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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:08.03.2021

+ O.M.P.(T)(COMM.) 82/2020 & I.A. 11922/2020 (for ex parte ad interim stay of arbitral proceedings)

REOM INFRASTRUCTURE AND CONSTRUCTION LIMITED

..... Petitioner

Through: Ms. Mani Gupta, Advocate.

versus

AIR FORCE NAVAL HOUSING BOARD

..... Respondent

Through: Mr. Vivekanand, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral)

1. By way of the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*], the Petitioner-company, through its Resolution Professional Mr. Satya Prakash Gupta appointed under the provisions of the Insolvency and Bankruptcy Code, 2016 [*hereinafter referred to as 'IBC'*], seeks declaration to the effect that Mr. Anil Kumar Kathuria, the Sole Arbitrator is *de jure* unable to act as an Arbitrator, and further seeks appointment of a substitute Arbitrator.

2. The Petitioner and the Respondent had entered into a Contract dated 11th April, 2011, for construction/development of its housing project at

Bhubaneswar consisting 256 flats of different categories [*hereinafter referred to as the 'Contract'*]. The Contract provided for dispute resolution through the mechanism of arbitration under clause 18.2 [*hereinafter referred to as the 'Arbitration Agreement'*]. The same is reproduced as under:-

"All disputes or differences arising between the parties hereto arising out of the subject matter of this agreement or the respective rights and duties of the parties under this agreement except those the decision whereof is specifically provided for in the agreement to be final, shall be referred to on the sole arbitration of an arbitrator, to be only nominated by the Chairman, Air Force Naval Housing Board, New Delhi whose decision thereon shall be final and binding on both the parties provided that if the differences and disputes are claimed by the contractor to have arisen, reference shall only be made if the Contractor has given notice in writing, of the said disputes or differences, within 28 days of cause of action for the same arising to the Chairman Air Force Naval Housing Board, New Delhi.

It is hereby expressly agreed that the sole arbitrator shall not be disqualified by reason of the fact that he had on an earlier occasion dealt with the matter in dispute on the administrative side or his expressed views on an or any of the matters in dispute or difference. In case the person nominated as the sole arbitrator is not available due to certain reasons. The Chairman Air Force Naval Housing Board New Delhi, shall nominate another person in his place, who shall proceed with the arbitration from the stage the arbitration proceedings were last left.

The arbitrator shall have power to open up, review and revise any certificate, opinion, decision requisition or notice and shall determine all matters in dispute, which shall be submitted to him.

It is expressly agreed to by and between the parties that the arbitration proceedings shall be held in Delhi and only Delhi courts shall have jurisdiction."

3. The Respondent invoked the Arbitration Agreement on 29th November, 2019. In terms of the Arbitration Agreement, the appointing authority therein, (i.e. the Chairman of Respondent-Board, Vice Admiral R. Hari Kumar), nominated Mr. Anil Kumar Kathuria as the Sole Arbitrator to adjudicate the disputes and differences between the parties under the Contract.

4. The Petitioner contends that the Arbitration Agreement contained in the Contract, as extracted above, was not fully enforceable in accordance with the law as it stood on 29th November, 2019. The Supreme Court in *Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd.*, AIR 2020 SCC 59, has held that dispute resolution clauses which provide rights to the Director/Chairman of a party to nominate an arbitrator will be invalid and unsustainable. The appointing authority, in the present facts (i.e. the Chairman of the Respondent-Board), would naturally be interested in the outcome of the decision in respect of the disputes that have arisen between the parties. Therefore, the prerequisite of an element of impartiality would be absent in such a process. The Arbitration Agreement is thus *ex facie* in conflict with the aforesaid judgment.

5. The Petitioner further submitted that Schedule V and VII of the Act ought to be taken into consideration, which lay down the criteria for determining the independence and impartiality of an arbitrator. The arbitral proceedings are at an early stage and the Respondent is yet to file its counter-claim and reply to the statement of claim. Therefore, the court may declare that the mandate of the Arbitral Tribunal stands terminated *de jure*, and appoint an independent substitute arbitrator.

6. Mr. Vivekanand, learned counsel for the Respondent, objects to the present petition and relies upon Section 4 of the Act. He submits that the present petition is not maintainable because, from the date of appointment of the Arbitrator (*vide* order dated 29th January, 2019), till November 2020, the Petitioner has had ample opportunities to object to and challenge such appointment before the sole Arbitrator, but the Petitioner had not raised any such objection. He refers to the procedural orders passed by the Arbitrator to support the aforesaid submission, and further submits that the objection not having been taken before the Arbitral Tribunal within the period stipulated under Section 13(2) of the Act, the right to object to the appointment of Arbitrator stood waived in terms of Section 4 of the Act. Besides, no circumstances exist that could raise justifiable doubts about his conduct or impartiality. The arbitrator was appointed from a panel of arbitrators maintained by Delhi International Arbitration Centre (DIAC). The Arbitrator is neither from the department of the Respondent, nor in any way connected to it. There is no relation between him and any of the past office-bearers or management of the Respondent-Board either. The appointment of the arbitrator is also not in conflict with the provisions of Schedules V or VII of the Act. Thus, the objections raised by the Petitioner are toothless. Lastly, Mr. Vivekanand submits that if the Petitioner would have raised an objection to this effect before the Arbitral Tribunal well in time, the Respondent, a Government organisation, would not have been burdened with the arbitral fee of Rs. 3,00,000/- that has been paid to the learned Arbitrator.

