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

% ***Date of decision: 03rd May, 2023***

+ **FAO (COMM) 70/2022**

CITICORP FINANCE INDIA LTD Appellant

Through: Mr. Inderbir Singh Alag, Senior Advocate with Mr. Avinash Kumar and Mr. Ajay Kumar, Advocates.

versus

MR RAJESH JAIN Respondent

Through: Mr. Sudhir Nagar, Mr. Krishna Dev Pandey and Mr. Shamindra Kadian, Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN

NAJMI WAZIRI, J.(ORAL)

The hearing has been conducted through hybrid mode (physical and virtual hearing).

1. This appeal impugns the order of the learned District Judge (Commercial), Central District, Tis Hazari Courts, Delhi dated 18.09.2021 in OMP (COMM.) No. 95 of 2020 which has set aside the Sole Arbitrator's award dated 22.11.2019 in respondent's petition under section 34 of Arbitration & Conciliation Act, 1996

(‘The Act’), on the ground that it was rendered by an Arbitrator who was not appointed with the respondent's consent. Reliance was placed on the dicta of the Supreme Court in *Perkins Eastman Architects DPC & Anr. V. HSCC (India) Ltd.* (2020) 20 SCC 760, which was rendered on 26.11.2019.

2. Mr. Inderbir Singh Alag, learned Senior Advocate appearing on behalf of the appellant submits that: i) no arguments were raised apropos the constitution of the Arbitral Tribunal till the arbitral proceedings were concluded; ii) the award had already been pronounced on 22.11.2019, so the rationale and benefit of *Perkins Eastman* (supra) was not available before the learned Sole Arbitrator; iii) the issue of the constitution of the Arbitral Tribunal was never pressed substantially nor pursued by the respondent, albeit in a passing remark in his reply, he did say that the Arbitrator was not appointed with his consent; iv) the respondent could not have challenged the award apropos the very constitution of the Arbitral Tribunal as this ground is not available under section 34 of the Act; v) the respondent could have raised such grounds under Section 11(6) of the Act but he chose not to. The appellant places

reliance upon the dicta of this Court in *Kanodia Infratech Limited vs. Dalmia Cement (Bharat) Limited* (2021) 284 DLT 722 inter alia reads as under:-

"...Now, even if at this belated stage this Court tests the case of petitioner applying the ratio of law laid down in Perkins Eastman (supra) and TRF Limited (supra), it finds that in those cases the Hon 'ble Court had dealt with petition filed under the provisions of Section 11(6) of the Act, whereas the present petition has been filed under Section 34 of the Act, provisions whereof prescribe the ground on which an arbitral award can be challenged and set aside and not the mandate of appointment of Arbitral Tribunal. Hence, reliance placed upon decision in Perkins Eastman (supra) is of no help to the case of the petitioner... "

3. The learned Senior Advocate further submits that a compassionate view needs to be taken since the proceedings have gone ahead and the award was passed; that the *lis* is an old one and the objective of the Arbitral proceedings is to find a resolution and closure to such *lis* at the earliest.
4. However, the records show that the issue of appointment was raised at the initiation of the Arbitral proceedings itself. The respondent had objected to the appointment of the Arbitrator and the same is recorded in the impugned order as under:-

"...39. The contention made by Ld. Counsel for the

respondent no.1 is not convincing. The arbitral record reflects that in the objection/written statement filed on behalf of the petitioner herein, in para 5 of the preliminary objection it is stated by the petitioner

“that the Ld. Arbitrator has no jurisdiction/power to adjudicate the present claim petition of the claimant because the Ld. Arbitrator was not appointed by the written consent of the parties”

However, the Ld. Arbitrator has not considered that objection and the award is silent upon the same.

40. The counsel for the respondent no.1 has rightly contended that the autonomy of the parties to the choice of procedure is the foundational pillar of the arbitration. ...”

5. The learned counsel for the respondent places reliance upon the

Bharat Broadband Network Limited v. United Telecoms Ltd.

(2019)5 SCC 755, wherein the Supreme Court held as under:

“...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.

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

“Arbitrator's relationship with the parties or counsel

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.”

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] on 3-7-2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 3-7-2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. 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. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23-10-2015. The judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] nowhere states that it will apply only prospectively i.e. the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23-10-2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27-1-2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of Clause 33(d) of the purchase order dated 10-5-2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Considering that the appointment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] of a retired Judge of this Court was set aside as being non est in law, the appointment of Shri Khan in the present case must follow suit. ...”

6. The respondent further places reliance on the judgment of the Division Bench of this court in the case of *Govind Singh V. Satya Group Pvt. Ltd.* 2023 SCC OnLine Del 37, which has held as under:

“... 21. In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person

who is ineligible to act as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction.

....

23. We are unable to agree that the decision in Bharat Broadband Network Limited v. United Telecoms Limited (supra) can be distinguished on the aforesaid ground. The said decision had authoritatively held that in terms of the proviso of Section 12(5) of the A&C Act, the ineligibility of an arbitrator under Section 12(5) of the A&C Act could be waived only by an express agreement in writing and cannot be inferred by the conduct of the parties. Thus, the fact that the parties had participated before the arbitral tribunal cannot be construed as a waiver of their rights to object to the ineligibility of the arbitrator (s). We are unable to accept that while such a right could be exercised prior to the delivery of the award, it would cease thereafter. If the arbitrator is ineligible to act as an arbitrator, the arbitral award rendered by the arbitral tribunal would be without jurisdiction...”

7. What is settled is that unilateral appointment of an Arbitrator by one party cannot be sustained. When an objection is raised regarding such appointment, it is a contention which goes to the root of the arbitral proceedings. It is a foundational argument as it questions the very jurisdiction and authority of the appointee to proceed with the arbitration. This issue needs to be determined promptly before the arbitral process can proceed

any further. In the present case, the arbitrator had been appointed unilaterally by the appellant, it was objected to by the respondent from the very beginning, the non-determination of the objection rendered further arbitral proceedings, void and of no consequence. Therefore any award or order purporting to cast a liability on the objecting party would be *non-est*.

8. In view of the above, the impugned order setting aside the arbitral award dated 22.11.2019 does not call for any interference.
9. The appeal is dismissed.

NAJMI WAZIRI, J

SUDHIR KUMAR JAIN, J

MAY 03, 2023

sk/sw/ss