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

% *Date of Decision: 21st October, 2021*

+ **O.M.P. (T) (COMM.) 83/2021 and IA No. 10800/2021**

DELHI BUILDTECH PVT. LTD Petitioner

Through: Mr Abhishek Grover,
Advocate.

versus

M/S. SATYA DEVELOPERS PVT. LTD Respondent

Through: Ms Kaadambari, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. (ORAL)

1. The matter is taken up today as 18.10.2021 was declared a holiday.

2. The petitioner has filed the present petition under Sections 14 & 15 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') praying that the mandate of the Arbitral Tribunal be terminated and an independent and impartial arbitrator be appointed in substitution of the learned Arbitrator.

3. The respondent had issued a Work Order dated 30.11.2012 in respect of Civil, Structural & Finishing Works for Tower T1, T2, T7, Club, STP & other Non Tower Areas and other works in favour of the petitioner. Thereafter, on 04.02.2014, the respondent issued another

Work Order for the balance Civil, Structural & Finishing Works for Tower T8, T6, T5, T4 and T3 & corresponding Non Tower Areas of the project known as “The Hermitage”, which was being developed by the respondent. On 08.10.2014 and 19.03.2016, addendums to the Work Order were issued. In the meanwhile, the respondent issued another Work Order dated 15.02.2016.

4. Disputes arose between the parties in respect of the said Work Orders.

5. On 24.07.2018, the respondent issued a legal notice calling upon the petitioner to pay a sum of ₹ 6,40,26,263/- claiming that the said amount was paid in excess of what was due to the petitioner. The petitioner responded to the said notice, whereby it disputed the assertions made by the respondent and also demanded a sum of ₹6,23,22,425/- as the balance amount due to it. On 19.03.2019, the respondent issued another legal notice reiterating its demand as made in the notice dated 24.07.2018 and additionally, also demanded a sum of ₹1,00,00,000/- as damages. In view of the aforesaid disputes, by a letter dated 26.04.2019, the Managing Director of the respondent appointed an Advocate as the Sole Arbitrator to adjudicate the disputes between the parties.

6. Thereafter, the learned Arbitrator entered upon reference. The respondent filed its Statement of Claims and the petitioner filed its Statement of Defence. The petitioner also filed its counter-claims.

7. On 15.02.2020, the petitioner filed an application seeking recusal

of the learned Arbitrator on the ground that he was ineligible to act as such. The learned Arbitrator rejected the said application by an order dated 22.02.2021.

8. Mr Grover, learned counsel appearing for the petitioner relies on the decisions of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377***; ***Bharat Broadband Network Limited v. United Telecoms Limited: (2019) 5 SCC 755***; and ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.: 2019 SCC OnLine SC 1517*** in support of his contention that the learned Arbitrator is ineligible to act as an arbitrator as he was unilaterally appointed by the Managing Director of the respondent. The petitioner has also referred to the decision of a Coordinate Bench of this Court in ***Proddatur Cable TV Digi Services v. Citi Cable Network Limited: (2020) 267 DLT 51***.

9. Ms Kaadambari, learned counsel appearing for the respondent submitted that the petitioner acquiesced in the appointment of the Arbitrator and had also participated in the arbitration proceeding without any reservations. The petitioner did not raise any objection regarding the ineligibility of the learned Arbitrator at the material time. She submitted that in the aforesaid circumstances, it must be construed that the petitioner had waived its objection if any. She also submits that the objections raised by the petitioner is at a much belated stage and therefore, the same ought not to be entertained. In addition, she contends that the petitioner has not made any allegations of bias and therefore, the mandate of the learned Arbitrator cannot be terminated.

10. However, it is admitted that the learned Arbitrator has been unilaterally appointed without seeking any concurrence from the petitioner.

