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

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Date of Decision: 12.02.2024+ **FAO (COMM) 129/2023**
M/S ENVISAGE

..... Appellant

Through: **Mr. Utkarsh Tiwari, Mr. Karan Anand
& Mr. Prajjanya Rathore, Adv.**

Versus

M/S SAK BUILDTECH PVT LTD AND ORS RespondentsThrough: **Mr. Brij Bhushan Solanki, Adv.****CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J.**

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 (hereafter the *A&C Act*) impugning an order dated 28.02.2023 (hereafter the *impugned order*) passed by the learned Commercial Court in OMP(COMM) No.147/2022 captioned *M/s SAK Buildtech Pvt. Ltd. V. M/s Envisage & Anr.*

2. The respondent no.1 had filed the aforesaid application under Section 34 of the A&C Act seeking that the arbitral award dated 10.06.2022 (hereafter *the impugned award*) rendered by an Arbitral Tribunal comprising of a sole arbitrator, be set aside.

3. The learned Commercial Court allowed the said application by the impugned order and set aside the impugned award. The court held that the Arbitral Tribunal comprising of a sole arbitrator did not have the jurisdiction to act as an arbitrator as the appellant had unilaterally appointed the sole



arbitrator without the concurrence or consent of respondent no.1.

4. Briefly stated, the relevant facts necessary to address the controversy are as under:

4.1 Respondent no.1 issued a notice dated 14.12.2015 inviting tenders for carrying out 'Public Area and Back Office (BOH) Interior Work' for its hotel project in Chennai.

4.2 The appellant carries on his business under the name of its sole proprietorship concern "M/s. Envisage". He submitted a bid and was declared a successful bidder. Thereafter, the parties entered into an Agreement dated 06.04.2016 for execution of the project at a consideration of ₹2,41,00,351/-.

4.3 The appellant claims that respondent no.1 had failed to pay the entire amount due for execution of the works. According to the appellant, respondent no.1 is liable to pay a sum of ₹23,79,476/- along with interest.

4.4 The appellant sent a letter dated 09.02.2021 to Mr. J.N. Yadav, former District Judge appointing him as the sole arbitrator to adjudicate the disputes. On the same date, the appellant also sent a letter to the respondents seeking their concurrence for appointment of Mr. J.N. Yadav as the sole arbitrator and further stating that if no reply was received from the respondents within seven days of the receipt of the letter, the appellant would presume that respondents had given their consent for appointment of Mr. J.N. Yadav as the sole arbitrator. The relevant extract of the said letter is set out below:

"11. That my client hereby appoint Mr. J.N. Yadav, Retired District Judge Office at NIB Basement, Jangpura Extension, New Delhi-110014 as the sole arbitrator to decide all the matters in issue/dispute pertaining between Envisage and SAK Buildtech Pvt. Ltd. i.e. my client and



you the addressee, as per the Agreement Dated 06th April, 2016 and thus, you are hereby called upon to give your concurrence in the matter for his appointment as an Arbitrator so that the matter can be resolved by Arbitration. In case no reply is received within 7 days of the receipt of this notice by you, then in that event, it shall be presumed that you have given your consent for the appointment of Mr. J.N. Yadav, Retired District Judge as the sole Arbitrator and the matter shall be referred to him for arbitration.”

4.5 The sole arbitrator acted on the basis of his appointment and commenced the arbitral proceedings. He recorded a disclosure to the effect of his independence and impartiality. He also disclosed that the appellant had appointed him as an arbitrator in the first matter in the last two years.

4.6 The respondents challenged the appointment of the sole arbitrator by filing an application under Section 13 of the A&C Act, *inter alia*, on the ground that respondents had not given their consent for appointment of the sole arbitrator. The respondents’ application was dismissed by the sole arbitrator by an order dated 14.12.2021. Thereafter, the Arbitral Tribunal proceeded with the arbitral proceedings, which culminated into the sole arbitrator delivering the impugned award.

5. The learned counsel appearing for the respondents referred to the decision of the learned Single Judge of the Calcutta High Court in *McLeod Russel India Ltd. & Anr. v. Aditya Birla Finance Ltd. & Ors.*: 2023 SCC OnLine Cal 330 and submitted that the unilateral appointment could not be challenged as the respondents had participated in the arbitral proceedings. He also submitted that the reference by the learned Commercial Court to the decisions of the Supreme Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*:2019 SCC OnLine SC 1517; *TRF Ltd. v. Energo*



Engineering Projects Ltd.: (2017) 8 SCC 377; Bharat Broadband Network Ltd. v. United Telecoms Ltd.: (2019) 5 SCC 755 and the decision of this Court in *Proddatur Cable TV Digi Services v. Siti Cable Network Ltd.: 2020 SCC OnLine Del 350*, were misplaced.

6. We have heard the learned counsel for the appellant. There is no requirement to refer to the decisions of the Supreme Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. (supra)*, *TRF Ltd. v. Energo Engineering Projects Ltd. (supra)* and *Bharat Broadband Network Ltd. v. United Telecoms Ltd. (supra)*. The said decisions were rendered in the context of arbitration agreements, which provided for unilateral appointment of an arbitrator by a party / its designated employee. In that context, the Supreme Court had held that an arbitrator appointed by a person who is ineligible to act as an arbitrator, would also be ineligible to act as an arbitrator.

7. In the present case, the arbitration agreement did not empower the appellant to appoint an arbitrator. Clause 15.8 of the General Conditions of Contract applicable to the Agreement dated 06.04.2016 is relevant and is set out below:

“15.8. Dispute Resolution:

Any dispute or difference whatsoever between the Parties out of or relating to the construction, meaning, scope, operation or effect of this Agreement whether arising during the currency or after the completion of this Agreement in regard to any matter or thing of whatsoever nature arising out of this Agreement or in / connection therewith shall be referred to a sole arbitrator who shall conduct the arbitral proceedings in accordance with provisions of the Arbitration and Conciliation Act, 1996, or any modification or any succeeding Act. The proceedings shall be conducted in English and held in New Delhi. The decision of the sole arbitrator shall be final and binding on the Parties. The cost of the



arbitral proceedings shall be equally borne by the Parties. Notwithstanding the above, the Parties agree that, prior to initiating formal dispute resolution, they will attempt to resolve disputes informally by working together to promptly address problems and escalate issues within their respective officials as reasonably required.”

8. It is apparent from the plain reading of the aforesaid clause that the same does not contain any provision for the appointment of an arbitrator. Thus, in any view, the arbitrator could only be appointed by the express consent of the parties. Absent any such consent, it was incumbent upon the appellant to file an appropriate application under Section 11 of the A&C Act for appointment of an arbitrator. The appellant could, under no circumstances, proceed to unilaterally appoint an arbitrator.

9. In view of the above, we are of the view that the impugned award was rightly set aside by the learned Commercial Court. The appeal is unmerited and is accordingly dismissed with costs quantified at ₹25,000/-. The costs shall be paid to the respondents.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

FEBRUARY 12, 2024

‘gsr’

Click here to check corrigendum, if any