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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION APPEAL NO. 32 OF 2018

Rahul Bhaskar Mhaske & Anr.

...Appellants

Versus

M/s. Gandhi & Associates & Anr.

...Respondents

* * *

- Mr. Rahul Bhaskar Mhaske Party in Person present, for Appellants.
- Mr. N. P. Deshpande, for Respondent No. 1.

* * *

CORAM : MANISH PITALE, J

DATE : 20TH OCTOBER, 2022.

P. C. :

1. Admit. Heard finally with the consent of the Appellant in person and Mr. N. P. Deshpande, the learned Counsel for the Respondents.

2. The present Appeal arises out of a judgment and order dated 26th July, 2018, passed by the Court of District Judge-5, Pune, whereby an application under Section 34 of the Arbitration and Conciliation Act, 1996, filed by the appellant was dismissed and award dated 10th April, 2017, passed by the learned Arbitrator was confirmed.

3. The brief facts leading to the present Appeal are that the Respondents as promoters had constructed apartments, of which one apartment was purchased by the Appellant. The possession receipt

executed in favour of the appellant contained a clause pertaining to the liability of payment of VAT concerning the said project. The said clause also provided that in case there was a dispute regarding the question of liability of payment of VAT by either the Respondents as the promoters or the Appellant as the purchaser, such a dispute would be referred to a sole Arbitrator to be appointed by the Respondents.

4. A dispute did arise between the parties as the Respondents raised a demand against the Appellant for a specific amount towards liability of VAT, which the Appellant refused to pay. In this situation, the Respondents invoked the aforementioned clause No. 7, of the possession receipt dated 09th June, 2009, and appointed a sole Arbitrator in the year 2017. On 20th January, 2017, the sole Arbitrator entered upon the reference and called upon the Appellant to remain present for hearing, in the backdrop of the Arbitration clause being invoked and the Respondents staking their claims.

5. Pursuant to the Arbitration proceedings initiated before the sole Arbitrator, by award dated 10th April, 2017, the learned Arbitrator held that the Respondents were entitled to recover an amount of Rs. 3,55,056/- with 20% interest thereon from 2011-2012 from the Appellant with future interest @ 9% per annum along with costs quantified at Rs. 75,000/-.

6. Aggrieved by the same, the Appellant filed application under Section 34 of the Arbitration and Conciliation Act, 1996, before the District Court, Pune. By the impugned judgment and order dated 26th July, 2016, the District Court dismissed the application, thereby confirming the award passed by the learned Arbitrator.

7. Upon the Appellant approaching this Court, notices were issued, pursuant to which the Respondents entered appearance through Counsel.

8. The appellant in person appeared and argued that the impugned judgment and order of the District Court and the award passed by the Arbitrator deserve to be set aside on a pure question of law. It was submitted that post the amendment in the aforesaid Act, as per Section 12(5) thereof, the Respondents were barred by law from appointing a sole Arbitrator. It was submitted that the implication of Section 12(5) of the Act, as amended, came up for consideration before the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.*** 2019 SCC OnLine SC 1517, wherein the Hon'ble Supreme Court, after taking into consideration the position of law, as clarified in its earlier judgment in the case of ***TRF Ltd. (2017) 8 SCC 377***, held that such clauses wherein one of the parties had the exclusive right to appoint a sole Arbitrator

were in the teeth of Section 12(5) of the aforesaid Act and that such appointment of the sole Arbitrator stood barred by law. On the basis of the aforesaid position of law, the Appellant in person submitted that the entire proceeding stood vitiated, as the clause of Arbitration executed between the parties was hit by Section 12(5) of the aforesaid Act, and the appointment of the sole Arbitrator by the Respondents was vitiated, in turn vitiating the award, making it liable to be set aside. On that basis it was submitted that the appeal deserved to be allowed.

9. On the other than, Mr. N. P. Deshpande, the learned Counsel appearing for the Respondents submitted that by operation of Section 11(2) r/w 11(6) of the said Act, since the parties were free to agree to the procedure for appointment of an Arbitrator, the effect of the amendment to Section 12(5) of the said Act could not be detrimental to the Respondents and that the award did not deserve to be set aside only on that ground. It was submitted that on merits, the award was clearly sustainable and that since the Appellant had failed to make out any ground for exercise of power under Section 34 of the said Act by the District Court, no error could be attributed to the impugned judgment and order passed by the District Court.

10. Reliance was placed on judgment of Hon'ble Supreme Court in case of *Rajasthan Small Industries Corporation Ltd. Vs. M/s*

Ganesh Containers Movers Syndicate (judgment and order dated 23rd January, 2019 passed in Civil Appeal No. 1039 of 2019), to contend that the question of law sought to be raised on behalf of the Appellant deserved to be answered in the negative and the appeal deserved to be dismissed.

