

08 26.11.2024

Ct-37

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**In the High Court at Calcutta
Civil Appellate Jurisdiction
Commercial Division**

FMA 1295 of 2024

**M/s Power Mech Projects Ltd.
Vs.
M/s Bharat Heavy Electricals Limited**

Ms. Swati Dalmia
Ms. Sabarni Mukherjee
... For the Appellant

Mr. Rohit Das
Ms. Kishwar Rahman
Ms. Divya J. Tekriwal
Ms. Sristi Roy
... For the Respondent

- 1.** This appeal is arising out of an order passed by the Judge, Commercial Court at Rajarhat, North 24 Parganas in Misc. (Arb) Case No. 24 of 2019 on 22nd September, 2023 in connection with an application for setting aside of the award filed on behalf of the award-debtor.
- 2.** A bare reading of the application for setting aside of the application would show that the challenge was essentially on the merits of the award, but from a stray sentence in one of the paragraphs in the application the applicant remonstrated impartiality of the arbitrator. This plea has been taken for the first time in the application for setting aside of the award without raising any such plea in the arbitration proceeding. This was presumably done with a

view to take advantage of the decision of the Hon'ble Supreme Court in **TRF Ltd. Vs. Energo Engineering Projects Ltd.**, reported in **(2017)8 SCC 377** and **Bharat Broadband Network Limited Vs. United Telecoms Limited**, reported in **(2019) 5 SCC 755**.

3. The Learned Commercial Judge without taking into consideration that the appointment of the arbitrator was at the instance of the award-debtor pursuant to a request made by the award-holder on 16th March, 2016 prior to the rendering of any of the aforesaid two decisions. The appointing authority in exercise of the power under Article 18 of the Works Order appointed an arbitrator, who happens to be a past employee of the award-debtor. The arbitrator in all fairness made a disclosure statement under Section 12(5) read with the Seventh Schedule and invited the parties in its sitting on 3rd May, 2016 to express their views as the sole arbitrator had felt and rightly so that later on he might be charged with bias. This fair gesture of the learned arbitrator is now being abused by the award-debtor who after participated in the said proceeding with its eyes

wide open and now that it suffered an award in an application under Section 34 of the Arbitration and Conciliation Act, 1996 a stray sentence was made that by reason of the amendment to Section 12(5) read with Schedule 7 the appointment is inherently bad.

4. We are aghast at such stand being taken by a Public Sector Undertaking before the learned Commercial Court after having accepted such appointment and it seems that the Commercial Judge was overwhelmed by the decisions cited on behalf of the award-debtor without taking into consideration that the participation of the award-debtor before the arbitrator was without any objection. The award-debtor not even filed an application under Section 16 of the Act questioning the eligibility and competence of the arbitrator.

5. Learned counsel for the award-debtor in supporting the judgment has strenuously argued that by reason of the decision of **TRF Ltd. (supra)**, the award of the arbitrator is inherently bad as the subsequent decision of the Supreme Court has given retrospective effect to such decision thereby rendering all appointments that had fallen foul of the eligibility criteria are required to be set aside.

We are unable to persuade ourselves with such submission and even in **Bharat Broadband Network Limited (supra)** on which much stress has been made by the award-debtor as a last straw on the camel is back and in a quagmire of despondency, it would appear that the point of jurisdiction and impartiality of the arbitrator was raised before the learned Arbitrator in TRF Ltd. during the pendency of the proceeding before the learned arbitrator and such plea was rejected disregarding the fact that he would have been otherwise ineligible by reason of Section 12(5) read with Schedule 7 of the Arbitration and Conciliation Act, 1996.

6. In any event, by reason of the conduct of the award-debtor it is no more open to challenge the award on such ground. The appellant is estopped from raising such plea as the rule of estoppel clearly applies and is a clear bar to raise any such plea at the Section 34 stage. There is a conscious and voluntarily relinquishment of a known right by the appellant. It is a clear case of waiver. Having regard to the fact that the parties have consciously waived their rights as regards the eligibility of the arbitrator to decide the dispute

such a plea cannot be allowed to be raised by the appellant after having suffered an award. Moreover, we find that there was an obvious mistake in the order passed by the learned Commercial Court as it had proceeded on the basis that the award-holder has appointed the arbitrator.

7. On such consideration, we set aside the order passed by the learned Commercial Court and direct the learned Commercial Judge to consider the application for setting aside of the award on merits.
8. In view of the above, the appeal being FMA 1295 of 2024 stands disposed of.
9. However, there shall be no order as to costs.
10. Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)

