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

Date of Decision: 28th May, 2024

+ **O.M.P. (T) (COMM.) 53/2024**

M/S RADHIKA ENGINEERING CO.

..... Petitioner

Through: Mr. Ankit Gupta, Mr. Sahil Sonkusale, Mr. Shoeb H. Khan, Mr. Anmol Gupta, Mr. Mithil Malhotra & Mr. Pranjal Agrawal Adv. (M: 8860441378)

versus

TELECOMMUNICATION CONSULTANTS
INDIA LIMITED

..... Respondent

Through: Mr. Nikhilesh Krishnan, Mr. Abhishek Bhushan Singh & Ms. Ritika Priya, Adv. (M: 7337603842)

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WITH

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O.M.P. (T) (COMM.) 54/2024

M/S RADHIKA ENGINEERING CO.

..... Petitioner

Through: Mr. Ankit Gupta, Mr. Sahil Sonkusale, Mr. Shoeb H. Khan, Mr. Anmol Gupta, Mr. Mithil Malhotra & Mr. Pranjal Agrawal Adv.

versus

TELECOMMUNICATION CONSULTANTS
INDIA LIMITED

..... Respondent

Through: Mr. Nikhilesh Krishnan, Mr. Abhishek Bhushan Singh & Ms. Ritika Priya, Adv.

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AND

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O.M.P. (T) (COMM.) 55/2024

M/S RADHIKA ENGINEERING CO.

..... Petitioner

Through: Mr. Ankit Gupta, Mr. Sahil Sonkusale, Mr. Shoeb H. Khan, Mr.



Anmol Gupta, Mr. Mithil Malhotra &
Mr. Pranjal Agrawal Advs.

versus

TELECOMMUNICATION CONSULTANTS
INDIA LIMITED

..... Respondent

Through: Mr. Nikhilesh Krishnan, Mr.
Abhishek Bhushan Singh & Ms.
Ritika Priya, Advs.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

PRATHIBA M. SINGH, J.

1. This hearing has been done through hybrid mode.

I.A. 30652/2024 (for exemption) in O.M.P. (T) (COMM.) 53/2024

I.A. 30654/2024 (for exemption) in O.M.P. (T) (COMM.) 54/2024

I.A. 30656/2024 (for exemption) in O.M.P. (T) (COMM.) 55/2024

2. Allowed, subject to all just exceptions. Applications are disposed of

O.M.P. (T) (COMM.) 53/2024 & I.A. 30651/2024 (for interim stay)

O.M.P. (T) (COMM.) 54/2024 & I.A. 30653/2024 (for interim stay)

O.M.P. (T) (COMM.) 55/2024 & I.A. 30655/2024 (for ad-interim stay)

3. The present petitions have been filed by the Petitioner- M/s. Radhika Engineering Co. under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*) seeking substitution of the Sole Arbitrator. The claim of the Petitioner is that the Id. Sole Arbitrator adjudicating the disputes between the parties was unilaterally appointed by the Respondent and thereby, the Petitioner is seeking substitution of the Id. Sole Arbitrator.

4. The arbitration which commenced in the year 2008 has still not



culminated into the final award owing to repeated change of Arbitrators and apparently even due to the conduct of the parties themselves.

5. The Respondent had awarded three packages for construction and/or upgradation of Rural Roads under the Pradhan Mantri Gram Sadak (MPPRDA Contract) to the Petitioner. The said three packages are numbered as MP-0735, MP-0737 and MP-0739 and were awarded to the Petitioner by the Respondent on 28th November, 2007. Thereafter, disputes arose under the performance of the said MPPRDA Contract and initially, one Shri A.K. Duggal was appointed as the Sole Arbitrator in 2008, in accordance with Clause 12 of the Terms and Conditions annexed with the MPPRDA Contract. The said Clause is extracted below:

“DISPUTES / ARBITRATION

In the event of any dispute or difference arising between TCIL, and the tenderer in any matter covered by this contract or arising directly or indirectly there from or connected or concerned with the said contract in any manner of implementation of contract, In any manner of the implementation of any terms and conditions of the said contract; the matter shall be referred to the Chairman & Managing Director, TCIL within 90 days of occurring of dispute who may himself act as sole arbitrator or may name as sole arbitrator an officer of TCIL notwithstanding the fact that such officer has been directly or indirectly associated with this contract and the provisions of the Indian Arbitration Act shall apply to such arbitration. The tenderer expressly agrees that the arbitration proceedings shall be held at New Delhi. In case the tenderer wants to take the dispute to a court of law after arbitration award as aforesaid, it is clearly understood that only courts in Delhi shall have the jurisdiction.”



