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

+ O.M.P. (COMM) 100/2021, I.A. 3615-3616/2021 & I.A. 5578/2023

ISHVAKOO (INDIA) PVT. LTD.Petitioner

Through: Mr. Jasdeep Singh Dhillon, Mr. Rajpal Singh, Mr. Yugantar Singh Chauhan, Advocates.

versus

SP SAI IT PRIVATE LIMITEDRespondent

Through: Mr. Manish Sharma, Ms. Jigyasa Sharma, Mr. Mikhil Vij, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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09.08.2024

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["Act"], the petitioner assails an arbitral award dated 15.02.2021, by which a sole arbitrator has purported to adjudicate disputes between the parties under an agreement dated 30.08.2016, for construction of a shopping mall/commercial complex at Greater Noida, West.

2. I have heard learned counsel for the parties.

3. The first ground urged by Mr. Jasdeep Singh Dhillon, learned counsel for the petitioner, is that the learned arbitrator was appointed unilaterally by the respondent. He submits that, in terms of the judgments of the Supreme Court in *TRF Limited vs. Energo Engineering Projects*



Limited [(2017) 8 SCC 377] and *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Limited* [(2020) 20 SCC 760], and the judgments of this Court which follow it, such an appointment is impermissible and an award rendered in such an arbitration is void-*ab-initio* and *non-est*.

4. Mr. Manish Sharma, learned counsel for the respondent, does not dispute the factual position that the learned arbitrator was unilaterally appointed by the respondent or the legal position outlined above. However, he submits that the petitioner participated in the arbitration from beginning to end, comprising of approximately forty hearings in total, and that the petitioner specifically reposed faith in the learned arbitrator, as recorded in the orders passed by the learned arbitrator. In these circumstances, Mr. Sharma submits that the petitioner ought to be taken to have waived this objection in terms of the proviso to Section 12(5) of the Act.

5. Mr. Dhillon disputes this submission. He states that the expression of faith in the learned arbitrator was during the course of conciliation proceedings, and the petitioner had already recorded its objection to the learned arbitrator adjudicating the disputes.

6. I am of the view that it is unnecessary to determine this question as the consistent jurisprudence on Section 12 of the Act is that a party cannot waive its objection by conduct. *Bharat Broadband Network Ltd. vs. United Telecoms Limited* [(2019) 5 SCC 755] makes it clear that an effective waiver has to be in writing, and not by conduct. The judgment of this Court in *Smaaash Leisure Ltd. vs. Ambience Commercial Developers Pvt. Ltd.* [2023 SCC OnLine Del 8322] has considered the matter further, and held that recording of consent in an order of the



learned arbitrator is also insufficient.

7. As far as this Court is concerned, several binding Division Bench judgments of this Court including *Ram Kumar & Anr. vs. Shriram Transport Finance Co. Ltd.* [2022 SCC OnLine Del 4268], *Govind Singh vs. Satya Group Pvt. Ltd. & Anr.* [2023 SCC OnLine Del 37], *Kotak Mahindra Bank Ltd. vs. Narendra Kumar Prajapat* [2023 SCC OnLine Del 3148], and *Babu Lal & Anr. vs. Cholamandalam Investment & Finance Co. Ltd. & Anr.*, [2023 SCC OnLine Del 7239], put the matter beyond doubt. An award of an unilaterally appointed arbitrator, absent effective waiver under Section 12(5) of the Act, is *non-est*, and is susceptible to challenge at any stage. Even in the absence of a challenge, such an award has been held to be unenforceable, as it is a nullity in law.

8. Having regard to this legal position, the impugned award dated 15.02.2021 is set aside. The parties are free to agitate their respective claims and counterclaims in accordance with law.

9. The petition, alongwith pending applications, is disposed of in these terms.

PRATEEK JALAN, J

AUGUST 9, 2024

“Bhupi”/