11. It is relevant to refer to the arbitration agreement as embodied in Clause 52 of the Agreement and the said Clause is set out below:

“52. SETTLEMENT OF DISPUTES /
ARBITRATION:

52.1 All disputes and differences of any kind whatsoever arising out of or in connection with this Contract as also with regard to the implementation, meaning, interpretation or implications of the various clauses of the Contract and those of the Contract Documents or in respect of any other matter or thing arising out of or relating to the development and construction of the Project whether during the progress of the work or after its completion shall be communicated by the Contractor in writing to the Owner & the Project Manager and all possible efforts would be made by the Parties to sort out and resolve all such matters of controversy, disputes and differences amicably with due dispatch and effective priority. In case, the Contractor and the Owner & the Project Manager were unable to resolve such issues amicably latest within 10 working days from the date of receipt of such communication by the Owner & the Project Manager, in such eventuality the Owner / Project Manager shall refer the dispute or controversy to the Arbitration of a Sole Arbitrator to be appointed by the Managing Director of the Owner. The arbitration proceedings shall be held in accordance with the Indian Arbitration & Conciliation Act, 1996 and

the Rules made there-under as amended from time to time. The place of Arbitration shall be New Delhi only and the language of the arbitration shall be English. The cost of arbitration including the arbitration's fee shall be shared jointly by the Owner and the Contractor. The parties agreed that during the pendency of the arbitration, the parties shall continue to discharge their respective obligations under this Agreement.

52.2 Decisions, directions and clarifications pertaining to measurements, drawings and certificates taken by the Managing Director of M/s Satya Developers Pvt. Ltd. shall be final and binding on the Parties. The Decisions so taken with respect to any matter the decision for which is specifically provided for by these or other special conditions to be given and made by the Project Manager / their M.D. with or without the concurrence of the Owner or of the Architect are exempted matters for the purpose of Arbitration proceedings and shall not be set aside on account of non-observance of any formality, any omission, delay or error in proceeding in or about the same or on any other ground or for any reason. They shall be specifically excluded from the scope of arbitration proceedings hereinafter referred to.

52.3 ** ** ** **

52.4 This tender shall be subject to the jurisdiction of the courts at Delhi.”

12. In terms of the Arbitration Clause, the Managing Director of the

respondent was conferred the exclusive power to appoint an arbitrator. And, he had appointed the learned Arbitrator in exercise of that power. In **TRF Limited** (*supra*), the Supreme Court had held that if the Managing Director is ineligible to act as an Arbitrator, such an ineligible person could not appoint an arbitrator. In **Perkin Eastman** (*supra*), the Supreme Court considered an arbitration clause which empowered the Chairman and the Managing Director to make an appointment of the sole arbitrator. Following the earlier decision in **TRF Limited** (*supra*), the Supreme Court held that the said appointment would also fall foul of the provision of the A&C Act. Since the Managing Director is ineligible by operation of law to act as an arbitrator, he was also ineligible to nominate an arbitrator.

13. In the aforesaid circumstances, the petitioner's contention that it was impermissible for the Managing Director of the respondent to appoint an arbitrator is merited.

14. The contention that the petitioner had acquiesced in the appointment of the learned Arbitrator by participating in the arbitral proceedings and it must be construed as the petitioner had waived its right to object to the appointment of the learned Arbitrator, is unmerited. At this stage, it is relevant to refer to Section 12(5) of the A&C Act. The same is set out below:

“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.”

15. The proviso to Section 12(5) of the A&C Act provides that the ineligibility under Section 12(5) of the A&C Act may be waived by the parties. However, it also makes it clear that the same is required to be “*by an express agreement in writing*”.

16. The question regarding deemed waiver was also considered by the Supreme Court in the case of ***Bharat Broadband Network Ltd v. United Telecoms Ltd*** (*supra*). The Supreme Court rejected the contention that a waiver of the right to object under Section 12(5) of the A&C Act could be inferred by conduct. The relevant observations of the Court are reproduced below:

“20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an “express agreement in writing”. The

expression “express agreement in writing” refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

“9. Promises, express and implied. – Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied. ”

It is thus necessary that there be an “express” agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such.”

