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

+ O.M.P. (COMM) 355/2023

UNION OF INDIA

..... Petitioner

Through: Mr. Ankur Mahindro and Mr. Rohan
Taneja, Advs.

versus

M/S. M. V. OMNI PROJECTS (INDIA) LTD.

..... Respondent

Through: Mr. Subodh Kr. Pathak, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

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08.05.2024

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the impugned corrected Arbitral Award dated 19.06.2023 and Award dated 30.05.2023 passed by the learned Sole Arbitrator.

2. The brief facts are that in the year 2015, the petitioner issued open tender for construction work of Institutional and Hostel block with basement, auditorium and Boundary Wall including Superstructure, Interior, Water supply, Sanitary Installations, Drainage, External Development, Internal Electrical Installations, HVAC, Lifts, Substation, DG Sets, Fire Alarm & Fire Fighting System, Solar Water Heating, Solar Power Generation, Conducting for Telephone/LAN, etc. at IIIDEM Campus at Plot No. 1, Sector 13, Dwarka, New Delhi. Respondent participated in the tender and was awarded the contract *vide* Agreement No. 01/EE/IIIDEMPD/2015-16 dated 12.01.2016 at their tendered amount of Rs.85,15,59,138/- with stipulated period for completion of the work as 15 months with Stipulated



date of start as 14.01.2016 and completion as 13.04.2017.

3. Since there was disputes between the parties, the respondent invoked the arbitration mechanism in term of clause 25 of General Conditions of Contract which reads as under: - page 1217 of pleading

“CLAUSE 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i)

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director General, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief



Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Special Director General or Director General/, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be concluded in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

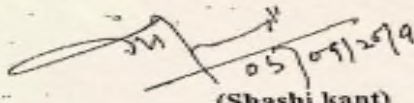
It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement or claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of



the arbitrator who may direct to any by whom and In what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

4. As the petitioner was not appointing an arbitrator to adjudicate the disputes, the respondent filed Section 11 petition bearing ARB.P. 199/2019 wherein the petitioner submitted that they would take steps for appointment of an Arbitrator. The statement was taken on record and the above petition was disposed of *vide* order dated 23.08.2019.

5. Subsequent to the said order, the Addl. Director General appointed the Sole Arbitrator *vide* letter dated 06.09.2019. The said letter reads as under:-

 Govt. of INDIA O/o Additional Director General (PRD) CPWD, Sewa Bhawan, R.S. Puram New Delhi - 110065. Tel. No. 011-26104679, 26104052 Email: delade-prd@cpwd.gov.in	 भारत सरकार कार्पस कम महानिदेशक (परियोजना सेवा विभाग) केंद्रीय सेवा भवन, नई दिल्ली। संघ मन्द, अवरकेपुरम, नई दिल्ली। Tel. No. 011-26104679, 26104052 ईमेल: delade-prd@cpwd.gov.in
सं०: 24(7)/अपर महानि. (परि.क्षे.दि.)/2019/491	
दिनांक 06/09/2019	
Office Memorandum	
विषय:- In the matter of arbitration between M/s M. V. Omni Projects (India) Limited and Union of India, regarding the work C/o IIIDEM Campus at Plot No.-1, Sector-13, Dwarka, New Delhi. (SH: Hostel Block with basement, Auditorium, Institutional Block and Boundary Wall including Superstructure, Interior, Water supply, Sanitary installation, Drainage, External Development, Internal Electrical Installation, HVAC, Lifts, Sub-station, DG sets, Fire Alarm & Fire Fighting System, