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

*Date of Decision: 17<sup>th</sup> March, 2023*

+ O.M.P. (COMM) 519/2019 & I.As. 17587/2019, 2186/2023

**M/S ECO RECYCLING LTD**

..... Petitioner

Through: Mr. Rajeev Mehra, Senior Advocate with Mr. Arvind Sharma, Mr. Madhu Kant Jha, Advocates.

versus

**NATIONAL RESEARCH DEVELOPMENT CORPORATION  
& ANR.**

..... Respondents

Through: Mr. J.M. Kalia (Enrolment No. D/46/1985, Mobile No. 9810325510), Mr. Dhruv Kalia, Mr. Siddharth Shukla, Mr. Paras Machanda, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE PRATEEK JALAN**

**PRATEEK JALAN, J. (ORAL)**

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1. By way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"], the petitioner assails an award dated 22.08.2019 rendered by a sole arbitrator in a dispute between the respondents herein (who were the claimants before the learned arbitrator) and the petitioner (who was the respondent therein).

Signature Not Verified

Digitally Signed By: SHITU

NAGPAL

Signing Date: 20.03.2023

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2. The first ground raised in support of the petition by Mr. Rajeeve Mehra, learned Senior Counsel for the petitioner, is that the arbitral proceedings were *void ab-initio* as the learned arbitrator was unilaterally appointed by the Secretary, Department of Legal Affairs, Government of India, who was himself ineligible to act as the arbitrator.

3. I have heard Mr. Mehra and Mr. J.M. Kalia, learned counsel for the respondents on this issue.

4. Respondent No.1, National Research Development Corporation [hereinafter, “NRDC”] is an enterprise of the Department of Scientific and Industrial Research, Government in India [“hereinafter, “DSIR”], which is arrayed as respondent No.2. The arbitration proceedings arose out of a Tripartite Agreement dated 23.11.2010 [hereinafter, “the Agreement”] by which the respondents agreed to support a project of the petitioner for development of a process for “*E-waste recycling and precious metal recovery*”.

5. Clause 15 of the Agreement contains an arbitration clause in the following terms:

*“If any dispute or difference arises between the parties hereto as to the construction, interpretation, effect and implication of any provision of this Agreement including the rights or liabilities or any claim or demand of any Party (or its extent) against other party or its sub-contractor or in regard to any matter under these presents but excluding any matters, decisions or determination of which is expressly provided for in this Agreement such disputes or differences **shall be referred to the sole arbitration of the Secretary of Department of Legal Affairs, Govt. of India or his nominee.** A reference to the arbitration under this clause shall be deemed to be submission within the meaning of the Arbitration and*

*Conciliation Act, 1996 and any modification or re-enactment thereof and the rules framed thereunder for the time being in force.”<sup>1</sup>*

6. Disputes having arisen between the parties, NRDC invoked arbitration by a communication dated 08.12.2017 addressed to the Secretary, Department of Legal Affairs. In the said communication, it specifically referred to the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 and requested the addressee not to act as the arbitrator, but to nominate any other person who may not fall under the categories specified in the Fifth and Seventh Schedules to the Act.

7. Pursuant to this request, the Secretary, Department of Legal Affairs, issued an order dated 22.02.2018, appointing Shri Sarvesh Chandra, Former Chairman, FERA Board as the sole arbitrator. The arbitrator entered into the reference on 05.03.2018 and also made a declaration in terms of the Act.

8. After the conclusion of the arguments before the arbitrator, and during the period when the award was reserved, a communication dated 16.08.2019 was addressed by Mr. Kalia (who was acting for NRDC and DSIR in the arbitration proceedings also) to the arbitrator (incidentally, without copying the petitioner herein or its representative), in which it was stated as follows:

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*Respected Sir,*

***The aforestated issue alongwith the other connected issues were put up and considered by the competent authorities of***

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<sup>1</sup> Emphasis Supplied.

National Research Development Corporation / DSIR, Ministry of Science and Technology (Govt. of India). After active and considered deliberation by the respective authorities, the contentious legal issues emerged, gist of which, I have been directed by the National Research Development Corporation to convey to you:

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4. The Secretary Department of Legal Affairs, Ministry of Law (Govt. of India) who is a designated arbitrator as per the arbitration clause render advice to the various departments including DSIR, Ministry of Science and Technology, one of the party in the arbitral proceeding thus falls under the category as consultant / advisor vide entry 1 of V Schedule incurring ineligibility. As he himself is ineligible to act as arbitrator, the nomination made by him is also hit by the same principle. Accordingly, your nomination/ appointment becomes void ab-initio and the mandate automatically terminates as per the mandate of the Apex Court. It is pertinent to mention here that there is no agreement in writing by the parties to the arbitral proceeding waiving this disqualification as per proviso to section 12(5) of the Arbitration and Conciliation Act.

As your mandate automatically terminates under section 14(1)(a) of the Arbitration and Consideration Act, you being de-jure unable to perform your function on account of disqualification under the V Schedule of the Act and absence of any waiver in writing, the entire proceeding and the award if any would become null & void, leaving the parties to seek fresh appointment of the arbitrator as per the judgment of the Supreme Court dated 16.04.2019 in Civil Appeal No.3972 of 2019 - Bharat Broadband Network Ltd. Vs. United Telecom Ltd.

The competent authority therefore seek your humble indulgence to consider the above stated position of law and advice accordingly.

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9. By an e-mail dated 20.08.2019, the arbitrator forwarded a copy of this communication to the learned counsel for the petitioner herein also. On 23.08.2019, learned counsel for the petitioner acknowledged

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<sup>2</sup> Emphasis Supplied.

receipt of the e-mail of the arbitrator, and requested to be informed about the status of the same.

10. The aforesaid communication was dealt with by an order of the arbitrator dated 21.08.2019, which according to Mr. Mehra was sent to the parties only with the impugned award dated 22.08.2019, by which respondents' claims were allowed. In the order dated 21.08.2019, the arbitrator dealt with the aforesaid issue as follows:

*“3. Claimants’ communication has caused some confusion because the reservation about my appointment has been made by the claimants who themselves had approached Law Secretary to appoint an arbitrator when they were already aware that in an earlier case relating to identical agreement (M/s National Development Research Corporation (NRDC) v. M/s Sapala Organics Pvt. Ltd. (SOPL) in which I was appointed by Law Secretary as sole arbitrator, a similar objection was raised by SOPL citing the case of TRF Ltd. v. Energo Engineering Projects Ltd but both the parties, NRDC & SOPL mutually agreed to my appointment. I was also able to encourage the parties to mutually settle the matter even after the case was fully argued. Moreover, even though the claimants are aware of SOPL’s case and are represented by the same counsel who appeared in that case also, they continued with the present proceedings upto the conclusion of the arguments without making any reservation. It is also to be noted that even after receiving my declaration as per Sixth Schedule of the Act, neither the claimants nor the respondents raised any issue about my acting as arbitrator in the case. In view thereof, the communication at the stage when only a few days were left before expiry of extended time for making the award, is not understandable.*

*4. It is seen that the ld. Counsel has referred to section 14.1(a) of the Act while raising question about my appointment. **The question arises whether section 14.1(a) applies to a case where an arbitrator, after having been duly appointed, becomes unable, by operation of law, to perform his functions as arbitrator, or, it also applies to a situation where initial appointment itself is questioned. The question as to the relevance of section 16 also will arise.** These issues, obviously enough, can be decided only after hearing the parties. **Since only a few days are left for the***

**expiry of extended time for award, it is not possible to hold hearings and take any action on the letter sent by the ld. Counsel for the claimants. In the circumstances, I will proceed to sign and publish my award leaving it to the parties to take such action as they are advised.**<sup>3</sup>

11. Mr. Mehra submits that the arbitral award is liable to be set aside on the short ground that the arbitrator was appointed by a person who was himself ineligible to act as the arbitrator. In support of this contention, he relies upon the judgments of the Supreme Court in *TRF Ltd. vs. Energo Engg. Projects Ltd.*<sup>4</sup> and *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*<sup>5</sup> and the Division Bench judgments of this Court in *Ram Kumar & Anr. vs. Shriram Transport Finance Co. Ltd.*<sup>6</sup> and *Govind Singh vs. M/s Satya Group Pvt Ltd & Anr.*<sup>7</sup>.

12. Mr. Mehra also submits that the factual position that the Secretary, Department of Legal Affairs was ineligible to act as the arbitrator, is borne out by the contention of the respondents in the letter of invocation itself, and by the communication of learned counsel for respondents dated 16.08.2019.

13. Mr. Kalia disputes this position. He firstly submits that reliance upon his letter to the arbitrator dated 16.08.2019 is misplaced as it was not an application made before the arbitrator at all. He also states that the issue of ineligibility of the arbitrator was raised in the context of the fee demanded by the arbitrator, which according to the

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<sup>3</sup> Emphasis Supplied.

<sup>4</sup> (2017) 8 SCC 377.

<sup>5</sup> (2020) 20 SCC 760.

<sup>6</sup> FAO (COMM) 60/2021.

<sup>7</sup> FAO (COMM) 136/2022.

respondents was not in accordance with law. Mr. Kalia further submits that on an appropriate interpretation of the communication, it cannot be said that the Secretary, Department of Legal Affairs was ineligible to act as the arbitrator as he was a consultant/ advisor only to DSIR, which was not a contesting party in the arbitration proceedings. (It is however undisputed that DSIR was itself a party in its own name.)

14. Mr. Kalia relies upon judgments of the Supreme Court in *Union of India vs. Pradeep Vinod Construction Co.*<sup>8</sup> and *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*<sup>9</sup> to submit that the appointment of Mr. Sarvesh Chandra in the present case was not hit by Section 12 of the Act. It is his submission that the appointment of a retired officer of one of the parties has been upheld in the aforesaid judgments. Mr. Kalia also sought to distinguish the Division Bench judgment of this Court in *Ram Kumar*<sup>10</sup> on the ground that *Ram Kumar*<sup>11</sup> was a case where no declaration under Section 12 of the Act was made by the arbitrator.

15. Having heard learned counsel for the parties, I am of the view that the submissions advanced on behalf of the respondents are entirely unmerited. They fly in the face not only of binding authority of the Supreme Court and this Court, but also of the categorical assertions of the respondents themselves in the course of the proceedings. Suffice it to say that it is a matter of some dismay that a

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<sup>8</sup> (2020) 2 SCC 464.

<sup>9</sup> (2020) 14 SCC 712.

<sup>10</sup> Supra (note 6).

<sup>11</sup> Ibid.

statutory authority should take such contrary stands in the arbitral proceedings and before this Court, that too on a matter which reflects upon the independence and impartiality of the arbitrator, and thus upon the integrity of the arbitral process itself.

16. The judgments of the Supreme Court in *TRF*<sup>12</sup> and *Perkins*<sup>13</sup> clearly hold that it is impermissible for arbitral proceedings to be conducted by an arbitrator who was appointed by a person who was himself/ herself ineligible to act as the arbitrator. In *TRF*<sup>14</sup>, the Supreme Court held as follows:

*“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.”<sup>15</sup>*

In *Perkins*<sup>16</sup>, the Supreme Court followed the same line of reasoning in these terms:

<sup>12</sup> Supra (note 4).

<sup>13</sup> Supra (note 5).

<sup>14</sup> Supra (note 4).

<sup>15</sup> Emphasis Supplied.

<sup>16</sup> Supra (note 5).

“21. But, in our view that has to be the logical deduction from TRF Ltd. 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.”<sup>17</sup>

17. These judgments have been considered by the Division Bench in *Ram Kumar*<sup>18</sup> and *Govind Singh*<sup>19</sup>. The Division Bench held that an award rendered by an ineligible arbitrator would be *void ab-initio*. In *Ram Kumar*<sup>20</sup>, the Division Bench put it thus:

“28. **Clearly, an award rendered by a person who is ineligible to act as an arbitrator would be of little value; it cannot be considered as an arbitral award under the A&C Act.** While it is permissible for the parties to agree to waive the ineligibility of an arbitrator, the proviso to Section 12(5) of the A&C Act makes it clear that such an agreement requires to be in writing. In *Proddatur Cable TV Digi Services v. Siti Cable Network Limited*: (2020) 267 DLT 51, the learned Single Judge of this Court,

<sup>17</sup> Emphasis Supplied.

<sup>18</sup> Supra (note 6).

<sup>19</sup> Supra (note 7).

<sup>20</sup> Supra (note 6).

*following the decision in TRF Ltd. v. Energo Engineering Projects Ltd. (supra) and Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. (supra), held that unilateral appointment of an arbitrator by a party is impermissible.*

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31. This Court is of the view that the approach of the learned Commercial Court is flawed. **Unilateral appointment of the Arbitrator by the respondent is impermissible.** The fact that the learned Sole Arbitrator had been engaged in a number of matters by the respondent is, concededly, a material fact that would raise justifiable grounds as to his independence and impartiality. **Thus, in addition to being ineligible as an arbitrator under Section 12(5) of the A&C Act,** the grounds giving rise to justifiable doubts as to the independence and impartiality exist in the present case. The learned Sole Arbitrator was required to disclose in writing such circumstances which are likely to give rise to justifiable doubts as to his independence and impartiality, but he had failed to make any such disclosure. In our view, since the grounds giving rise to justifiable doubts as to impartiality exist, failure to make such disclosure vitiates the arbitral proceedings and the impugned award.”<sup>21</sup>

In Govind Singh<sup>22</sup> also, the Division Bench held as follows:

**“18. In view of the law as noted above, the learned Arbitrator unilaterally appointed by the respondent company was ineligible to act as an arbitrator under Section 12(5) of the A&C Act.**

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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.”<sup>23</sup>

<sup>21</sup> Emphasis Supplied.

<sup>22</sup> Supra (note 7).

<sup>23</sup> Emphasis Supplied.

18. Viewed in this context, the case of the respondents during the course of proceedings is of some relevance. It may be reiterated at the outset that both the NRDC and DSIR were parties to the agreement and claimants in the arbitral proceedings. As pointed out by Mr. Kalia himself, while seeking the appointment of an arbitrator, NRDC itself referred to the provisions of the Amendment Act of 2015 and requested the Secretary, Department of Legal Affairs as follows:

**“Since the Arbitration & Conciliation Act, 1996 has been amended by the Arbitration & Conciliation (Amendment) Act, 2015 w.e.f. 23.10.2015, you are requested not to act as Arbitrator but nominate either one of them out of the panel enclosed or any other person who may not fall under any of the categories specified in the Fifth and Seventh Schedules of the Arbitration & Conciliation Act, 1996 (as amended by the Arbitration & Conciliation (Amendment) Act, 2015 (No.3 of 2016) effective from 23.10.2015.”<sup>24</sup>**

This request in itself indicates that according to NRDC, the Secretary, Department of Legal Affairs was ineligible to act as the arbitrator, having regard to the provisions of the Amendment Act of 2015.

19. The communication dated 16.08.2019 addressed by Mr. Kalia to the arbitrator reiterates this in even stronger terms. In view of the submissions made today, it is necessary to note that the communication dated 16.08.2019 itself notes that it has been issued after “active and considered deliberation by the competent authorities” of NRDC and DSIR. Paragraph 4 of the letter contains a factual assertion that the Secretary, Department of Legal Affairs is the consultant/ advisor to DSIR, which is one of the parties in the arbitration proceedings. It is on this basis that it was further asserted

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<sup>24</sup> Emphasis Supplied.

on behalf of DSIR and NRDC that the nomination by the Secretary, Department of Legal Affairs is hit by the same principle. The appointment of the arbitrator was characterized as “*void ab-initio*”. The respondents also categorically stated that there was no waiver by the parties in terms of the proviso to Section 12(5) of the Act in the facts of the present case, and in light of the judgment of the Supreme Court in *Bharat Broadband Network Ltd. vs. United Telecom Ltd.*<sup>25</sup> Indeed, no argument of waiver has been addressed before me either.

