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

Date of Decision: 26th July, 2021

+ **O.M.P. (T) (COMM.) 30/2020 & I.A. 3201/2021**

M/S INTEGRATED TECHNO SYSTEMS PVT. LTD. Petitioner
Through: Mr. Gracious Timothy Dunna,
Advocate.
versus

IRRIGATION AND FLOOD CONTROL
DEPT., GOVERNMENT OF NCT DELHI Respondent
Through: Mr. Shadan Farasat, ASC for GNCTD
with Mr. Bharat Gupta, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. In this petition filed under Sections 14(2), r/w 15 and 11(5) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*], the Petitioner seeks termination of mandate of the Arbitral Tribunal, unilaterally appointed by the Respondent, and further seeks appointment of a substitute arbitrator by this court. The Respondent strongly contests the petition and urges that the Petitioner has, by unconditionally participating in the arbitral proceedings, acquiesced to the appointment by implied waiver, and consequently lost its right to seek termination of the mandate of the Arbitrator. Let's examine if the objections raised by the Respondent have

any merit in them.

2. The relevant facts to be taken note of are as follows:

(i) The Arbitration Agreement between the parties is contained in Clause 25 of the Agreement, which reads as under:

“CLAUSE 25: Settlement of Disputes & Arbitration

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-In-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer - FCI in writing for written instruction or decision. Thereupon, the Superintending Engineer- FCI shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer- FCI fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer- FCI, the contractor may, within 15 days of the receipt of Superintending Engineer's - FCI decision, appeal to the Chief Engineer - I&FC who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer - I&FC shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer - I&FC the contractor may within 30 days from the receipt of the Chief Engineer - I&FC decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer - I&FC The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. if the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC). then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer - I&FC for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(ii) *Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer CPWD, in charge of the work or if there be no Chief Engineer I&FC, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.*

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer, Zone-I, I&FC Deptt. CPWD or Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

If is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

(ii) Aggrieved by the non-payment of its claims/interim bills, the Petitioner attempted settlement of disputes in accordance with the aforesaid clause, *vide* communication dated 22nd March, 2019. Upon not receiving any reply, Petitioner made further requests on 26th April,

2019 and 22nd May, 2019, but these communications were also met with silence.

(iii) Instead, Respondent issued a letter dated 31st July, 2019, intimating the Petitioner of the unilateral appointment of Sh. Dinesh Kumar as the Sole Arbitrator.

(iv) On 02nd August, 2019, the Sole Arbitrator communicated his acceptance to the appointment and issued his statement of disclosure under Schedule V and VI of the Act. The first arbitral proceedings were held on 8th August, 2019.

(v) The Petitioner paid arbitration fees, filed its Statement of Claim, and in response, the Respondent filed its Statement of Defence and pleadings stood completed. Ten hearings took place between 8th August, 2019 and 16th June, 2020.

(vi) On 26th June, 2020, the Petitioner submitted an application before the Sole Arbitrator under Section 14(1) r/w Section 15 of the Act, seeking termination of his mandate on the ground that he had become *de jure* unable to perform his functions and prayed for withdrawal of proceedings. The same was opposed by the Respondent. This application remained undecided.

3. In the aforementioned background, the Petitioner has approached this Court invoking Section 14(2) r/w Section 15 of the Act.

4. Mr. Shadan Farasat, Learned ASC for the Respondent, resists the present petition and urges several grounds in opposition, which are summarised as under:

- (i) The proceedings and procedural orders passed by the sole arbitrator demonstrate that there is an implied agreement between the parties in terms of proviso to Section 12(5) of the Act to waive the objection of ineligibility.
- (ii) The procedural order passed on the first hearing of the arbitral proceedings, held on 8th August, 2019, records that the parties expressly confirm their no objections to the appointment. Thereafter, in subsequent hearings held on 26th September, 2019, 3rd October, 2019 and 15th November, 2019, the Petitioner has participated without any objection or demur.
- (iii) The Petitioner, in fact, allowed proceedings to continue for ten hearings. As a result, the matter has reached the stage of final arguments. Now, at this belated stage, realising that the award may not perhaps go in its favour, Petitioner has filed the present petition.
- (iv) Without prejudice to the foregoing contentions, if the procedural order dated 8th August, 2019 is not accepted as sufficient compliance of the proviso to Section 12(5) of the Act,

even then, the Petitioner is estopped from challenging the eligibility of the Arbitrator at this stage because, from the onset of the arbitration, the Petitioner was well-aware that the Arbitrator was unilaterally appointed, and thus, ineligible to be appointed under Section 12(5). Yet, the Petitioner did not raise any objection to that effect. To support this contention, it is argued that the Chief Engineer of the Respondent appointed Sh. Dinesh Kumar as the Sole Arbitrator, which came to the knowledge of the Petitioner *vide* communication dated 31st July, 2019. The Arbitrator entered upon the reference on 2nd August, 2019. The Supreme Court pronounced its judgment in the case of **BSNL v. United Telecom Ltd.**,¹ on 16th April, 2019, categorically holding that a person who is *de jure* ineligible to act as an Arbitrator himself cannot appoint an Arbitrator. Thus, the Petitioner was well aware of the alleged ineligibility on the date of appointment, in terms of **BSNL** (*supra*), and had ample opportunity to object to the appointment, which it voluntarily decided not to do.

- (v) The Petitioner's conduct is *mala fide*. It has led to the Respondent not just revealing its strategy under the arbitral proceedings by filing Replies and Statement of Defence, but the Respondent has also become liable to pay arbitrator's as well as counsel's fee. Had the Petitioner acted timely, the Respondent

¹ (2019) 5 SCC 755.

would not have been required to change its position, which now stands to its detriment. In support of this submission, he places reliance upon *Bokaro and Ramgur Ltd. v. Dr. Prasun Kumar Banerjee*.²

5. Mr. Gracious Timothy Dunna, counsel for the Petitioner, controverts the contentions of Mr. Farasat on the following grounds:

- (i) Section 12(5) of the Act mandatorily requires a prior express agreement in writing, without which, any person whose relationship falls under any of the categories specified in Schedule VII shall be ineligible to be appointed as an arbitrator. There is no express agreement in writing between the parties for waiver of the applicability of sub-Section 5 of Section 12. No such agreement can be construed from the procedural orders of the learned Arbitrator. Reliance is placed upon para 20 of *BSNL (supra)*, which notes that in terms of the proviso to Section 12(5), waiver has to be expressed in writing.
- (ii) The case of the Petitioner is premised on the law as clarified by the Supreme Court in the case of *Perkins Eastman Architects DPC & Anr. v. HSCC India Ltd.*,³ and of this court in *Proddatur Cable TV Digi Services v. SITI Cable Network Limited*.⁴

² 1967 SCC OnLine Pat 23.

³ AIR 2020 SC 59.

⁴ 267 (2020) DLT 51.

- (iii) There is no limitation prescribed under law for filing the petition under Section 14 of the Act.
- (iv) There is no question of estoppel against the Petitioner from raising a challenge to the appointment of the Arbitrator on the grounds enumerated under Section 12(5) of the Act.

ANALYSIS:

6. The Court has considered the rival contentions of the parties. The arbitration clause *inter-alia* stipulates that other than excepted matters, disputes or differences shall be referred for adjudication through arbitration conducted by a sole arbitrator appointed by the Chief Engineer-Zone-I, I&FC Deptt. Thus, the designated authority to appoint the arbitrator, as per the clause, is an employee of the Respondent. It cannot be disputed that the Chief Engineer of the Respondent is an authority who is interested in the outcome or decision of the dispute between the parties. In terms of the judgment of the Supreme Court in *Perkins (supra)* and of this court in *Proddatur (supra)*, it is no longer permissible for an authority who himself is ineligible, to appoint an Arbitrator, by virtue of Section 12(5) of the Act.

7. The court also does not find merit in the contention of the Respondent that, not having raised an objection before the learned arbitrator, the Petitioner would be precluded/estopped to seek

termination of his mandate. The objections under Section 12(1), read with Section 13 of the Act, are wholly different from objection under Section 12(5). Hence, it cannot be said that by not filing any objections under Section 13 before the Sole Arbitrator, the Petitioner waived its right to object under Section 12(5) of the Act.

8. Thus, keeping in mind the underlying principles noted in the aforementioned judgments, the appointment of the Sole Arbitrator by the Chief Engineer of the Respondent, who is interested in the outcome of the arbitration on account of being one of the officers of the Respondent party, the Sole Arbitrator appointed by him has become *de jure* unable to perform his functions and his mandate is liable to be terminated.

9. Next we have to consider if there is any express agreement between the parties that amounts to waiver of the objection as contemplated under the proviso to Section 12(5) of the Act. On this issue, much emphasis has been laid on the procedural order dated 08th August, 2019 passed by the learned Arbitrator, relevant portion whereof is extracted as under:

“2. The objections to the appointment as sole Arbitrator were invited by: 08/08/2019 from both the parties.

3. The claimant and Respondent did not file any objection to the appointment of Sole Arbitrator, which is confirmed by both the parties today.

4. After welcoming the representatives of the parties, Sole Arbitrator declared under sec. 12(1) of the Arbitration and Conciliation (Amendment) Act, (1996) 2015 and the disclosures were made as required under Sixth Schedule and

stated that there are no circumstances likely to give rise to justifiable doubts, as to their independence and impartiality. The Claimant and Respondent confirmed that they have no objection to the Appointment of Sh. Dinesh Kumar as Sole Arbitrator.

5. The representatives of Claimant and Respondent will submit its authorization/Vakalatnama on or before next date of hearing.

6. With the consent of the parties, the Arbitral Tribunal has fixed the following procedure & schedule of Arbitration proceedings:

xx ... xx ... xx

7. With the consent and agreement of parties following order is passed by AT:

xx ... xx ... xx

V. With the consent of the parties, the next date of hearing is fixed on 26-09-2019 at 11:30 AM in New Delhi at Institution of Engineers, Delhi State Centre, 2 Bahadur Shah Zafar Marg, New Delhi- 110002.”

10. Section 12(5) of the Act requires an “express agreement in writing” made “subsequent to disputes having arisen,” without which there is no waiver. There cannot be an implied consent. Rather, consent must not only be express, but it must also be specific and contrary to the import of Section 12(5) of the Act. The law on this subject is in fact quite well-settled. There has to be an express waiver in writing which must reflect awareness of the parties to the applicability of the said provision as well as the resultant invalidation of the learned Arbitrator. (See: **JMC Projects (India) Ltd. v. Indure Private Ltd.**⁵) Therefore, it has to show a conscious intention of the parties to waive the applicability of the said provision, emanating from the agreement. Keeping in view the principles laid down in the above case for determining whether there is an express consent, in the opinion of the Court, the order of the Sole arbitrator dated 8th August, 2019 does not

⁵ 2020 SCC OnLine Del 1950.

satisfy the requirement of proviso to Section 12(5) of the Act. The aforesaid order would not amount to an express waiver, nor preclude the Petitioner from seeking termination of the mandate of the Arbitrator.

11. The Court also does not find merit in the contention of the Petitioner that the principle of estoppel would prevent the Petitioner from seeking termination of the mandate of the Arbitral Tribunal. The bar under Section 12(5) of the Act is absolute and cannot be whittled down by mere participation in the proceedings. The unilateral appointment of the Sole Arbitrator by the Chief Engineer, being an officer of the Respondent, who is inherently interested in the outcome of the arbitration, is not sustainable. The Sole Arbitrator appointed by him has become *de jure* unable to perform his functions.

12. In view of the foregoing, the present petition is allowed and accordingly, the mandate of Sh. Dinesh Kumar is terminated.

13. Accordingly, Mr. Gautam Narayan, Advocate [Contact: 9811411735] is appointed as the substitute Sole Arbitrator to adjudicate the disputes which were pending consideration in the arbitration before Sh. Dinesh Kumar.

14. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being

ineligible under Section 12(5) of the Act.

15. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions of the parties on merits are left open.

16. At this stage, Mr. Farasat, on instructions, states that in the facts of the instant case, he does not have any objection in case the Court were to direct that the proceedings which have been conducted before the erstwhile Arbitrator, not be repeated. Counsel for the Petitioner also makes a similar submission. Accordingly, it is clarified that the learned Arbitrator so appointed by this Court today, shall continue the proceedings from the stage it was at before the erstwhile Arbitrator.

17. In view of the above, the present petition is allowed and stands disposed of. The pending application also stands disposed of.

JULY 26, 2021

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(corrected and released on 25th August, 2021)

SANJEEV NARULA, J