

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

% **Date of Order: 24th April, 2023**

+ **O.M.P. (T) (COMM.) 32/2023 & I.A. 7641/2023**

ANUJ KUMARPetitioner

Through: **Ms. Rhea Luthra and Ms.
Pratishtha Negi, Advocates**

versus

M/S FRANCHISE INDIA BRANDS LIMITEDRespondent

Through: **None**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”) has been filed on behalf of the petitioner seeking the following reliefs:

“a. Allow the present petition and terminate the mandate of the Ld. Sole Arbitrator, Sh. Durgesh Kumar Pandey on account of the Arbitrator being de jure incapable of adjudicating the disputes between the Parties;

b. Appoint a neutral and impartial sole arbitrator and refer the dispute arising out of the Branch Agreement dated 17.02.2019 between the parties to the said neutral arbitrator if this Hon’ble Court deems fit that the disputes involved herein may be arbitrated;

c. Direct the Ld. Arbitral Tribunal to return the Arbitration Fees paid by the Petitioner.

d. Impose cost on the Respondent for unilaterally appointing the Ld. Sole Arbitrator for the dispute arising out of the

Branch Agreement dated 27.02.2019 and acting in contravention to the law laid down on appointment of arbitrator.

e. Pass any other order(s) as this Hon'ble Court may deem fit in facts and circumstances of the present case."

FACTUAL MATRIX

2. The respondent approached petitioner with a proposal to become a Branch Associate and open up an office at Noida, the rent for which was to be borne by the petitioner.

3. During the preliminary meetings it was agreed between the parties, that the duties of the petitioner included supervising the sales staff, manager and other employees provided by the respondent who shall be bringing prospective clients for the respondent. It was further agreed that the respondent will pay certain percentage of the total revenue as remuneration to the petitioner.

4. Accordingly, the petitioner paid an amount of Rs 10, 00,000/- inclusive of tax and surplus charges for a period of 5 years as the refundable fees for Association with the respondent. Furthermore, it was agreed that petitioner's residence shall be used as the branch office.

5. The petitioner filled an Expression of Interest Form on 02nd January 2019. The Branch Agreement was finally signed on 17th February 2019. The contract provided *inter alia* for dispute resolution in Clause 13(2). The relevant portion of said clause was as under:

"13(2).Arbitration: All disputes and differences arising between the parties hereto as also between the Company and the BA. Including any dispute or difference in regard to the interpretation of any provision or term or the meaning thereof, or in regard to any claims of one party against the

other or in regard to the rights and obligations of any parties under this Agreement shall be settled by Arbitration and Conciliation Act, 1996. Company will be sole authority to appoint the Arbitrator. The awards of the Arbitrator will be final and binding on both the parties. The place of such Arbitration shall be Delhi, India and Proceedings shall be in English Language.”

6. The respondent modified the Branch Agreement on 02nd July 2019 vide “First Addendum Agreement to Branch Agreement” which restricted remuneration of the petitioner to thirty percent payout upfront and the remaining was to be paid on quarterly reconciliation basis.
7. Pursuant to execution and initiation of Agreement, there was no remuneration received by the petitioner. Moreover, it is alleged that the petitioner was directed to move to an expensive office premises and was not provided the committed sales personnel as per the Agreement. Due to which, the petitioner had to incur additional expenditure.
8. It is alleged by the petitioner that the respondent vide email on 21st November 2019, without any prior communication to the petitioner terminated the Branch Agreement dated 17th February 2019.
9. For the purpose of claiming its dues, the petitioner filed a consumer complaint at the District Consumer Dispute Redressal Commission, Gautam Buddh Nagar. In the *interregnum*, the respondent invoked arbitration vide letter dated 11th November 2020 and appointed Sole Arbitrator. The petitioner opposed the appointment of the Sole Arbitrator vide email 12th November 2020.
10. The proposal to appointment was confirmed by the sole arbitrator vide letter dated 11th February 2021. The petitioner wrote letter to the

Sole Arbitrator dated 18th February 2021, stating that there were certain cases pending between the parties before the various Courts. It was further stated that the petitioner will join the arbitration proceedings once the cases are decided by the Court.

11. The respondent filed its Statement of Claim before the Arbitral Tribunal on 25th February 2021. Pursuant to which, the petitioner appeared before the Sole Arbitrator on 27th January 2022 and made submissions objecting to the jurisdiction of the Sole Arbitrator.

12. The Arbitrator ruled on submissions of petitioner *vide* order dated 13th October 2022. The objections regarding the appointment were dismissed with the following reasoning:

“Further, the undersigned is in consonances with the law laid down in “M/s Swiss Timing Limited versus Organising Committee CWG 2010, Delhi” of Hon’ble Supreme Court inter alia dealt with the issue of ‘arbitrability’, to rule that even where it is alleged that contract stands vitiated by fraud, such a dispute is arbitral.

Further, the appointment of Arbitrator is governed by the provision of Arbitration and Conciliation Act 1996 as amended from time to time. The appointment of sole arbitrator is covered in para 13.2 of Branch Agreement dated 17th February 2019, duly executed by claimant and respondent. Hence the appointment is in accordance with the Arbitration and Conciliation Act 1996, Branch Agreement dated 17th February 2019. A formal notice has been served on you by the claimant on 09th November 2020, and you had objected only on commencement of Arbitration proceedings due to pending cases.

Further; the appointment of undersigned as sole arbitrator has not been objected at any point of time during the prescribed period under the A & C Act. Also the tribunal has time and again given the Respondent several opportunities to contest the claim of claimant, besides Respondent’s right

to file counter claim against the claimant. This is based on principle of equality and justice and the present Arbitration Proceedings which are time bound cannot be suspended any further”

13. The petitioner further challenged the said order by filing a writ petition before this Court bearing CM (M) No. 1170/2022 under Article 227 of the Constitution of India. The petition was eventually dismissed as withdrawn by the petitioner vide order dated 03rd November 2022.

14. The petitioner thereafter, preferred an application under Section 16 read with Section 11 and 12(3) of the Act before the Arbitral Tribunal on 07th November 2022. The petitioner also filed its Statement of Defence along with the said Application. The respondent also filed its reply to the said Application on 03th March 2020. Pursuant to which the petitioner, filed its rejoinder to the Application on 03rd December 2022. The Application under Section 16 read with Section 11 and Section 12(3) of the Act was dismissed by the Arbitral Tribunal on 27th January 2023 by upholding its jurisdiction to adjudicate upon the dispute.

15. The instant petition has been filed by the petitioner under Section 14 and Section 15 of the Act praying for termination of the arbitrator which has been unilaterally appointed by the respondent. The petitioner has also prayed that a neutral and impartial arbitrator be appointed by this Court for adjudication of disputes between the parties.

(Submission on behalf of the Petitioner)

16. The learned counsel for the petitioner submitted that once it is found that the arbitrator is unable to perform his functions due to eventualities mentioned in section 14(1) of the Act, there shall be an

automatic termination of the mandate of the arbitrator and he shall be substituted by another arbitrator. Moreover, under section 14(1) of the said Act, the word used is “shall”. Therefore, the mandate of an arbitrator “shall” terminate and he shall be substituted by another arbitrator, if he, *de jure* or *de facto*, is unable to perform his functions or for other reasons fails, to act without undue delay.

17. It is submitted that there has been a unilateral appointment of the Arbitrator by the respondent. The petitioner objected to the unilateral appointment at the time of signing the Branch Agreement and at the time of nomination of the name of the Sole Arbitrator by the respondent.

18. It is further argued that the Sole Arbitrator has wrongly dismissed the Application under Section 16 read with Section 11, 12(3) of the Act. It is submitted that the Sole Arbitrator while adjudicating the said Application has wrongly held that the judgment passed in the case of ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited (2020) 20 SCC 760*** is not applicable to the facts of the present case. It is contended that as per Section 12 (5) of the Act, the Sole Arbitrator is *de jure* ineligible. Since, the party interested in the outcome of the dispute appointed the Sole Arbitrator hence, there is *de jure* ineligibility as upheld by the Hon’ble Supreme Court in ***Perkins Eastman Architects DPC (Supra)***. The relevant extract of the judgment is as follows-

“3. In the aforesaid premises the Applicants submit :-

(b) *The Chairman and Managing Director was the competent authority to appoint a sole arbitrator;*

xxx

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 authorized 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. 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 advantages a party may derive by nominating an arbitrator of its choice would get counterbalanced 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.”

19. It is further argued by the counsel for the petitioner that the arbitrator shall be appointed in an impartial and independent way with the consent of both the parties. The petitioner has placed reliance on the judgments of this in the cases of ***Proddatur Cable TV Digi Services v. Siti Cable Network Limited*** 2020 SCC OnLine Del 350 and ***M/s Vsk Technologies Private Limited & Ors vs Delhi Jal Board*** 2021 SCC OnLine Del 3525.

20. It is further submitted that this Court held in the case of ***SMS Ltd. vs Rail Vikas Nigam Limited***, Arb. P. 167/2019 dated 14th January 2020 referring to ***Perkins Eastman Architects DPC & Anr (Supra)*** that if there are justifiable doubts as to the independence and impartiality of the person nominated and if other circumstances warrant appointment of an independent by ignoring the procedure prescribed, such an appointment can be made by the Court.

21. It is submitted that the disclosure with regards to impartiality, in the manner prescribed under Section 12(1) of the Act has not been given by the Sole Arbitrator.

22. It is further asserted by the petitioner that the Sole Arbitrator has been appointed as an arbitrator in various arbitrations by the respondent. In view of the foregoing averments, the learned counsel appearing on behalf of the petitioner submitted that the prayers in the present petition may be allowed.

23. Heard the learned counsel for the petitioner and perused the record.

FINDINGS AND ANALYSIS

24. Before delving into the analysis this Court finds it necessary to briefly revisit the existing position of law with respect to the scope of Section 12(5), Section 14 and Section 15 of the Act which reads as under

“Section 12 Grounds for challenge

(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

14. Failure or impossibility to act.

(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not

imply acceptance of the validity of any ground referred to in this section or sub-section(3) of section 12.”

15. Termination of mandate and substitution of arbitrator.

*(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—
(a) where he withdraws from office for any reason; or (b) by or pursuant to agreement of the parties*

. (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held maybe repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

25. The Section 14 of the Act provides for the termination of the mandate of the arbitrator in two cases. Firstly, if there is *de-jure* or *de-facto* inability of the arbitrator. Secondly, if the arbitrator himself withdraws from the office. In case, there is any such inability, the mandate of the arbitrator is terminated and there is appointment of a new arbitrator.

26. The *de-jure* or *de-facto* termination of the mandate of an arbitrator under the Section 14 of the Act has to be assessed with respect to the Section 12 (5) of the Act. The section 12(5) of the Act provides that

irrespective of any prior agreement, the person to be appointed as arbitrator whose relationship with parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule he or she shall become ineligible to be appointed an arbitrator. The exception is carved out under proviso of Section 12(5) which provides that if the parties after the dispute have arisen have expressed their intention to circumvent and obliterate any disqualification by way of written agreement. Moreover, it is required that the agreement in writing must be by a party who may take objection to the appointment of the arbitrator and seek recourse under Section 12 (5) of the Act. Then the irregularity under Section 12 (5) is deemed to have been cured by way of such express written agreement.

27. This Court has referred to the judgment of Calcutta High Court in the case of ***Mc Leod Russel India Limited and Anr. v. Aditya Birla Finance Limited and Others*** 2023 SCCOnline Cal 330 which has been reproduced below:

“34. Section 12(5) specifies the disqualification of an arbitrator and not of the party appointing the arbitrator.

35. The proviso to section 12(5) which allows the parties to a dispute to waive the applicability of section 12(5) by an express agreement in writing would hence take from and be confined to section 12(5). In other words, the express agreement of the parties to get around the disqualification under the categories mentioned in section 12(5) can only be in relation to the Seventh Schedule. This is clear from the words "... waive the applicability of this sub- section ..." in the proviso (underlined for emphasis).

