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

% ***Decided on: 14.03.2024***

\+ O.M.P. 3/2022 & I.A. 6531/2022
BIHAR STATE BACKWARD CLASSES FINANCE AND DEVELOPMENT CORPORATION ..... Petitioner
Through: Mr. Ajay Kumar, Mr. Dilip Singh, Mr. M.P. Singh and Ms. Supriya Berriwal, Advocates.

versus

NATIONAL BACKWARD CLASSES FINANCE AND DEVELOPMENT CORPORATION & ANR. ..... Respondents
Through: Mr. Ravindra Kanth, Advocate for R-1.
Mr. Azmat H. Amanullah, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. The petitioner–Bihar State Backward Classes Finance and Development Corporation assails an arbitral Award dated 18.11.2019, passed apparently upon consent of the parties.

A. Facts

2. The petitioner had taken financial assistance from respondent No. 1 –National Backward Classes Finance and Development Corporation, under a General Loan Agreement dated 20.03.1993 ["the Agreement"]. Upon the petitioner's inability to repay the amount, arbitral proceedings were instituted by respondent No. 1, in terms of an arbitration clause

contained in the Agreement.

3. The learned Arbitrator has passed the impugned Award on consent, in terms of a One Time Settlement ["OTS"] proposal given by respondent No.1 on 30.01.2019, relying upon a resolution of the petitioner's Board of Directors, dated 15.11.2019.

B. Submissions of learned counsel

4. Mr. Ajay Kumar, learned counsel for the petitioner, submits that the impugned Award is assailed principally on two grounds:

a. that the learned Arbitrator was unilaterally appointed by respondent No. 1, rendering the Award a nullity, and

b. that the learned Arbitrator has erred in inferring consent of the petitioner from the Board resolution.

5. Mr. Ravindra Kanth, learned counsel for respondent No. 1, submits that, although the learned Arbitrator was unilaterally appointed by respondent No. 1, the petitioner did not object at any stage, and in fact, consented to the extension of his mandate under Section 29A of the Act. On merits, Mr. Kanth submits that the resolution of the petitioner's Board of Directors was placed before the Arbitral Tribunal by learned counsel for the petitioner itself, and no contention was raised to the effect that further approval was required.

6. Mr. Azmat H. Amanullah, learned counsel for respondent No. 2 – State of Bihar, supports the case of the petitioner.

C. Analysis.

i. Re: Unilateral Appointment

7. Turning to the first contention, as noted above, it is factually undisputed that the learned Arbitrator was unilaterally appointed by

respondent No. 1, and that the arbitration proceedings commenced after the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015.

8. Mr. Kumar also submits that the petitioner had filed an application under Section 12(3) of the Arbitration and Conciliation Act, 1996 ["the Act"], on 26.10.2018, as reflected in the minutes of the arbitration proceedings held on that date, but the application was never adjudicated by the learned Arbitrator.

9. The only argument urged by Mr. Kanth, in this regard, is that the application was never pressed by the petitioner, and that the petitioner had participated in the arbitration proceedings, including by way of according consent to extension of the mandate of the Arbitral Tribunal, as recorded in the order of the learned Arbitrator dated 06.06.2019. It is contended that the petitioner has thus waived its objection under Section 12(5) of the Act.

10. The question of whether participation in arbitral proceedings can constitute waiver of the disqualification under Section 12(5) of the Act is no longer *res integra*. Interpreting the judgment of the Supreme Court in *Bharat Broadband Network Limited v. United Telecoms Limited,*[1] the Division Bench of this Court in *Ram Kumar vs. Shriram Transport Finance Co. Ltd.*[2] has clearly held that waiver must be express and in writing:

> "*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***

[1] (2019) 5 SCC 755.
[2] (2022) SCC OnLine Del 4268.