6. The statement of claims and also counter claims were filed by the parties. However, the Id. Arbitrator resigned on 5th February, 2012. Upon the said resignation, the Respondent unilaterally appointed a new Sole Arbitrator Ms. Shalini Sinha. From 2014 till 2023 she continued as the Sole Arbitrator. However, she also resigned on 14th December, 2023. The Respondent again unilaterally appointed Mr. Karnal Singh as the Sole Arbitrator on 2nd January, 2024. The matter is at the stage of evidence before the said Sole Arbitrator.

7. The present petitions have come to be filed seeking termination of the mandate of the said Sole Arbitrator and for appointment of an Independent Arbitrator.

8. The stand taken by the Petitioner is that since the latest appointment by the Respondent, which is unilateral, has been made after commencement of 2015 Amendment, the said unilateral appointment would not be permissible. He relies upon the following three decisions of the Supreme Court and the High Court.

- *Ellora Paper Mills Limited v. State of Madhya Pradesh, (2022) 3 SCC 1*
- *Progressive Infotech Private Limited v. Ircon International Ltd., 2023 SCC OnLine Del 550*
- *KRR Infra Projects Pvt. Ltd. v. Union of India, 2018 SCC OnLine Del 12418*

9. On the other hand, Id. Counsel appearing for the Respondent has vehemently contended that the decision in *Ellora Paper Mills Limited (supra)* would not be applicable and the decision of the Supreme Court in *Union of India v. Parmar Construction Company, (2019) 15 SCC 682*



would be applicable. It is his submission that since the invocation was prior to the introduction of the 2015 Amendment, the appointment by the Respondent would be governed by the said clause in the contract and the Act as applicable prior to the 2015 Amendment to the Act. He relies upon the following three decisions.

- ***Union of India v. Parmar Construction Company, (2019) 15 SCC 682***
- ***Aravali Power Company Private Limited v. Era Infra Engineering Limited, (2017) 15 SCC 32***
- ***Shree Vishnu Constructions v. Engineer in Chief Military Engineering Service and Ors., (2023) 8 SCC 329***

10. The Court has considered the matter at length and heard both the parties. The clear ineligibility to any unilateral appointment is set out in Section 12 of the Act read with the Seventh Schedule of the Act. Clearly, after the 2015 Amendment to the Act came into effect, any unilateral appointment would be contrary to law. The only question is whether the appointment now made in January, 2024 by the Respondent would be considered as a new appointment or the continuation of the earlier invocation itself.

11. The Petitioner has relied upon ***Ellora Paper Mills Limited (supra)*** wherein the Supreme Court was dealing with a fact situation where the contract in question was of year 1993-94. A civil suit was filed and in the said civil suit, application under Section 8 of the Act was filed. The said application was rejected and the High Court allowed the revision on 3rd May, 2000. The High Court appointed the Stationary Purchase Committee comprised of the officers of the Respondent as the Arbitral Tribunal. It is



this order that was under challenge before the Supreme Court. The question that was raised in this matter was whether the Stationary Purchase Committee could be appointed after the introduction of 2015 Amendments of the Act or a fresh Arbitrator would need to be appointed. The relevant extracts of the said judgement are extracted as under:

“12. We have heard the learned counsel for the respective parties at length. Having heard the learned counsel for the respective parties and on considering the impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court, the short question which is posed for consideration of this Court is, whether, the Stationery Purchase Committee—Arbitral Tribunal consisting of the officers of the respondent has lost the mandate, considering Section 12(5) read with Seventh Schedule of the Arbitration Act, 1996. If the answer is in the affirmative, in that case, whether a fresh arbitrator has to be appointed as per the Arbitration Act, 1996?

12. Thereafter, the Supreme Court in paragraphs 20, 21 & 22 discusses the decisions in ***Bharat Broadband Network Ltd. v. United Telecom Ltd., (2019) 5 SCC 755*** and ***Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248*** and holds that the appointment of the Stationary Purchase Committee, who are officers of one of the parties, would be contrary to law and, thus, appointed a retired Supreme Court Judge as the independent Arbitrator. The relevant paragraphs are extracted herein below:

“20. In view of the above and for the reasons stated hereinabove, the impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court is contrary to the



law laid down by this Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] and the recent decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] . It is held that the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and : (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, **has lost its mandate by operation of law in view of Section 12(5) read with Seventh Schedule and a fresh arbitrator has to be appointed under the provisions of the Arbitration Act, 1996. The impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court is therefore unsustainable and deserves to be quashed and set aside.**

21. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court of Madhya Pradesh dated 27-8-2021 passed in Ellora Paper Mills Ltd. v. State of M.P. [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] is hereby **quashed and set aside and the application being AC No. 100 of 2019 filed by the appellant herein before the High Court is hereby allowed.** It is declared that the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional



Secretary, Department of Revenue as President, and :
(i) Deputy Secretary, Department of Revenue, (ii)
Deputy Secretary, General Administration Department,
(iii) Deputy Secretary, Department of Finance, (iv)
Deputy Secretary/Under Secretary, General
Administration Department, and (v) Senior Deputy
Controller of Head Office, Printing as **Members are
ineligible to act/continue as arbitrators in view of
sub-section (5) of Section 12 read with Seventh
Schedule of the Arbitration Act, 1996 and therefore a
fresh arbitrator under the provisions of the
Arbitration Act, 1996 is to be appointed to adjudicate
upon and resolve the dispute between the parties.**

22. Instead of remanding the matter to the High Court to name the arbitrator, we appoint Justice Abhay Manohar Sapre, a former Judge of this Court to act as an arbitrator to adjudicate upon/resolve the dispute between the parties. We hope and trust that the learned arbitrator shall conclude the arbitration proceedings and declare the award at the earliest considering the fact that the dispute between the parties is pending since the year 2000. Both the parties shall appear before the learned arbitrator, at the first instance, within a period of four weeks from today. A copy of this judgment shall be forwarded to the newly appointed arbitrator.”

13. Subsequently, a coordinate Bench of this Court in **Progressive Infotech Private Limited (supra)** has considered a similar issue involving the Northern Railways. In the said case, the Court has set aside the appointment of the Managing Director or his nominee on the ground that it does not meet the test of impartiality. The relevant portion of the said decision is set out below:



“21. Clause 40 of the Agreement thus, authorized the MD/Director, IRCON to appoint or substitute the Arbitrator in case of his transfer or if he vacates his office or is unable to act for any reason, from a panel of arbitrators to be approved by the Northern Railway. Thus, it is the MD of the respondent who was entitled to appoint the Arbitrator. **The question is whether an appointment under such a procedure can continue and remain valid in light of the 2015 amendment.**

22. The respondent has placed reliance on Aravali Power Co. (p) Ltd. v. Era Infra Engg. Ltd., (2017) 15 SCC 32 to submit that since the arbitration proceedings in the present case was initiated prior to the amendments affected in 2015, it is the un-amended act that shall be applicable. It was further observed that merely because the arbitrator happens to be an employee of the party to the arbitration, it would not by itself as per the un-amended Act, render the appointment invalid and unenforceable.

23. The implication of the 2015 amendment was examined in Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665. **It was found to be clear that the major goal of the amendment was to ensure the impartiality of arbitrators.** To accomplish this, sub-section (5) of Section 12 states that notwithstanding any prior Agreement to the contrary, any person whose relationship with the parties, counsel, or the dispute fell under any of the categories listed in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. **In the event that the revised provision conflicts with the arbitration clause, the court would have the authority to appoint arbitrator(s) in a manner permissible under the A & C Act, 1996. Due to the non-obstante provision in Section 12(5), the opposite party can insist on the arbitrator's nomination in defiance of the arbitration agreement**



in case of the ineligibility of the proposed arbitrator.

24. *The Hon'ble Supreme Court has dealt with the issue of applicability of 2015 Arbitration amendment to pre 2015 contracts in Ellora Paper Mills Limited v. State of Madhya Pradesh, (2022) 3 SCC 1, wherein the High Court of Madhya Pradesh had held that Amendment Act, 2015 will not apply retrospectively to arbitration proceedings. This view was overruled by the Hon'ble Supreme Court and while relying upon Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited v. Ajay Sales & Suppliers, 2021 SCC OnLine SC 730 and TRF Limited v. Energo Engineering Projects Ltd., (2017) 8 SCC 377, it was held that not applying Section 12(5) of the Arbitration (Amendment) Act, 2015 is unjust and against principles of natural justice. It went on to further state that an ineligible arbitrator cannot act/continue as an arbitrator even if the Arbitral Tribunal was constituted much prior to Amendment Act, 2015.*