7. The court has considered the submissions advanced by the counsels. In this case, in terms of Section 21 of the Act, the arbitral proceedings

commenced on 29th January, 2019 when the Respondent invoked the Arbitration Agreement. Thus, the amendments introduced in Section 12 the Act, including Section 12(5) read with Schedule VII of the Act and/or amendments to Section 12(1) read with the Schedule V, are squarely applicable. Undoubtedly, the appointing authority as per the Arbitration Agreement is the Chairman of the Respondent herein. As per the language employed in Schedule VII, the Chairman is ineligible to become an arbitrator by operation of law. Due to such ineligibility to act as an arbitrator, he also does not have the power to nominate any other person as an arbitrator. In *Perkins (supra)*, the Supreme Court has also discussed in detail and clarified the position of law with regard to the unilateral appointment of a Sole Arbitrator by one party. The said Judgment articulates in detail, the effect of the 2015 Amendments to the Arbitration and Conciliation Act, 1996. It is no longer open for any one party to unilaterally appoint an Arbitrator. In *Perkins (supra)*, the Supreme Court, following the principle enunciated in its earlier decisions, held that, “*the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*” The appointing authority who is itself ineligible to become an arbitrator under Section 12(5) of the Act, cannot nominate another to as an arbitrator. Considering the fact that the Chairman of the Respondent-Board 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*”. Thus, the fundamental principle remains that no authority, having an interest in the dispute which is sought to be adjudicated, is entitled to appoint the Arbitral Tribunal. There can also be no doubt that the Chairman of the Respondent would naturally be interested in

the outcome or decision in respect of the dispute between the parties. Having regard to above-noted legal position, the unilateral appointment of the Arbitrator by the Chairman of the Respondent is *ex facie* not permissible, being in conflict with the statutory provisions and the judgment of the Supreme Court referred above.

8. Next, we shall deal with the objections of the Respondent. This Court is also unable to accept the contention that just because the Petitioner has participated in the proceedings before the Arbitrator, it constitutes as a waiver of its right to object under Section 4 of the Act. The waiver of such a right has to be examined under sub-section 5 to Section 12 of the Act. The said provision is reproduced as under: -

"12(5) – Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

9. In terms of the proviso to sub-section 5 of Section 12 of the Act, the parties may waive the applicability of Section 12(5) of the Act. However, the said waiver has to be made only after the disputes have arisen; and is to be made by way of an express agreement in writing. In the present case, there is no written agreement between the parties whereby the Petitioner has agreed to waive the applicability of Section 12(5) of the Act and therefore, the Court does not find any merit in the contentions raised by the Respondent. No doubt the Petitioner has participated in the proceedings before the

Arbitral Tribunal, however, from the perusal of the proceedings recorded by the Arbitrator, the court is not able to discern any agreement between the parties, whether express or implied, which is in line with Section 12(5) of the Act. The Petitioner entered appearance for the first time on 30th January, 2020 before the Sole Arbitrator. At the said hearing, the counsel for the Petitioner submitted that the Petitioner is not in receipt of any of the records pertaining to the arbitration proceedings. Then on 14th February, 2020, an application was filed seeking *sine die* adjournment of the arbitral proceedings till the completion of the Corporate Insolvency Resolution Process, in accordance with Section 14 of the IBC. Not having received arbitral records and copy of the Contract before the hearing, the Petitioner again made a request for the same during the hearing held on 14th February, 2020. Petitioner then moved an application on 27th July, 2020 seeking copy of arbitral records, which was then made available on 25th September, 2020. In such circumstances, the Court cannot construe that there was an implied consent by the Petitioner for the appointment and for the commencement of the arbitration proceedings, further the conduct also does not demonstrate that the Petitioner had waived its right to object to the above, as is being canvassed by the Respondent.

10. The court is also not impressed with the contention that since the appointment of the Sole Arbitrator is of a person who is unrelated to the Respondent, he is not in conflict with the criteria specified in Schedule V or VII of the Act. The question here is not whether the sole arbitrator appointed by one of the parties is actually biased or partial, but it is the premise for making the unilateral appointment that is called into question. As already discussed above at length, the appointment is squarely in teeth of the law

laid down in *Perkins* as well as Section 12(5) of the Act.

11. Accordingly, the present petition is allowed and the mandate of Mr. Anil Kumar Kathuria, unilaterally appointed by the Respondent, is terminated. Hon'ble Mr. Justice Badar Durrez Ahmed (Retd.) former Chief Justice of the Jammu and Kashmir High Court [+91 7042205786] is appointed as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties. With the consent of parties, it is directed that the learned Arbitrator shall conduct the arbitration proceedings under the aegis of DIAC and shall be paid his fees in terms of the DIAC Rules. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act. The parties are directed to appear before the learned Arbitrator as and when notified. It is, however, made clear that the termination of the mandate of Mr. Anil Kumar Kathuria will not be seen as a reflection on his impartiality or fairness.

12. It is further made clear that in the event the Respondent succeeds in the arbitration proceedings, it would also be entitled to recover the arbitration fee of Rs. 3,00,000/- paid to Mr. Anil Kumar Kathuria.

13. The petition is allowed in the aforesaid terms, and disposed of. Pending application is also disposed of.

SANJEEV NARULA, J

MARCH 8, 2021

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