35. *The de jure or de facto termination of mandate of an arbitrator under section 14 must not only be assessed in light of the proviso to section 12(5) but also with reference to the express agreement entered into between the parties subsequent to the dispute having arisen between the parties.*

36. *The proviso to section 12(5) must be read in sync with the momentum of the 1996 Act. The proviso to section 12(5) is not a speed-breaker in the momentum to be achieved through arbitration but an accelerator to the process so that parties may resolve any lingering ineligibility issues and put such matters at rest once and for all. The proviso is not to be treated as an escape-route to a disgruntled party who is dissatisfied with a decision of an arbitrator and decides to do a volte-face after participating in the proceedings for a considerable length of time.*

37. *The provisions of The Arbitration and Conciliation Act, 1996, including section 12(5) read with the proviso are not fact-neutral. The statutory leeway given to parties is for a purpose; which is to facilitate the speed and ease of the arbitration procedure. The Act aims to aid parties who are ready to flow with the momentum built into the statute and not parties who change their positions consequent to adverse orders in the arbitration. Section 12(5) is certainly not context-indifferent where a party's continuous, repeated and unequivocal acceptance of the arbitrator's appointment and subsequent participation in the arbitration is wiped out simply on an application being filed for termination of the arbitrator's mandate.*

38. *All unilateral appointments of arbitrators cannot automatically be nullified on the application of section 12(5). The perceived disqualification must be assessed only on the mandate of section 12(5) which is within the guard-rails of the Seventh Schedule. Entry 12 of the Seventh Schedule specifically deals with a situation where the arbitrator is a manager, director or part of the management or has a controlling influence in one of the parties. This is*

not the same and cannot be put on an equal footing as an arbitrator being appointed by one of the parties to the dispute. A distinction must be made on the obvious dissimilarity between an arbitrator being hit by any one or all of the conflicted relationships in the Seventh Schedule and an arbitrator being rendered ineligible simply by reason of being appointed by one of the parties to the dispute.”

28. The ratio of ***McLeod Russell India Limited and Anr. v. Aditya Birla Finance Limited (Supra)*** is that when there is a unilateral appointment it has to be seen as per the facts and circumstances of the case. Mere unilateral appointment cannot nullify the appointment of the arbitrator. The Court held there is a difference between the fact that when one of the manager or key managerial personnel of one of the parties is appointed as the arbitrator and when one of such personnel of one of the party appoints an arbitrator unilaterally. Moreover, in the second situation where one of the party unilaterally appoints the arbitrator, the irregularity can be waived by way of an express agreement as per the proviso under Section 12 (5) of the Act.

29. In the present scenario, the petitioner submitted to jurisdiction of the Arbitral Tribunal as per the email dated 12th November 2020 sent by the petitioner to the respondent wherein, the petitioner did not object to the unilateral appointment of the Arbitrator. The petitioner merely disputed the fact that the dispute can be decided by the concerned Court and the arbitration was invoked with malicious intent. The relevant extract of the said email is reproduced as below:

“Concerned courts are competent enough to decide validity instead of you making such decision protecting & promoting

your unlawful vested interests and ulterior motives. I would be pursuing these”

30. Moreover, letter dated 18th February 2021 sent by the petitioner to the Sole Arbitrator wherein, the petitioner as per the said letter has itself consented to the jurisdiction of the Arbitral Tribunal. Therefore, the petitioner cannot take a different stand now by objecting to the appointment of the arbitrator. The relevant extract is reproduced as below:

“I will join the Arbitration proceeding once the current cases are decided by the court”

31. The order of the Arbitrator dated 13th October 2022, regarding the objections submitted by the petitioner has been rightly dismissed by the Arbitrator. The Arbitrator held that the petitioner never objected to the unilateral appointment of the Arbitrator. The petitioner has been even given several opportunities to the petitioner to contest the claims of the respondent. The petitioner also had an option to file counter claims which was not availed by the petitioner.

32. The Arbitrator has further upheld its jurisdiction as per the order, in the Application under Section 16 read with Section 11 & 12(3) of the Act. The relevant extract of the order is reproduced as below:

“3. The claimant further submitted that the first name of the director of the claimant and the undersigned are incidentally identical i.e. “Durgesh Kumar” and thus apprehension of the Respondent doubting the impartiality of arbitration proceedings is baseless and devoid of any merit.

4. It is also observed from the records that the Respondent has not alleged any prejudice or malice with the respect to the Ld. Sole Arbitrator within the statutory period prescribed

under the Section 16 of the A & C Act. The objection of the Respondent merely on the ground that the arbitrator was appointed by one of the director who is not drawing any salary and he is not under employment or claim any other benefit in the claimant company is of no merit and the claimant has invoked the provision of the Branch Agreement dated 17.02.2019, without following the due process as per the Arbitration and Conciliation Act, 2019 does not vitiate the present proceedings.

