central Organisation for Railways Electrification*², his client was, consequent on the default of the petitioner in responding to the notice dated 6th November, 2019 (*supra*) of the respondent, entitled to unilaterally appoint the arbitrator, is obviously misplaced.

18. In fact, the exercise of unilateral appointment of the arbitrator by the respondent is in the teeth of section 11(6) of the 1996 Act. A bare reading of the said provision makes it apparent that, in the event of either party failing to act in accordance with the procedure for

³ (2019) 5 SCC 755

appointment of arbitrator, as envisioned in the agreement between the parties, the opposite party would have to approach the court, under the said provision, to appoint the arbitrator. There is no justification in law, therefore, for the respondent having proceeded to *suo moto* appoint the learned arbitrator, merely because, according to the respondent, the petitioners defaulted in responding to the notice dated 6th November, 2019. At that stage, the respondent may have legitimately approached this court under Section 11(6) and have the arbitrator appointed; it could not, however, have proceeded to appoint the arbitrator unilaterally.

19. Even on this sole ground, therefore, the appointment of the learned sole arbitrator by the respondent, as effected on 19th November, 2020, is unsustainable in law.

20. Mr. Sibbal has also submitted that this view harmonises with Section 12(5) of the 1996 Act, as well as the law laid down in *Perkins Eastman Architects DPC¹*, which specifically disentitles any party, falling within the “related” categories enumerated in the Seventh Schedule to the 1996 Act, either from acting as arbitrator or from appointing an arbitrator. Even on this ground, submits Mr. Sibbal, the respondent could not have proceeded to appoint the arbitrator, to arbitrate on the disputes, unilaterally, without engaging the petitioners in that exercise.

21. In my view, this submission, too, merits acceptance.

22. I am, therefore, constrained to hold, without meaning any disrespect to the learned arbitrator, that her appointment, by the respondent on 19th November, 2020, having been unilaterally effected without engaging the petitioners in the said appointment, is unsustainable.

23. The appointment of the learned sole arbitrator is, accordingly, set aside.

24. The fall out is that the arbitrator would have to be appointed by this court.

25. Accordingly, this court proceeds to appoint Hon'ble Mr Justice Ajit Bharihoke, a respected retired Judge of this Court, as the learned arbitrator to arbitrate on the disputes between the parties. The learned arbitrator would enter on the disputes from the stage at which it stands as on date and would, within one week of entering on the dispute, furnish the requisite disclosure under section 12(2) of the 1996 Act.

26. The learned arbitrator would be entitled to fees in accordance with the Fourth Schedule to the 1996 Act .

27. The contact details of the learned arbitrator are as under:

219, Church/ Mall Road,
Vasant Kunj,
New Delhi

Mobile No.9650110057

Email ID: ajitbharihoke@gmail.com

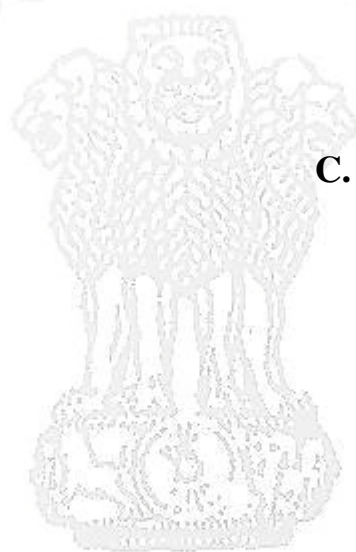
28. Parties are directed to contact the learned arbitrator, within one week of receipt, from the registry of this court, of a copy of this judgment by email.

29. With the aforesaid observations, this petition stands allowed.

C. HARI SHANKAR, J.

JANUARY 21, 2021

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