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

+ **ARB.P. 506/2024**

M/S SUPERCON

..... Petitioner

Through: **Mr. Ashok Singh, Advocate. [M:-
9313649228]**

versus

UNION OF INDIA

..... Respondent

Through: **Mr. Om Prakash, CGSC for UOI.**

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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23.04.2024

I.A. 8769/2024(Exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

ARB.P. 506/2024 & I.A. 8770/2024(Condonation of delay)

1. Issue notice. Mr. Om Prakash, learned Central Government Standing Counsel, accepts notice on behalf of Union of India.
2. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of an arbitrator to adjudicate disputes between the parties under an agreement dated 09.03.2010. The agreement contains an arbitration clause in Clause 64 of the General Conditions of Contract. The clause provides for arbitration by a sole arbitrator.
3. Disputes having arisen between the parties, the arbitration clause



was first invoked by the petitioner on 10.07.2017. In terms of the arbitration clause, the appointment of the arbitrator was to be made by the respondent-Railways. It appointed the Deputy Chief Engineer (Construction), Division-I, Northern Railways, as the sole arbitrator. Both parties raised claims and counter claims. By an award dated 29.10.2020, some of the claims of the petitioner were allowed and the counter claims of the respondent were rejected.

4. Against this award, the petitioner herein filed O.M.P.(COMM) 88/2021 under Section 34 of the Act, before the learned District Judge, Central Delhi. The petition was allowed by a judgment dated 25.11.2023 of the learned District Judge, Commercial Court-08, Central, Tis Hazari. The only ground upon which the award was set aside was that the learned arbitrator was ineligible to act and the appointing authority was also ineligible to make the appointment, in terms of Section 12 of the Act and the Schedules thereto, read with judgments of the Supreme Court in *TRF Limited vs. Energo Engineering Projects Limited* [(2017) 8 SCC 377] and *Perkins Eastman Architects DPC vs. HSCC (India) Limited* [(2020) 20 SCC 760].

5. In these circumstances, the petitioner has filed this petition for appointment of a new arbitrator to adjudicate the disputes.

6. The only objection taken by Mr. Prakash is that after the judgment of the learned Commercial Court dated 25.11.2023, the petitioner has not invoked arbitration afresh in terms of under Section 21 of the Act.

7. Having heard learned counsel for the parties on this point, I am of the view that the objection is unmerited. The requirement of invocation of arbitration derives from Section 21 of the Act, which provides as follows:



“21. Commencement of arbitral proceedings. – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

8. In the facts of the present case, the invocation was made prior to first arbitral proceedings. The Division Bench judgments of this Court in *Ram Kumar vs. Shriram Transport Finance Co. Ltd.* [2022 SCC OnLine Del 4268] and *Govind Singh vs. Satya Group Pvt. Ltd.* [2023 SCC OnLine Del 37] make it clear that the award rendered by a unilaterally appointed arbitrator or ineligible arbitrator, is itself a nullity. The position, therefore, is that the proceedings commenced by the original invocation have not come to a legal or valid end. When the matter is looked up from this angle, the relief sought is in fact for appointment of an independent arbitrator to conduct the same proceedings, which were commenced by the original invocation letter.

9. My attention is also drawn to a recent judgment of the Bombay High Court, which takes the same view. In *Kirloskar Pneumatic Company Ltd. vs. Kataria Sales Corporation* [Commercial Arbitration Petition No. 16/2023, decided on 21.03.2024], the Bombay High Court has summarised the position thus:-

“13 The argument of Mr. Dalal, will have to be appreciated in the aforesaid statutory scheme, as it is his contention that when an unilateral appointment of an arbitrator was frowned upon and resultantly, the award passed by such an arbitrator, who was de jure ineligible to act is set aside, once again the arbitration, will have to be invoked by issuing a notice under Section 21.

The above argument on its face is fallacious, since the petitioner has already forwarded a request to the respondent for referring the dispute, that had arisen between them to arbitration and the arbitral proceedings in respect of that dispute has commenced. Merely



because the award passed by an ineligible arbitrator is set aside, is not sufficient enough to give new contour to the dispute, as the dispute between the parties still remain the same but now what is sought by the petitioner today, is appointment of a competent arbitrator to arbitrate the dispute and the petitioner expect the arbitrator to be eligible to act as such i.e he shall be a neutral and independent person and his appointment is not in teeth of Section 12 of the Act of 1996 or schedule V and VII of the Act.”

10. I am in respectful agreement with the aforesaid view taken by the Bombay High Court. The alternative course, which would require a party in these circumstances to invoke arbitration afresh and for the arbitral proceedings to be thus “*commenced*” *de novo*, does not commend to me. It militates against the underlying objective of speedy and efficient resolution of disputes, which underpin the scheme of the Act.

11. There is no dispute, in the present case, with regard to the existence of the arbitration clause. In fact, the respondent had also agitated its counter claims before the erstwhile learned arbitrator.

12. In these circumstances, the petition is allowed and the disputes between the parties are referred to arbitration under the aegis of Delhi International Arbitration Centre, Shershah Road, New Delhi-110503 [“DIAC”]. DIAC is requested to nominate an arbitrator from its panel.

13. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

14. I have also put it to learned counsel for the parties, as to whether they would insist upon fresh round of pleadings and evidence being led before the newly appointed arbitrator, or whether they would be inclined to argue the matter afresh, on the pleadings and documents placed before the erstwhile arbitrator. They have not taken instructions on this aspect but submit that they will make their submissions in accordance with law



before the learned arbitrator appointed by the DIAC.

15. The petition, alongwith pending application, stands disposed of with these observations.

APRIL 23, 2024
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PRATEEK JALAN, J