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Arb.O.P.(Comm.Div.) No.222 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2022

CORAM

THE HONOURABLE MR.JUSTICE SENTHILKUMAR
RAMAMOORTHY

Arb.O.P.(Comm.Div.) No.222 of 2022

M.Suresh
Proprietor,
Samvrooms Automotives
No.69/4, Vallam Road,
Thirukanurpatti Village,
Thanjavur 613 303

... Petitioner

vs.

1. T.V.Sundaram Iyengar & Sons Pvt. Ltd.
No.7B, TVS Building,
West Veli Street,
Madurai 625 001.
2. TVS Motor Company Limited,
Regd. Office "Chaitanya",
No.12, Khader Nawaz Khan Road,
Nungambakkam,
Chennai 600 006.
3. Mr.V.Karthic,
Senior Advocate
Sole Arbitrator
Having Office at No.336, Shaw Wallace Building



Arb.O.P.(Comm.Div.) No.222 of 2022

2nd Floor, Thambu Chetty St, Chennai-1

... Respondents

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PRAYER: Arbitration Original Petition filed under 14(1)(A) of the Arbitration and Conciliation Act read with Section 11 (6) of the Arbitration and Conciliation Act, 1996, pleased to Terminate the appointment of the learned Arbitrator /third Respondent herein and consequently appoint a new Arbitrator to adjudicate the disputes between Petitioner and 1st and 2nd Respondents arising out of the stockist agreement dated 22.06.2019.

For Petitioner : Ms.Dakshyani Reddy

For Respondents : Mr.Satish Parasaran, Senior Advocate
for M/s.R.Parthasarathy for R1 & R2

ORDER

The petitioner had entered into a stockist agreement dated 22.06.2019 with the first and second respondents herein. Upon disputes arising in relation thereto, the arbitral tribunal was constituted by order dated 22.03.2021 in O.P. No.78 of 2021. Shortly thereafter, by communication dated 08.04.2021, learned Arbitrator provided a disclosure in terms of Section 12 of the Arbitration and Conciliation Act 1996 (the Arbitration Act). In the said disclosure, learned Arbitrator stated, in relevant part, as

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under:

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“Had appeared for TVS group companies prior to 2016, in my capacity as Partner T.S.Gopalan & Co Advocates Chennai.”

Upon receipt thereof, the petitioner provided its no objection in the following terms:

“I have no objection to your appointment as an Arbitrator to adjudicate the disputes arising under the Stockiest Agreement dated 22.6.2019 in terms of the order of the High Court dated 22.3.2021 in O.P.78 of 2021. However, I request you to again defer the preliminary hearing to the 2nd week of May 2021 given the rising number of Covid 19 cases all over India and my inability to come over to Chennai. I will be deeply obliged.”

2. Thereafter, hearings of the arbitral tribunal were scheduled. The respondents herein filed a statement of claim and the petitioner filed a statement of defence and made counter claims. Upon completion of pleadings, the first and second respondents herein/claimants examined



witnesses who were, in turn, cross-examined by learned counsel for the petitioner. By contending that the disclosure of learned arbitrator was examined by the petitioner only when the matter was listed for the cross-examination of the witnesses of the first and second respondents herein, an application was filed by the petitioner herein under Sections 12 and 13 of the Arbitration Act. By such application, learned Arbitrator was challenged on the ground that there are justifiable doubts as to his independence or impartiality since he had acted as counsel for the first and second respondents previously. The said application was rejected by an order dated 20.04.2022. In the said order, learned arbitrator adverted to the declaration made by him and the no objection of the petitioner in response thereto. The present petition is filed in these facts and circumstances.

3. Learned counsel for the petitioner submits that learned arbitrator is ineligible as per entry 6 of the VII Schedule of the Arbitration Act. Consequently, it is asserted that a petition under Section 14 of the Arbitration Act is both maintainable and sustainable. In order to buttress this contention, learned counsel relies upon the judgment of the Hon'ble Supreme Court in *Bharat Broadband Network Limited v. United Telecoms*



Limited (Bharat Broadband), (2019) 5 SCC 755. With reference to paragraphs 11, 12 and 15 thereof, it is contended that the ineligibility under Section 12(5) can be cured only by an express agreement as per the proviso to Section 12(5). As regards the letter issued by the petitioner, it is stated that the said letter does not make reference to the declaration of the learned arbitrator and that such no objection was given by the petitioner without examining the disclosure. In this connection, learned counsel draws reference to the application filed under Sections 12 and 13, particularly paragraphs 8 to 20 thereof.

4. The second ground of challenge is based on the order passed by learned arbitrator. With specific reference to paragraph 7 thereof, learned counsel submits that the arbitral tribunal recorded a conclusion that the application under Sections 12 and 13 was filed only to overcome the liability to pay the fees of learned arbitrator. According to learned counsel, this evidences bias and brings the matter within the ambit of Section 14.