<u>to Section 12(5) of the A&C Act makes it clear that such an agreement requires to be in writing</u>. *In Proddatur Cable TV Digi Services v. Siti Cable Network Limited: (2020) 267 DLT 51, the learned Single Judge of this Court, following the decision in TRF Ltd. v. Energo Engineering Projects Ltd. (supra) and Perkins Eastman Architects DPC v. HSCC (India) Ltd. (supra), held that unilateral appointment of an arbitrator by a party is impermissible.*

29. In Bharat Broadband Network Limited v. United Telecoms Limited: (2019) 5 SCC 755, ***<u>the Supreme Court rejected the contention that the waiver of a right to object the ineligibility of an arbitrator, under Section 12(5) of the A&C Act, could be inferred by conduct</u>***. *The relevant observations made by the Supreme Court are set out below:*

> *"20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:*
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> > *"9. Promises, express and implied. - Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*
>
> *It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and*

say that they have full faith and confidence in him to continue as such.""[3]

11. The aforesaid position has subsequently been reaffirmed by another judgment of the Division Bench of this Court in *Govind Singh vs. Satya Group Pvt. Ltd.,*[4] which holds as under:

> "*19. The contention that the appellant by its conduct has waived its right to object to the appointment of the learned Arbitrator is also without merit. The question whether a party can, by its conduct, waive its right under Section 12(5) of the A&C Act is no longer res integra. The Supreme Court in the case of Bharat Broadband Network Limited v. United Telecoms Limited : (2019) 5 SCC 755 had explained that any waiver under Section 12(5) of the A&C Act would be valid only if it is by an express agreement in writing.* ***There is no scope for imputing any implied waiver of the rights under Section 12(5) of the A&C Act by conduct or otherwise****....*"[5]

12. Thus, no waiver by conduct is to be inferred from a party's participation in arbitral proceedings. In the present case, no such express written waiver is found in any of the documents on record, and Mr. Kanth also does not contend that such a document was ever executed by the petitioner. The facts, therefore, do not establish waiver of the petitioner's right.

13. It has been held in several Division Bench judgments[6] that an Award passed by a unilaterally appointed Arbitrator is a nullity in law. The Award is, therefore, liable to be set aside on this ground alone.

ii. Re: Merits of the Consent Award

14. In the interest of completeness, I also propose to deal with the

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[3] Emphasis supplied.
[4] (2023) SCC Online Del 37.
[5] Emphasis supplied.
[6] See *Govind Singh vs. Satya Group Pvt. Ltd.* [(2023) SCC Online Del 37], *Ram Kumar vs. Shriram Transport Finance Co. Ltd.* [(2022) SCC OnLine Del 4268], *Babu Lal and Anr. v. Cholamandalam Investment and Finance Company Ltd. and Anr*. [FAO (COMM) 135/2023] and *Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat* [(2023) SCC OnLine Del 3148]

contention of the petitioner that the learned Arbitrator has erred in passing an Award by consent of the parties.

15. The impugned Award is contained in an order entitled "***21st ARBITRATION PROCEEDINGS DATED 18.11.2019***," which was passed in the presence of learned counsel for the parties. The entirety of the Award is reproduced below:

> "*Efforts made by the Respondents at the ground level punctuated by support and strength provided by the claimant, have borne fruits.* ***One Time Settlement (OTS) proposed by letter No.NBCFDC/GM(Plg.)/ Recovery Bihar-BC/2019/5508 dated 30.01.2019 of over dues of the claimants from the respondents has in principle been accepted by the respondents' Board****, which has been conveyed to the Ld. Counsel to the Respondents who in turn has communicated the same to the Tribunal and the said communication has been taken on record.*
>
> ***Sequely, the Award is made in terms of the OTS dated 30.01.2019*** *including point No.2 of the OTS as proposed by the claimants and the current financial year as proposed in the OTS be read as up to 31.03.2020 for the reason that good time has been taken in approval by the Respondents of the OTS proposal of the claimant primarily for the force majure circumstances e.g. natural calamity in the State of Bihar. In this backdrop, the proposal couldn't mature for approval during the financial year 2018-19.*
>
> ***The Award is hereby passed in terms of the OTS dated 30.01.2019****.*
>
> *When there is no order as to costs, mention needs to be made with regard to Arbitration Fees in terms of order dated 13.08.2018, balance share of the respondents corporation comes to Rs.5,28,786/ - which has not been paid by the respondents. Keeping in view the totality of circumstances in which this settlement has come through this balance payment would now be made by the claimant corporation by 30.11.2019.*
>
> *The Award would take effect accordingly.*"[7]