17. In view of the unambiguous language of the proviso, a waiver under Section 12(5) of the A&C Act cannot be inferred by the conduct of the parties. It must necessarily be by an express agreement in writing. It is well settled that where a statute provides a particular manner of doing a particular act, it must be done in that manner and no other.

18. In this view, this case is squarely covered by the decision of the Supreme Court in ***Bharat Broadband Network Limited*** (*supra*). In that case, the arbitration clause provided that the disputes would be referred to the Sole Arbitration of the CMD, BBNL (Chairman and Managing Director, Bharat Broadband Network Limited) or to the officer entrusted to perform the functions of the CMD, BBNL. If the CMD or the said officer is *unable or unwilling to act, then to the sole arbitration of some other person appointed by the CMD or the said officer*. In view

of the disputes, the respondent (United Telecoms Limited) issued a notice dated 03.01.2017 invoking the arbitration clause and called upon the CMD, BBNL to appoint an independent and impartial arbitrator. The CMD thereafter, proceeded to appoint one Shri Khan as the Sole Arbitrator to adjudicate the disputes between the parties. After the decision of the Supreme Court in **TRF Ltd.** (*supra*), Bharat Broadband Network Limited (hereafter 'BBNL') filed an application before the Arbitrator contending that he is *de jure* unable to perform as an arbitrator and prayed that he withdraws himself from the proceedings. The said application was rejected. Thereafter, BBNL filed a petition under Section 14 and 15 of the A&C Act before this Court seeking termination of the mandate of the Arbitrator and appointment of another arbitrator in his place. The court rejected the said petitioner by an order dated 22.11.2017. The court held that BBNL is estopped from challenging the Arbitrator as its CMD had appointed the Arbitrator and, BBNL had participated in the arbitral proceedings.

19. BBNL had appealed against the decision of this Court before the Supreme Court. The Supreme Court held that the CMD of BBNL was ineligible to act as an arbitrator and, that the decision in **TRF Ltd** (*supra*) had made it clear that “*an appointment made by an ineligible person is itself void ab initio*”. The Court further held that “*since such appointment goes to eligibility i.e. to the root of the matter, it is obvious that Shri Khan’s appointment would be void*”.

20. Ms Kaadambari had earnestly contended on behalf of the respondent that the petitioner has not made any allegations of bias and

therefore, the present petition is liable to be dismissed. The said contention is also unmerited. There is no requirement for a party to raise any objections regarding bias of the arbitrator for seeking enforcement of the provisions of Section 12(5) of the A&C Act. Section 12(5) of the A&C Act relates to ineligibility of a person to act as an arbitrator. If the said ineligibility is attracted by operation of law, the same would be attracted notwithstanding that no specific allegations of lack of independence or bias has been made against the arbitrator. No such allegations are required to be made.

21. If an arbitrator is ineligible to act as such, the mandate is required to be terminated in terms of Section 14 of the A&C Act. In ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited: (2018) 12 SCC 471***, the Supreme Court had clarified that insofar as any challenge to the Arbitral Tribunal under Section 12(1) of the A&C Act, the same is to follow the discipline of Section 13 of the A&C Act. However, in cases falling within the scope of Section 12(5) of the A&C Act, the parties would be at liberty to approach the court directly under Section 14 of the A&C Act for termination of the Arbitral Tribunal's mandate.

22. The relevant extract of the said decision is set out below:

“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with

the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellants may challenge the appointment of either

arbitrator. They will be free to do so only after an award is rendered by the Tribunal.”

23. In view of the above, this Court considers it apposite to allow the present petition. The pending application is disposed of. Accordingly, the mandate of the learned Arbitrator is terminated.

24. This Court considers it apposite to appoint Justice (Retired) Gita Mittal, former Chief Justice of J&K High Court as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

25. It is clarified that the arbitral proceedings shall proceed from the stage as currently obtaining.

VIBHU BAKHRU, J

**OCTOBER 21, 2021
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Click here to check corrigendum, if any