

ODC 21

ORDER SHEET
AP/831/2022
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

M/S. KARAM ENTERPRISE AND ORS.
VS
M/S. BENGAL ULTIMATE RESORT LLP AND ORS.

BEFORE:
The Hon'ble JUSTICE SHEKHAR B. SARAF
Date: 8th May, 2023.

Appearance:
Mr. Utpal Bose, Sr. Adv.
Ms. Hashnuhana Chakraborty, Adv.
Ms. Neelina Chatterjee, Adv.
Mr. Suvodeep Chakraborty, Adv.
. . .for the petitioner.

Mr. Jishnu Saha, Sr. Adv.
Mr. Subhradip Roy, Adv.
Mr. Satyaki Chaudhuri, Adv.
. . .for the respondent no.1.

The Court:

1. This is a Section 14 application under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") wherein the petitioner has raised the point of unilateral appointment by the respondents. Affidavits have been exchanged in the matter.

2. Mr. Jishnu Saha, learned senior advocate appearing on behalf of the respondents, relies on the Section 21 notice dated 18th April, 2022 to argue that paragraph 5 of the said letter amounts to a waiver under the proviso to Clause 5 of Section 12 of the Act. The said paragraph is delineated below:-

“Also in terms of the said clause of 6.50.1 of the GCC read with agreement contract dated 04.02.2019, you are hereby called upon to appoint a Sole Arbitrator to adjudicate the claims and contentions of our client as referred to above, together with all claims and disputes which may arise between the parties relating to this contract while appointing an arbitrator, you are requested to please consider the provisions of the Arbitration and Conciliation Act, 1996 read with all the amendments thereto and in particular Section 12 read with Fifth and Seventh Schedule of the said Act.”

3. Mr. Saha contends that subsequent to the letter issued, the respondents appointed an Arbitrator and the petitioners appeared before the Arbitrator on one occasion and took adjournment. Subsequently, a Section 16 application was filed challenging the jurisdiction of the Arbitrator. He accordingly submits that the conduct of the petitioners also indicates that there was a waiver under the Proviso to Section 12(5) of the Act.
4. Mr. Utpal Bose, learned senior Advocate appearing on behalf of the petitioners, submits that the letter dated 18th April, 2012 is a Section 21 notice wherein arbitration has been invoked and paragraph 5 has to be read

to mean that the respondents shall act in terms of Section 12 of The Act. He submits that this in no manner amounts to a waiver under the proviso to Clause 5 of Section 12 of the Act.

5. In **TRF v. Energo Engineering Projects Limited** reported in **[2017] 8 SCC 377** [Coram: Dipak Misra and A.M. Khanwilkar, J.J.] the Apex Court held that an individual who himself is ineligible under the provisions of the Act to be appointed as an arbitrator, cannot nominate a sole arbitrator. The relevant paragraph is extracted below:

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

6. Thereafter, the Apex Court in **Perkins Eastman Architects DPC v. HSCC (India) Limited** reported in **[2020] 20 SCC 760** [Coram: U.U. Lalit and Indu Malhotra, J.J.] observed that a party who has an interest in the outcome of

dispute also cannot nominate a sole arbitrator. The relevant portion is reproduced below:

“20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] 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 Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , 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 Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 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 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]".

(Emphasis Added)

7. Ultimately, the Apex Court in ***Bharat Broadband Network Limited v. United Telecoms Limited*** reported in **[2019] 5 SCC 755** [Coram: R.F. Nariman and Vineet Saran, J.J.] held that a unilaterally appointed arbitrator is de jure ineligible to perform his functions and that there is no question of a challenge to such arbitrator, before such arbitrator. The ineligibility can be cured only through an express waiver post the disputes having been arisen. The relevant extracts are replicated below:

“15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an

“express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

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17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.”

8. In *Cholamandalam Investment and Finance Co. Ltd. v. Amrapali Enterprises and Anr.* in EC/122/2022, I have exhaustively dealt with unilateral appointments and held that the Apex Court has judicially expanded the Schedule VII of the Act to include persons unilaterally appointed by one of the parties vide its judgement in ***Perkins (supra)*** and/or persons appointed

by persons falling under Schedule VII of the Act vide its judgement in **TRF Limited (supra)**. Such appointments can only be sanctified by parties after disputes have arisen. Furthermore, such sanctification can be valid only if the waiver under proviso of Clause 5 of Section 12 of the Act is unequivocally expressed in writing.

9. Upon a plain reading of the relevant paragraph in the Section 21 notice, I am of the considered view that the same is a paragraph in relation to invocation of the Arbitration agreement and **does not amount to a univocally express waiver** under the proviso of Clause 5 of Section 12 of the Act, particularly when the paragraph itself makes the request for appointment of an arbitrator conditional upon the consideration of the said proviso. The particular appointment is unilateral in nature, and accordingly, the mandate of the present Arbitrator is required to be terminated and substituted by a new Arbitrator. Accordingly, I revoke the mandate of the present Arbitrator under Section 14 of the Act.
10. In light of the same, I appoint Justice Indira Banerjee, former Judge of the Supreme Court of India, as an Arbitrator to resolve the disputes between the parties.
11. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the

Act before the Registrar, Original Side of this Court within four weeks from today.

12. Let this order be conveyed to the Arbitrator by the Registrar, Original Side forthwith.

13. AP/831/2022 is accordingly disposed of.

(SHEKHAR B. SARAF, J.)

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