16. It is evident that the learned Arbitrator has founded the Award on consent of the petitioner, purportedly reflected in a meeting of the Board of Directors dated 15.11.2019. The relevant extracts of that meeting are contained in Resolution No. 32.4/ 2019. The original resolution in Hindi,

and a translation thereof, have been placed on record. The translation reads as under:

> *"32.4/2019*
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> ***Regarding the decision to be taken in connection with the One Time Settlement (OTS)*** *offer made by the National Backward Classes Finance & Development Corporation New Delhi (N.B.C.F.D.C) during the pendency of the Arbitration Proceeding filed by it.*
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> *Proposal:*
>
> *A new offer of One Time Settlement (OTS) has been made by (N.B.C.F.D.C) New Delhi during the pendency of Arbitration Proceeding vide letter No. 5508 dated 30.01.2019* ***in which the total liability of BSBCFDC till 31.03.2018 has been valued as Rs. 28,93,31,355/-*** *(Principle Rs. 15,36,06,356/-+ Simple Interest Rs. 9,55,18,410/- +Penal Interest Rs. 4,02,06,569/- .*
>
> *The main conditions of One Time Settlement (OTS) is as under:-*
>
> *A. Till the due liability is not discharge by the State of Jharkhand, the liability of making repayment of the loan associated with the State of Jharkhand will be on BSBCFDC.*
>
> *B. BSBCFDC will pay the remaining due amount alongwith the interest and penal interest total amounting to Rs. 2296.23 Lakhs till 31.03.2019 (Principal Rs. 15,36,06,356) + simple interest Rs. 9,55,18,410/- Less Penal Interest already received Rs. 1,95,02,014/-).*
>
> *C. After the payment of the said offered due amount by the State of Bihar The NBCFDC will waive the Penal Interest of Rs. 4,02,06,569/- and NBCFDC will provide Rs. 68,88,683/- to BSBCFDC as an incentive.*
>
> ***This Corporation is not financially capable to discharge the said due loan liability of NBCFDC and for this through the Department, the Financial Assistant will be needed from the State Govt****.*
>
> ***On aforesaid OTS proposal by obtaining consent in the Board Meeting the proposal may be sent to the State Govt. for its acceptance so that. the liability could be discharge at once****.*
>
> *Decision :-*
>
> ***Through the consent obtained in the Board Meeting the OTS offer made by NBCFDC New Delhi vide letter No. 5508 dated 30.01.2019 the Managing Director has been directed to take further action in accordance with law."***[8]

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[7] Emphasis supplied.
[8] Emphasis supplied.

17. I am unable to find any basis for the inference of the learned Arbitrator that respondent No.1's OTS proposal had been accepted by the petitioner. The minutes show that the OTS was placed before the Board of Directors, but the Board of Directors observed that the petitioner was not in a financial position to discharge the liability in terms thereof, and that financial assistance would be required from the State Government. The highest that can be said is that the Board of Directors granted an in principle approval, and authorized the Managing Director to take necessary action for obtaining the assistance of the State Government.

18. In the impugned Award also, the learned Arbitrator has noted that it is an in principle approval by the Board of Directors, but, with respect, has failed to notice that the matter was to be placed before the State Government before the OTS liability could be accepted.

19. While matters of interpretation of contracts and appreciation of evidence are certainly within the province of the Arbitrator, I am of the view that the present case falls within the limited class of cases in which the inference drawn in the Award is vitiated by patent illegality. The Award is intended to be a consent Award. As the finding of consent is itself based upon a document which cannot reasonably be read in that manner, the consequence is that the petitioner has been deprived of a hearing on merits, on the basis of a partial and untenable reading of the Board resolution. Such an outcome cannot be countenanced, even within the limited jurisdiction of the Court under Section 34 of the Act.

20. I am, therefore, of the view that the impugned Award is liable to be set aside on merits also.

D. Conclusion

21. For the aforesaid reasons, the petition is allowed, and the impugned Award dated 18.11.2019 is set aside. It will be open to respondent No. 1 to institute arbitration proceedings afresh in respect of the same cause of action. All rights and contentions of the parties in this regard are left open.

22. Pending application also stands disposed of.

PRATEEK JALAN, J

MARCH 14, 2024
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