



2024:DHC:7373



\$~35

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

+ O.M.P. (COMM) 143/2023, I.A. 9265/2024

DR. S.P. GUPTA

.....Petitioner

Through: Mr. Kewal Krishan Saini and
Ms. Suman Saini, Advs.

versus

KIRORI MAL COLLEGE & ORS.

.....Respondent

Through: Mr. Swetank Shantanu, Mr.
Pratap Shankar, and Mr. Ankit Kumar,
Advs. for R-1 & R-2.**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT(ORAL)**

%

20.09.2024**Facts**

1. The services of the petitioner, who joined the respondent college on 7 August 1975, were terminated on 30 November 2017. The petitioner submitted a representation against the termination on 4 December 2017. Thereafter, the petitioner approached this Court by way of WP (C) 1615/2018¹. The writ petition was disposed of, by this Court, on 20 February 2018. Paras 5 and 6 of the order passed by this Court read thus:

“5. Upon hearing and on perusal of the material on record, the relevant Ordinances as referred above, I find that against impugned order, petitioner is required to file an appeal in terms of Clause 9 to

¹ Dr. S.P. Gupta v Kirori Mal College



2024:DHC:7373



the Annexure to Ordinance XII of the Delhi University Act, 1922. The petitioner is granted 2 weeks' time to file the statutory appeal against the impugned order. So far as release of retiral benefits and the compensation sought is concerned, it will depend upon the outcome of the statutory appeal.

6. In the facts and circumstances of this case, it is deemed appropriate to call upon the Appellate Authority to decide petitioner's appeal (if so filed) within a period of 6 weeks and the fate of the appeal be conveyed to petitioner within a week thereafter, so that petitioner may avail of the remedy as available in law, if need be. The aspect of forfeiture of petitioner's contributory fund is required to be dealt with by the concerned authorities within a period of four weeks, if petitioner chooses to file a Representation within a week, to claim the contributory provident fund dues. The fate of the said Representation (if so received) be promptly conveyed to petitioner."

2. As directed by the aforesaid order dated 20 February 2018 of this Court in W.P.(C) 1615/2018, the petitioner *vide* letter dated 22 March 2018, preferred an appeal to the Appeal Committee, in terms of Clause 9 of the Annexure to Ordinance XII of the Delhi University Act, 1922². Clause 9 read thus:

"9. (1) Any dispute arising in connection with the termination of the services of the teacher, except when on probation, by the Governing Body shall be referred to the arbitration of an Appeal Committee *of three independent persons appointed by the Chancellor*, who shall have power to inquire into all the facts of the case and to interpret the terms of this agreement, and their decision shall be final and binding on both parties. The Appeal Committee shall give its final decision within a reasonable time:

Provided that during the pendency of the appeal, the teacher shall continue to draw such salary or subsistence allowance, as the case may be, as he was drawing immediately prior to the termination of his/her services.

(2) The Indian Arbitration Act, 1940, shall apply to all

² Actually, Clause 9 of the Form contained in the Annexure to Ordinance XII, referred to, hereinafter, as "Clause 9", for the same of convenience



2024:DHC:7373



arbitration under this Clause.”

3. Consequent thereon, as no action was being taken on the petitioner’s appeal, the petitioner preferred Cont. Cas. (C) 44/2019 before this Court. The contempt petition was disposed of, by this Court, by order dated 13 March 2019, recording the statement of the Counsel for the University that the Appeal Committee would expeditiously take up the petitioner’s appeal and a decision would be taken thereon.

4. Despite this assurance, it appears that the Appeal Committee was constituted by the University in terms of Clause 9 only on 6 October 2021. The Appeal Committee comprised of three members, who took a conscious decision that the proceedings would be conducted in accordance with the Arbitration and Conciliation Act, 1996³. The first proceedings of the Appeal Committee were conducted by video-conference on 15 October 2021. Paras 1 and 3 of the record of the proceedings of the said date merit reproduction:

“1. The formation of the present Appeal Committee was communicated by the Assistant Registrar (Colleges), University of Delhi vide Letter No. CS.1(111)/TS/Appeal Committee/KMC/2021/4 dated 06.10.2021 received by the Members of the Appeal Committee on 09.10.2021. By this Letter, it has been informed that the Appeal Committee has been constituted by Letter No. VPS-15/2/R/DU/2020 dated 25.09.2021 sent by Sh. Ashok Dewan, Joint Secretary, Vice-President's Secretariat to the Registrar, University of Delhi in terms of Ordinance XII (1) & (2) read with Clause (9) of the Agreement of Service for College Teachers (as prescribed in Annexure to Ordinance XII) of Delhi University. Certain case papers were also provided to the Members along with the above-mentioned letter

³ “the 1996 Act”, hereinafter



2024:DHC:7373



dated 06.10.2021.

3. The Members of the Appeal Committee, thereafter, met through video conference today to discuss the further course of action to be taken in the matter. It has been decided that the University of Delhi shall appoint its Presenting Officer or an Advocate to present the case before the Committee. Similarly, Dr. S.P. Gupta shall be at liberty to plead his case in person or appoint his representative or an advocate to present his case in the Appeal.”

5. Subsequently, the three members of the Appeal Committee conveyed their consent to act as members and arbitrate on the petitioner’s claims.

6. Before the Appeal Committee, the petitioner filed an application, submitting that the constitution of the Appeal Committee was in violation of Section 45(2)⁴ of the Delhi University Act, 1922⁵. The petitioner submitted that, under Section 45(2), the Arbitral Tribunal which was to arbitrate on the petitioner’s claims was required to include one member nominated by the petitioner. Inasmuch as the Appeal Committee did not include any such member and was unilaterally constituted by the Chancellor of the University, the petitioner submitted that the Appeal Committee was irregularly constituted and could not, therefore, arbitrate on the petitioner’s appeal.

⁴ 45. **Conditions of service of officers and teachers. –**

(2) Any dispute arising out of a contract between the University and any of its officers or teachers shall, at the request of the officer or teacher concerned or at the instance of the University, be referred to a Tribunal of Arbitration consisting of one member appointed by the Executive Council, one member nominated by the officer or teacher concerned and an umpire appointed by the Visitor, and the decision of the Tribunal shall be final.”

⁵ “the DU Act” hereinafter

O.M.P. (COMM) 143/2023

Page 4 of 15

Signature Not Verified

Digitally Signed By: AJIT
KUMAR
Signing Date: 24.09.2024
14:36:26

Signature Not Verified

Digitally Signed
By: CHANDRASHEKHARAN
HARI SHANKAR
Signing Date: 24.09.2024
14:35:23



2024:DHC:7373



7. The aforesaid application of the petitioner was rejected by the Appeal Committee by Order dated 24 November 2021, on the ground that Section 45 of the DU Act did not apply to the petitioner, as the petitioner was a teacher of a constituent college of the University, and not a teacher of the University itself. Mr. Swetank Shantanu, learned Counsel appearing for the Respondent 1 and 2 has drawn attention to para 12 of the said order, dated 24 November 2021 which may, therefore, be reproduced:

“12. On perusing the reply filed by the Respondent Nos.1 & 2 along with the copy of the Agreement purported to be signed by the Appellant while entering into a Form of Agreement dated 06.12.2001, *the Ld. Counsel for the Appellant did not press his contention that "appellant did not ever sign any agreement containing such arbitration clause whatsoever to the best of the knowledge of the appellant."*

(Emphasis supplied)

8. There is no dispute that the petitioner has not challenged the aforesaid order dated 24 November 2021 passed by the Appeal Committee at any point of time.

9. The Appeal Committee finally came to render an award, rejecting the petitioner's appeal, on 15 December 2022. Para 2 of the award recorded the decision of the Appeal Committee to proceed in accordance with the 1996 Act:

“2. The Members of the Appeal Committee by Order dated 19.10.2021 decided that as the Appeal Committee members are acting as Co-Arbitrators, the procedure as provided under the provisions of the Arbitration and Conciliation Act, 1996 ("The



2024:DHC:7373



Arbitration Act") shall be applicable in these proceedings.”

10. Aggrieved by the aforesaid award, the petitioner has approached this Court under Section 34 of the 1996 Act.

Rival Contentions

11. Mr. Saini, learned Counsel for the petitioner, has advanced a preliminary submission on the basis of which, according to him, the present petition deserves to be allowed. He submits that the entire arbitral proceedings conducted by the Appeal Committee were a nullity *ab initio*, as the Appeal Committee was constituted by the respondents, through the Chancellor of the University, without the consent of the petitioner. Such an appointment, he submits, is in the teeth of Section 12(5)⁶ of the 1996 Act. Inasmuch as the petitioner never waived his right as per the proviso to Section 12(5), and never consented in writing to the arbitration of his claim by the Appeal Committee, he submits that the arbitral proceedings stand vitiated, applying the law laid down by the Supreme Court in *Bharat Broadband Network Ltd v United Telecoms Ltd*⁷, *Perkins Eastman Architects DPC v HSCC (India) Ltd*⁸ and *Haryana Space Application Centre (HARSAC) v Pan India Consultants Pvt Ltd*⁹.

⁶ (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

⁷ (2019) 5 SCC 755

⁸ (2020) 20 SCC 760

⁹ (2021) 3 SCC 103



2024:DHC:7373



12. Mr. Swetank Shantanu contests the submission of Mr. Saini. He submits that there are various communications by the petitioner which indicate that the petitioner had consented to application of Clause 9 and which, therefore, have to be treated as resulting in waiver, by the petitioner, of the applicability of Section 12(5) of the 1996 Act. He particularly draws reference to

- (i) the letter dated 22 March 2018, by which the petitioner informed the respondent college that he had filed an appeal in terms of Clause 9,
- (ii) the fact that the petitioner had himself signed the form of the Agreement contained in the Appendix to Ordinance XII, which contained Clause 9, thereby signifying that the petitioner had consented to application of the said clause,
- (iii) an application dated 4 May 2019 submitted by the petitioner to the Public Information Officer in the Office of the Chancellor of the University under the Right to Information Act, 2005¹⁰, and
- (iv) the observation in para 12 of the order dated 24 November 2021, passed by the Appeal Committee, specifically noting that the Counsel for the petitioner did not press his contention that the petitioner had never signed any agreement containing the arbitration clause.

13. As such, Mr. Swetank Shantanu would submit that the petitioner cannot now seek to challenge the impugned award on the

¹⁰ "the RTI Act" hereinafter



2024:DHC:7373



ground that the constitution of the Appeal Committee was illegal in view of Section 12(5) of the 1996 Act.

Analysis

14. To my mind, there is no wishing away the fact that the Appeal Committee was in fact constituted in violation of Section 12(5) of the 1996 Act. Though Section 12(5) expressly proscribes only a person, related to a party to the dispute or to the Counsel for the party, within the meaning of the Seventh Schedule to the 1996 Act, from arbitrating on the dispute, the Supreme Court, applying the *qui facit per alium facit per se*¹¹ doctrine, held that such a person could not be permitted to appoint the arbitrator either, in *Perkins Eastman Architects*. The only escape from the rigour of Section 12(5) is where, in terms of the proviso thereto, there is an express waiver in writing, by the party seeking to invoke the clause, from the application of the clause. Following the decisions in *Perkins Eastman Architects* and *Bharat Broadband Network*, this Bench has, in *JMC Projects (India) Ltd v Indure (P) Ltd*¹², held as under:

“28. The import of these decisions is as unequivocal as it is inexorable. An “express agreement in writing”, waiving the applicability of Section 12(5), is the statutory *sine qua non*, for a person, who is otherwise subject to the rigour of Section 12(5), to remain unaffected thereby. Nothing less would suffice; no conduct, howsoever extensive or suggestive, can substitute for the “express agreement in writing”. Sans such “express agreement in writing”, Section 12(5), by operation of law, invalidates the appointment, of any person whose relationship, with the parties to the disputes, falls

¹¹ What one does through another is done by oneself.

¹² 2020 SCC OnLine Del 1950



2024:DHC:7373



under any of the categories specified in the Seventh Schedule of the 1996 Act. The invalidity, which attaches to such a person would also, *ipso facto*, attach to her, or his, nominee.”

In other words, the party must, in writing, agree to waive the applicability of Section 12(5) of the 1996 Act to the arbitration of his claims. This may also be in the form of an express acquiescence, in writing, by the party, to arbitration of the claims by that particular Arbitral Tribunal, provided the communication manifests a conscious decision to waive the application of Section 12(5). Waiver may even be found to exist where, though it may not be submitted in writing by the party, it is so stated during the arbitral proceedings, and the statement is recorded in the record of proceedings by the arbitrator, provided it is undisputed by the party.

15. In the present case, there is no such consent forthcoming on the record. There is no document by which the petitioner has waived the application of Section 12(5). Nor is there any order passed by the Appeal Committee, recording the waiver by the petitioner, to the applicability of Section 12(5) of the 1996 Act or even acquiescence by the petitioner to arbitration of the petitioner’s claim by the Appeal Committee.

16. The documents on which Mr. Shantanu places reliance cannot advance his case. They merely amount to an acknowledgement, by the petitioner, of the existence of Clause 9. At the highest, therefore, the case that Mr. Swetank Shantanu sets up can only be that the petitioner was aware of the existence of Clause 9 and had appended his



2024:DHC:7373



signatures to the Form contain in the Appendix to Ordinance XII which incorporated Clause 9.

17. Legally speaking, that is no different from a case in which a contract is signed by two parties, incorporating an arbitration clause in which one of the parties is permitted to appoint the Arbitrator. In all such cases, both the parties have signed the arbitration agreement and are conscious of the existence of the arbitration clause permitting unilateral appointment of the Arbitrator. Even so, the Supreme Court has held, in *Bharat Broadband Network, Perkins Eastman Architects* and *Haryana Space Application Centre* that such a clause is unworkable in law, as unilateral appointment of an Arbitrator goes against the very ethos of the arbitral process. This position stands recognised even prior to the amendment of Section 12 of the 1996 Act by the Arbitration and Conciliation (Amendment) Act, 2016 – by which sub-section (5) was introduced. Even prior to the amendment, the Supreme Court has held in *Dharma Prathishthanam v Madhok Construction Pvt Ltd*¹³ that unilateral appointment of an Arbitrator is antithetical to the arbitral process and arbitration by an Arbitrator, or an Arbitral Tribunal, unilaterally appointed, is completely unacceptable in law.

18. Consensus *ad idem*, to the procedure for arbitration, is the very ethos of the arbitral process. The complete unacceptability of arbitration by an Arbitral Tribunal which is unilaterally appointed by

¹³(2005) 9 SCC 686



2024:DHC:7373



one party is also underscored by sub-sections (5) and (6)¹⁴ of Section 11. Even in a situation in which one of the parties has written to the other, under Section 21, for reference of the disputes to arbitration, and the other fails to respond, or the parties fails to follow the contractually stipulated procedure for referring the disputes to arbitration and appointment of the Arbitral Tribunal, neither party is entitled unilaterally, thereafter, to proceed to appoint the Arbitral Tribunal. Unilateral appointment of the Arbitral Tribunal is, therefore, completely proscribed. The party who has extended the request, to the other, to refer the disputes to arbitration, and who finds the other not to be forthcoming, has to approach the Court under Section 11(5) or 11(6), and it is the Court which would then proceed to appoint the Arbitral Tribunal.

19. Some inroad to this principle is to be found in the decision of the Supreme Court in *Central Organisation for Railway Electrification v ECI-SPIC-SMO-MCML (JV)*¹⁵ and other decisions which follow it, though the exact scope of the said decisions are presently under consideration before a Constitution Bench of the

¹⁴ (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4).

(6) Where, under an appointment procedure agreed upon by the parties,—

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

¹⁵ (2020) 14 SCC 712



2024:DHC:7373



Supreme Court. Those decisions, too, however, apply only to a situation *in which one of the parties provides a panel of arbitrators to the other*, and affords the other a choice of arbitrator from the panel so provided. In the event that such a panel consists of disinterested and neutral persons, there are decisions which seem to hold that the requirement of the opposite party selecting an arbitrator from the panel is legal and does not infract Section 12(5) of the 1996 Act.

20. This, however, is not one such case. This is not a case in which the respondent provided a panel of arbitrators to the petitioner, and the petitioner had a freedom of choice to select the members of the Arbitral Tribunal from the panel. The respondents, here, unilaterally appointed the members of the Arbitral Tribunal and the petitioner had no choice in the matter. In such a situation, Section 12(5) would apply with full force, and its rigour would be relaxed only if there was an express written waiver, by the petitioner, of Section 12(5).

21. The documents on which Mr. Swetank Shantanu places reliance, to reiterate do not make out a case either of acquiescence or waiver in the aforesaid terms. The fact that the petitioner was aware of Clause 9, and had submitted his appeal under the said clause, does not indicate acceptance, by the petitioner, of arbitration of the petitioner's claims, by the unilaterally constituted Arbitral Tribunal/Appeal Committee.

22. Para 12 of the order dated 24 November 2021, passed by the Appeal Committee, too, does not further the respondent's case. In the

O.M.P. (COMM) 143/2023

Page 12 of 15



2024:DHC:7373



said paragraph, the Appeal Committee has merely recorded the fact that the petitioner's Counsel did not press the contention that the petitioner had not signed the agreement containing Clause 9. There is no dispute on this aspect on the fact that the petitioner did indeed sign the form containing Clause 9. That, however, as I have already noted, does not amount to acceptance, by the petitioner of arbitration of the petitioner's claim by a unilaterally constituted Appeal Committee, or of waiver in terms of the proviso to Section 12(5). It is, at the highest, akin to any commercial contract, which contains an arbitration clause permitting unilateral constitution of the Arbitral Tribunal, which is signed by both the parties. Even so, the Supreme Court has held, in the *Perkins* line of decisions, that the Arbitral Tribunal cannot be unilaterally constituted. An award rendered by such a unilaterally constituted Arbitral Tribunal is a nullity and is liable to be set aside.

23. The signing, by the petitioner, of the Form in the Appendix to the Ordinance, which contained Clause 9, and the awareness by the petitioner of the existence of Clause 9 cannot, therefore, relax the rigour of Section 12(5) of the 1996 Act, or render the provision inapplicable.

24. Inasmuch as the Appeal Committee itself took a decision to apply, to the proceedings before it, the 1996 Act, Section 12(5) would also apply with full force.

25. Mr. Swetank Shantanu has also drawn attention to the fact that the Appeal Committee was in fact constituted in terms of the order

O.M.P. (COMM) 143/2023

Page 13 of 15



2024:DHC:7373



dated 20 February 2018 passed by this Court in WP (C) 1615/2018. The relevant paragraphs from the said decisions already stand extracted earlier in this judgment. They cannot be read as an expression of opinion, by this Court, regarding the legality of constitution of the Appeal Committee *vis-à-vis* Section 12(5) of the 1996 Act. They merely recognize the existence of Clause 9 and direct the petitioner to submit an appeal under the said Clause for decision. The decision is *sub silentio*, therefore, regarding Section 12(5) of the 1996 Act.

26. It was also sought to be submitted that the Appeal Committee was constituted by the Chancellor of the University. No doubt, the petitioner was an employee of the respondent college, and may not have directly been an employee of the University. Given the interrelationship between the college and the University, however, constitution of the Appeal Committee by the Chancellor of the University would also be unacceptable in law in view of Section 12(5) read with the Seventh Schedule of the 1996 Act and the *Perkins* line of decisions of the Supreme Court. Clause 1 of the Seventh Schedule covers “an employee, consultant, advisor or has any other past or present business relationship with a party”, Clause 5 covers every person who “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” and Clause 12 covers an arbitrator who “is a manager, director or part of the management, or has a similar controlling influence in one of the parties”. The relationship of the University,



2024:DHC:7373



vis-à-vis the College, would clearly fall within these prohibited degrees.

27. The inevitable sequitur is that the impugned award, rendered as it is by an Appeal Committee, unilaterally constituted by the Chancellor of the University without the consent of the petitioner, is illegal and a nullity *ab initio*.

Conclusion

28. The impugned award is, therefore, set aside.

29. The appeal stands allowed in the aforesaid terms.

C.HARI SHANKAR, J

SEPTEMBER 20, 2024/aky

Click here to check corrigendum, if any