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29. It may thus be concluded that the appointment of a Sole Arbitrator by one party or appointment of the Managing Director or its nominee as the Arbitrator does not meet the test of impartiality and independence and is hit by the bar of Section 12(5) of the Act and are inherently incapable of being appointed as the Arbitrator as has been held in the various judgments. The learned Arbitrator is disqualified under Section 12 of A & C Act, 1996 to continue as an Arbitrator”

14. Similarly, in ***KRR Infra Projects Pvt. Ltd. (supra)***, the coordinate Bench of this Court has observed clearly that the invocation of the arbitration proceedings prior to the commencement of 2015 Amendment to the Act would not, in any manner, permit an appointment after 2015 under the said very clause. The relevant portion is extracted herein below:



“2. The limited ground for seeking review of the order is that this Court by its Judgment dated 04.05.2018 passed in OMP(T)(COMM) 9/2018, *Omaxe Infrastructure and Construction Ltd. v. Union of India* has held that where the Arbitrator is appointed after coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as ‘Amending Act’) and is ineligible in terms of the Seventh Schedule of the Act, such Arbitrator cannot proceed with the arbitration proceedings.

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8. In view of the above, merely because the Arbitration Agreement had been invoked prior to the coming into force of the Amending Act and the arbitration proceedings had commenced before the earlier Arbitrator prior to coming into force of Amending Act, the respondent could not have proceeded to appoint an ineligible Arbitrator under Section 12(5) read with the Seventh Schedule of the Act after coming into force of the Amending Act. At the time of such appointment, the eligibility of the Arbitrator had to be considered in accordance with the laws applicable to such appointment, including Section 12(5) and the Seventh Schedule of the Act. The Arbitrator being a serving employee of the respondent, was ineligible to be appointed in terms of Entry 1 of the Seventh Schedule to the Act and therefore, all proceedings that were conducted by him were not in accordance with the law.”

15. The decision in *Aravali Power Company Private Limited (supra)* has already been considered by the coordinate Bench in *Progressive Infotech Private Limited (supra)*. Mr. Krishnan’s emphasis on *Parmar Construction Company (supra)* to argue that in respect of proceedings, which were commenced prior to 2015 Amendment of the Act, the unamended Act would



apply, cannot be questioned, inasmuch as once the proceedings have commenced and there is no change in the Arbitrator, the old Act would continue to apply. But in the present case, the appointment of Mr. Karnal Singh as a Sole Arbitrator has been made in January, 2024, well after the 2015 Amendment of the Act came into effect. In the opinion of this Court, though the said appointment, post 2015, is being termed as a continuation to the previous appointment, it is in fact a new substitute appointment and would require to comply with the explicit mandate of the Act including the 2015 amendments to the Act. Moreover, in *Parmar Construction Company (supra)*, from the judgement it appears that the invocation was prior to 2015 and the arbitration petition under Section 11(6) of the Act was also filed prior to 2015. Under these circumstances, the decision in *Parmar Construction Company (supra)* would not be applicable in the present case.

16. Insofar as *Shree Vishnu Constructions (supra)* is concerned, in the said judgement as well, the invocation was of 2013. Thus, the question that has arisen in the present case is clearly covered by *Ellora Paper Mills Limited (supra)*.

17. In these circumstances and also in the spirit of impartiality and to ensure that the true spirit of the amendments is not lost in such cases, it is deemed appropriate to appoint **Dr. Amit George, Advocate (9910524364)** as the Sole Arbitrator to adjudicate upon the disputes between the parties.

18. The arbitration proceedings shall take place under the aegis of the DIAC. The arbitration proceedings shall be conducted under the Rules of DIAC. The fee of the Id. Sole Arbitrator shall be as per the Fourth Schedule of the 1996 Act, as amended by the DIAC Rules, 2023. The Arbitrator shall take up the matter expeditiously considering that the dispute itself is of the



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year 2008. The parties are directed to not take any unnecessary adjournments. The Arbitrator shall enter into reference from the stage at which the matters were pending before the earlier Arbitrator. Pleadings and records be obtained from the earlier Arbitrator by the Respondent and be transmitted to the DIAC. Considering the nature of the matter, the same Sole Arbitrator is being appointed in these three matters. The Arbitrator shall endeavour to conclude the proceedings by 31st December, 2024.

19. List before the DIAC on 9th July, 2024. Let a copy of the present order be emailed to Coordinator, DIAC on the email id-delhiarbitrationcentre@gmail.com.

20. The petitions are disposed of in the above terms. All pending applications are also disposed of, if any.

PRATHIBA M. SINGH
JUDGE

MAY 28, 2024/dk/am