5. A perusal of Clause 13.2 of the Branch Agreement empowers the Claimant to appoint the Sole Arbitrator and therefore was entitled to invoke the said clause for appointment of Sole Arbitrator and therefore was entitled to invoke the said clause for appointment of Sole Arbitrator and the present situation can be easily differentiated with the ratio what has been laid down by the Hon'ble Apex Court in the abovementioned Judgment as the appointing authority was not withdrawing any pecuniary benefit from the claimant company.

6. It has been seen from the records and response from the Respondent that appointment of undersigned was never challenged by the Respondent and categorically consented through email to join the arbitration proceedings after the conclusion of the 2 cases i. e. Consumer Complaint and Complaint Case under the Metropolitan Magistrate Court at Gautambudh Nagar, Noida.

7. That considering the representation of the Respondent, the arbitration proceedings was kept in abeyance and only date was given during the pendency of the aforesaid cases. The Claimant has submitted the order of the aforesaid cases. The Claimant has submitted the order of the Hon'ble District Consumer Redressal Commission, Gautam Budh Nagar dated 27.10.2021 whereby the complaint was dismissed and the order of the Hon'ble Allahabad High Court dated 27.10.2021 staying the proceedings of the claimant.

Accordingly, Respondent joined the arbitration proceedings.

8. That having pursued the submission of Respondent and response of Claimant on the applications filed by the Respondent for closure of the arbitration proceedings, it was found that judgment of Hon'ble Supreme Court is not applicable to the present case as the circumstances are entirely different and ratio of the said judgment is not applicable to the present arbitration proceedings

ORDER

"In view of above facts and circumstances following orders are passed:

A. The application filed by the Respondent under Section 16 read with Section 11 & 12(3) of the Arbitration and Conciliation Act challenging the appointment of the Arbitrator is hereby dismissed." "

33. The fulcrum of the dispute in the present matter is whether the objection by the petitioner regarding the appointment of the arbitrator by the respondent stands waived by the letter dated 18th February 2021 and email dated 12th November 2020 as an express agreement under Section 12(5) of the Act.

34. The Tribunal has rightly upheld its jurisdiction in the Application under Section 16, 11 and 12(3) of the Act. The Tribunal has proceeded after there was a consent of parties regarding the appointment. Moreover, the Tribunal considered the submissions of the petitioner and kept the arbitration proceedings in abeyance till the conclusion of the court cases sub-judice between the parties. The Arbitral Tribunal has therefore, considered all the submission of the petitioner and gave a reasoned decision on the same.

35. This Court observes that the only objection petitioner had, was with respect to the matters which were sub-judice between the two parties in the Court. The petitioner had submitted to the Arbitrator that arbitration proceedings. Hence, the petitioner waived the perceived disqualification of the Arbitrator under Section 12 (5) by an express agreement in writing by way of the letter dated 18th February 2021 and email dated 12th November 2020.

36. The Arbitrator in the present case does not fall under any of the prohibited relationships/ categories in the Seventh Schedule. The unilateral appointment by the petitioner was regularised in term of the express agreement under Section 12(5) of the Act by the letter dated 18th February 2021 and email dated 12th November 2020. Therefore, as per the email and letter the petitioner agreed to the jurisdiction of the Arbitral Tribunal.

37. Furthermore, the following judgments relied on by the Petitioner ***Perkins (Supra)***, ***VSK (Supra)*** and ***Prodattur Cable TV Digi Services (Supra)*** is distinguished from the present case, as these judgments dealt with the application under Section 11 of the Act for the appointment of an arbitrator. Moreover, there was no issue of express written agreement under the proviso to Section 12 (5) of the Act.

38. Therefore, considering the facts and circumstances, the submissions made on behalf of the petitioner and the respondent, the contentions raised in the pleadings, this Court is of the view that the appointment of the Sole Arbitrator does not warrant any interference from this Court. The petitioner has not been able to show that Sole Arbitrator is *de-jure* incapable.

39. Accordingly, the instant petition stands dismissed along with pending applications, if any.

40. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

APRIL 24, 2023

gs/db

Click here to check corrigendum, if any