11. Having heard the Appellant in person and the learned Counsel appearing for the Respondents, it would be appropriate to first refer to the Arbitration clause / Agreement executed between the parties. The same reads as follows :

7. If Works Contract Tax or Service tax or VAT or any similar cess be charged on construction of complex or on the transaction agreed between the parties herein or in relation to the construction, then flat/unit purchaser shall pay the same in advance to the Promoter, as and when charged and demanded by the Promoter. If Purchaser fails to pay the amount within seven days from demand then flat/unit purchaser shall be liable to pay interest thereon @ 20% p.a. until payment. Also in the said event there shall be charge of the amount due on the said Flat and income therefrom and until payment of said dues Purchaser shall not be entitled assign, sell or transfer the said Flat in any manner. It is understood that interest shall not cover the damages/losses that will be suffered by the Promoter due to non-payment. Therefore, Purchaser shall be further liable to pay damages

and losses that will be suffered by the Promoter due to non-payment and the Purchaser shall keep the Promoter harmless and indemnified therefrom. In case of dispute regarding above the small share be referred to a single arbitrator to be appointed by the Promoter. The Arbitrator shall dispense with oral evidence, give only one date for hearing both parties which will be informed to the parties on the addressed given below (and deemed as valid communication) and arbitrator shall give award maximum within 30 days from accepting the appointment. The award given as above shall be final and binding on both parties.

12. Section 12(5) of the aforesaid Act is relevant for deciding the present appeal, which reads as follows :

“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.”

13. As noted above, the aforesaid provision came up for consideration before the Hon’ble Supreme Court in the case of **TRF**

Ltd. (supra) and in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd. (supra)***. In those cases, the question was, *as to whether the Managing Director of one of the parties to the Arbitration Agreement was disentitled from appointing a sole Arbitrator ?*. The question was examined from different angles by the Hon'ble Supreme Court and it was found that there were indeed some Arbitration clauses wherein the Managing Director of one of the parties, himself was to act as an Arbitrator and in some clauses the Managing Director of one of the parties, had exclusive powers to appoint an Arbitrator. Both situations were taken into consideration and after referring to its earlier judgment in ***TRF Ltd. (supra)***, in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.***, the Hon'ble Supreme Court held as follows :

20. *We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he*

would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in

the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party 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. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.

14. The position of law clarified by the Hon'ble Supreme Court in the above quoted judgment makes it absolutely clear that when one of the parties to the Arbitration Agreement has a right to appoint a sole Arbitrator, an element of exclusivity in determining the course of dispute resolution becomes essential element of such a clause and it was further held that a person, who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole Arbitrator. The Hon'ble Supreme Court distinguished the said position from a situation where the clause permitted both parties to appoint arbitrators by observing that whatever advantage a party

may derive from nominating its own Arbitrator, would be counter balanced by equal power provided to the other party to nominate its own arbitrator. But, it was specifically laid down in the said judgment that the moment one party to the Arbitration agreement, has an exclusive right to appoint a sole Arbitrator, it falls foul of Section 12(5) of the said Act, as amended in the year 2015.

15. In the present case, although the Arbitration clause is contained in possession receipt dated 09th June, 2009, admittedly, the Arbitration proceeding was initiated in the year 2017, as it evident from the letter issued by the learned Arbitrator dated 20th January, 2017, when he entered the reference. The Arbitration having commenced after the amendment came into effect on 23rd October, 2015, the aforesaid provision i.e. Section 12(5) of the said Act applied in full force to the Arbitration proceedings in the present case. Therefore, it becomes clear that the Arbitration proceedings could be said to be vitiated from the very initiation and it was a still born exercise. It is also an admitted position that proviso to Section 12(5) of the said Act is not applicable to the present case, as there was no express agreement in writing between the parties to waive the applicability of the said sub-section. The entire award stood vitiated by such unilateral exclusive appointment of a sole Arbitrator by one of the parties to the Arbitration agreement i.e. Respondents herein.

This aspect goes to the very root of the matter, which the District Court failed to appreciate while dismissing the application filed by the Appellant under Section 34 of the aforesaid Act.

16. Although, this point was not raised in the application under Section 34 of the said Act, this Court is of the opinion that since the pure question of law goes to the very root of the matter and demonstrates that the Respondents by law were barred from exclusively appointing the Arbitrator. The said point can certainly be considered by this Court in the present Appeal, on the basis of position of law clarified by the Hon'ble Supreme Court.

17. As regards the judgment on which the learned Counsel for the Respondents has placed reliance i.e. ***Rajasthan Small Industries Corporation Ltd. Vs. M/s Ganesh Containers Movers Syndicate (supra)***, it is clearly distinguishable on facts, because in the said case, the Arbitration proceeding was admittedly initiated in the year 2005 i.e. much prior to the aforesaid amendment coming into effect in the year 2015.

18. In view of the above, this Court is of the opinion that the present appeal deserves to be allowed. Accordingly, the Appeal is allowed and the impugned judgment and order passed by the District Court, as well as the award rendered by the learned Arbitrator are

quashed and set aside, leaving the parties to take recourse to such steps as available in law. No order as to costs.

(MANISH PITALE, J.)