20. Mr. Kalia’s contention that the aforesaid communication was not be treated as an application before the arbitrator at all is misconceived. Arbitration proceedings are not conducted with the same formality as Court proceedings. The communication dated 16.08.2019 clearly sought a decision by the arbitrator. In the final paragraph of the said letter, the arbitrator was requested to “*consider the above stated position in law and advice accordingly*”.

21. The course of proceedings thereafter also leaves much to be desired. While forwarding the aforesaid communication to learned counsel for the petitioner on 20.08.2019, the arbitrator, in fact, dealt with the respondents’ request on 21.08.2019 itself. The application was neither accepted nor rejected; instead, questions which required consideration were formulated but not considered on the ground that time for making the award was expiring. The arbitrator, therefore, decided that he would proceed to sign and publish the award, leaving it to the parties to take such action, as they may be advised.

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<sup>25</sup> (2019) 5 SCC 755.

22. The judgments relied upon by Mr. Kalia are inapposite to the facts of the present case. In *Pradeep Vinod Constructions*<sup>26</sup>, the issue before the Supreme Court was with regard to appointment of a named arbitrator. The Court was concerned with a case where, despite a named arbitrator, the High Court had appointed another person as the arbitrator. The Court applied the principle of party autonomy in reversing the appointment by this Court. This is not the issue in the present case at all. The judgment in *Pradeep Vinod Constructions*<sup>27</sup> does not deal with a case where either the appointing authority or the named arbitrator was ineligible to act and the arbitrator was unilaterally appointed. In fact, it is perhaps for this reason that the judgments in *TRF*<sup>28</sup> and *Perkins*<sup>29</sup> were not placed before the Supreme Court in *Pradeep Vinod Constructions*<sup>30</sup>.

23. The judgment in *Central Organisation*<sup>31</sup>, is also inapplicable. In that case, the case was not held to be covered by the bar of *TRF*<sup>32</sup> and *Perkins*<sup>33</sup> as a broad based panel of retired officers had been suggested by the appointing authority to the other party and two arbitrators chosen by the other party were included in the tribunal of three members. In the present case, in contrast, the decision to appoint Mr. Sarvesh Chandra was taken by the Secretary, Department of Legal

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<sup>26</sup> Supra (note 8).

<sup>27</sup> Ibid.

<sup>28</sup> Supra (note 4).

<sup>29</sup> Supra (note 5).

<sup>30</sup> Supra (note 8).

<sup>31</sup> Supra (note 9).

<sup>32</sup> Supra (note 4).

<sup>33</sup> Supra (note 5).

Affairs unilaterally without forwarding any panel to the petitioner herein.

24. Mr. Kalia is also in error in suggesting that the judgment in *Ram Kumar*<sup>34</sup> deals only with the question of non-furnishing of the declaration under Section 12 of the Act by the arbitrator. Paragraphs 25 to 31 of the judgment, in fact, deal with the question of ineligibility under Section 12 of the Act. In my view, the judgments cited by Mr. Mehra clearly govern the present case.

25. Having regard to the aforesaid legal position, the petition is liable to succeed. The impugned award dated 22.08.2019 is, therefore, set aside. However, the respondents/ claimants will be at liberty to proceed for arbitration afresh in accordance with law, if they are so advised.

26. As noted above, the respondents have proceeded on a basis which is directly contrary to the stand taken by them during the course of the arbitration proceedings. The petitioner is therefore entitled to costs assessed at ₹30,000/- payable by the respondents, jointly and severally.

27. The petition, alongwith pending applications, is disposed of.

**PRATEEK JALAN, J**

**MARCH 17, 2023**

‘vp’

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<sup>34</sup> Supra (note 6).