



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

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Date of Decision : 01.12.2023

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O.M.P. (COMM) 469/2023

IN THE MATTER OF:

UMAXE PROJECTS PRIVATE LIMITED Petitioner

Through: Mr. Anirudh Bakhru, Mr. Ayush Puri,
Mr. Kanav Madnani, Ms. Pragya
Choudhary, Mr. Vijay L. Rathi and
Mr. Sultan Haider, Advocates.

versus

AIR FORCE NAVAL HOUSING BOARD Respondent

Through: Mr. Yoginder Handoo, Mr. Ashwin
Kataria and Ms. Medha Gaur,
Advocates with GP Captain K.K.
Sharma and Mr. B.S. Nirola.

AND

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O.M.P. (COMM) 470/2023

UMAXE PROJECTS PRIVATE LIMITED Petitioner

Through: Mr. Anirudh Bakhru, Mr. Ayush Puri,
Mr. Kanav Madnani, Ms. Pragya
Choudhary, Mr. Vijay L. Rathi and
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versus

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Sharma and Mr. B.S. Nirola.



CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petitions filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, '*the A&C Act*'), the petitioner seeks setting aside of the final arbitral Awards both dated 28.06.2023 (hereafter, '*the impugned Awards*') which was delivered by Arbitral Tribunal comprising of Sole Arbitrator (hereafter, '*the AT*').

2. Both the impugned Awards are delivered by the same Sole Arbitrator between the parties, albeit with respect to different projects. As the parties are same and the contentions raised being common in both the petitions, the same are taken up for consideration together.

3. In OMP No. 469/2023, the impugned Award was passed in the context of Letter of Acceptance (LOA) dated 04.05.2010 issued to the petitioner being the lowest bidder for the project to construct 430 flats in eight towers in a Housing Scheme near Jhajjar Village, Prem Nagar, Dehradun for an estimated cost of Rs.98.01 crores. An agreement was executed on 10.06.2010.

In OMP No. 470/2023, the impugned Award was passed in the context of Letter of Acceptance (LOA) dated 30.11.2017 issued by the respondent to the petitioner to complete the balance work at the project site comprising 545 flats in eight towers for an amount of Rs.38.33 crores. Notably, the respondent in the year 2010 had launched a Housing Scheme at Shatabdi Nagar, Meerut which it had awarded to one M/s Omaxe Infrastructure & Construction Ltd. However, the contract was terminated on 27.10.2017 resulting in issuance of LOA in favour of the petitioner. An agreement was executed on 17.01.2018.



4. Disputes having arisen between the parties, respondent invoked arbitration resulting in passing of the impugned Awards.

5. The primary ground for challenge pressed by the petitioner is the *de jure* ineligibility of the learned Sole Arbitrator to be appointed as an arbitrator being hit by Seventh Schedule of the A&C Act. It is contended that in terms of Section 12(5) of the Act, petitioner's participation in the arbitral proceedings will not preclude it from challenging the proceedings conducted by an inherently ineligible arbitrator, since only an express agreement in writing between the parties subsequent to the occurrence of dispute, could waive off the party's right to challenge the appointment, which did not happen in this case.

6. Petitioner, in support of its submissions, relied upon decisions in Govind Singh v. Satya Group Pvt. Ltd. & Anr.¹, Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat², Larsen & Toubro Ltd. v. HLL Lifecare³, Man Industries (India) Ltd. v. Indian Oil Corporation Ltd.⁴, Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Anr.⁵ and Om 360 Degree Advertising & Entertainment Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.⁶

7. Respondent, while refuting the submission, contended that the waiver could be implicit by the conduct, inasmuch as the petitioner was not a mere passive and reluctant participant in the arbitral proceedings but it took active steps for continuation of the arbitral proceedings by filing an application for under Section 29(A) of the A&C Act seeking extension of the mandate of the AT. Respondent opposed petitioner's reliance on the judgment delivered

¹ 2023 SCC OnLine Del 37

² 2023 SCC OnLine Del 3148

³ Order dated 20.09.2021 in OMP(T)(COMM.) 59/2021

⁴ 2023 SCC OnLine Del 3537

⁵ (2018) 4 SCC 793

⁶ 2023 SCC OnLine Del 6007



in Man Industries (Supra) since the same is under challenge in FAO(OS)(COMM.) 172/2023 and the same is pending consideration.