5. In response to these contentions, learned senior counsel for the first and second respondents submits that learned arbitrator recorded the conclusion in paragraph 7 of the order in the factual context of the



petitioner herein failing to make payments of any of the bills issued by learned arbitrator. He also submits that the fact that learned arbitrator acted as counsel for the first and second respondents herein prior to 2016 does not fall within the scope of even entry 20 of Schedule V of the Arbitration Act and certainly does not fall within the scope of entry 6 of Schedule VII. Therefore, he submits that the petition is bereft of merits.

6. The Arbitration Act provides for a challenge before the arbitral tribunal if the party challenging the arbitral tribunal is of the view that there are circumstances justifying doubts as to the impartiality or independence of the arbitrator(s). Schedule V of the Arbitration Act is intended to act as a guide to determine whether such circumstances exist. Therefore, Schedule V cannot be construed as exhaustive. If a challenge under Sections 12 and 13 is rejected by the arbitral tribunal, Sub-section 4 of Section 13 provides that the arbitral tribunal is entitled to proceed with the arbitral proceedings and pronounce the award. Such award will, however, be subject to challenge under Section 34 on the ground that the rejection of such challenge warrants interference.

7. Section 12(5) of the Arbitration Act provides that a person, whose



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relationship with parties or counsel to the dispute or to the dispute or interest in the dispute falls within entries 1 to 19 of Schedule VII, is ineligible to be appointed as arbitrator in the absence of an express waiver by an agreement in writing entered into after disputes arise between the parties. If the arbitrator is ineligible in terms of Section 12(5), it is open to the aggrieved party to petition this Court under Section 14 of the Arbitration Act as per the law laid down in *Voestalpine Schienen GmbH v. DMRC Ltd.* (2017) 4 SCC 665 and *HRD Corporation v. GAIL (India) Ltd.* (2018) 12 SCC 471 and ***Bharat Broadband***. Therefore, notwithstanding the rejection of the challenge under Sections 12 and 13, the question to be decided is whether the challenge before this Court falls within the scope of Section 12(5) read with Schedule VII and Section 14 of the Arbitration Act.

8. Learned counsel for the petitioner contended that learned arbitrator is ineligible in terms of entry 6 to Schedule VII. Entry 6 is set out below:

*“The Arbitrator's law firm had a previous but terminated involvement **in the case** without the arbitrator being involved himself or herself.”*(emphasis added)



On perusal of entry 6, it is clear that it applies when the arbitrator's law firm had a previous but terminated involvement in the case. When entries 1-19 in Schedule VII, which are common to entries 1-19 in Schedule V, are compared and contrasted with entries 20-31 in Schedule V, it is evident that the past relationship between the arbitrator and one of the parties to the dispute, whether as counsel or arbitrator, is dealt with in entries 20-24 of Schedule V and not in Schedule VII. Besides, the expression “in the case” should not be robbed of meaning. Therefore, the only reasonable construction of the phrase “in the case” in entry 6 of Schedule VII is involvement in the dispute referred for arbitration. From the declaration of the learned arbitrator, there is no indication that the law firm, with which learned arbitrator was previously associated, was involved in the dispute before the arbitral tribunal and the petitioner has also failed to provide any evidence of such involvement. Consequently, entry 6 clearly does not apply to the present case. Learned counsel for the petitioner has also been unable to establish that the circumstance falls within any of the other 18 entries in Schedule VII. Hence, it is concluded that the challenge is not on any of the enumerated grounds in Schedule VII.



9. In *Clarke Energy India Pvt. Ltd. v. SAS EPC Solutions Pvt. Ltd.*,

2021-5-L.W.92, I concluded that Schedule VII only deals with ineligibility arising out of conflict of interest, whereas Section 14 of the Arbitration Act is attracted if the arbitrator is *de jure* or *de facto* unable to exercise functions. I also concluded that *de jure* inability extends beyond open-and-shut legal disability. Inasmuch as Schedule VII is confined to three categories of conflict of interest, I further concluded that a petition may be maintainable and sustainable under Section 14 even if bias outside the context of conflict of interest is established. However, this was subject to the caveat that the threshold should necessarily be set at a high level so as to avert the derailment of arbitral proceedings by a disgruntled party thereto.

10. In this case, the allegation of bias is on the basis of the following conclusion in paragraph 7 of the order in the Sections 12 and 13 application. The said paragraph, in relevant part, is set out below:

“7.In the instant case, the declaration made by me was categorical in that I had appeared for some of the T V S Group Companies prior to 2016 when I was a Partner of M/s.T.S. Gopalan & Company and the same was informed and not demurred by the



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petitioner/respondent. The petitioner/respondent has only filed this petition so as to overcome his liability to pay the fees of the Arbitrator.”

In the factual context of the petitioner failing to honour the bills of learned arbitrator, which is noticed in paragraph 4 of the order, the above observation was made. This observation does not, by any stretch of imagination, meet the exacting threshold for interference under Section 14 on the ground of bias. Therefore, the petitioner has failed to make out a case warranting interference under Section 14. Hence, Arb.O.P.(Com.Div.) No.222 of 2022 is dismissed without any order as to costs. The period during which there was a stay of arbitral proceedings shall be excluded while computing time limits for purposes of Section 29A of the Arbitration Act.

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SENTHILKUMAR RAMAMOORTHY,

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