8. The only issue to be determined is whether petitioner's continued participation in the arbitral proceedings and further preferring a petition under Section 29(A) would preclude it from challenging the award by challenging the *de jure* eligibility of the Arbitrator. Indisputably, the arbitrator was unilaterally appointed by the respondent pursuant to Clause 18.2 of GCC forming part of the Agreement dated 10.06.2010 and Clause 22 of the Agreement dated 17.01.2018. The Clauses do not countenance any say of the petitioner in the appointment.

9. I have the benefit of ample case laws on the subject. The Supreme Court in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.⁷ while relying on its earlier dicta in TRF Ltd. v. Energo Engineering Projects Ltd.⁸ authoritatively laid down that the chairman-cum-managing director of a party being ineligible himself was also not eligible to appoint anyone else as an arbitrator. Division Benches of this Court, while following Perkins (Supra), set aside the Award in Govind Singh (Supra) and Kotak Mahindra Bank (Supra). In the former, it was held that even if it was assumed that a person participated in the arbitral proceedings without raising an objection to the appointment of the learned Arbitrator it was not open to hold that he had waived off his right under Section 12(5) of the A&C Act. The dictum of Supreme Court was followed by Coordinate Benches of this Court in Larson & Toubro Ltd. (Supra) and Man Industries (Supra). The latter decision also considered the issue whether filing of application under Section 29(A) would amount to waiver by party of its right to challenge the ineligibility of

⁷ (2020) 20 SCC 760

⁸ (2017) 8 SCC 377



the arbitrator under Section 12(5). The Single Judge while negating such a challenge also referred to another decision of the Coordinate Bench in M.S. Bridge Building Construction Co. Pvt. Ltd. v. Bharat Heavy Electricals Ltd.⁹

10. In Larson and Toubro (Supra), it has already been held that filing an application under Section 29A seeking extension of mandate, would not amount to ‘express waiver in writing’. This answers the respondent’s question on the effect of application made by the petitioner under Section 29A of the Act.

11. Respondent’s reference to decision in Bharat Broadband Network Limited v. United Telecoms Ltd.¹⁰, wherein the court held that filing of statement of defence by a party without objecting to the ineligibility of the arbitrator would amount to waiver under Section 12(5) is not helpful to the respondent’s cause. The waiver has to be express and in writing after becoming aware of the ineligibility. In Bharat Broadband (Supra), the court, in the facts of the case, held that the petitioner had demonstrably waived its right to object. However, it has to be seen in the facts of each case whether the conduct of the party challenging the eligibility is of a nature that it is akin to an “express waiver in writing”. An overt act on the part of the party expressly conceding to the jurisdiction of the arbitrator after becoming aware of the ineligibility may amount to waiver of the kind conceived in Section 12 (5). Simple act of participation, without any indication that the party is aware of the ineligibility and has consciously chosen to waive off the right to object, will not be sufficient.

12. In any case, respondent’s objection is essentially due to the filing of Section 29(A) application by the petitioner. However, this filing has been

⁹ 2023 SCC OnLine Del 242

¹⁰ (2019) 5 SCC 755



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held to not amount to a waiver.

13. Resultantly, the petitions are allowed. Awards are set aside. There shall be no orders as to cost.

14. Needless to state that the Court has not rendered any opinion on the merits of the impugned Award or any other respective contentions of the parties except the one noted and discussed hereinabove.

MANOJ KUMAR OHRI
(JUDGE)

DECEMBER 1, 2023

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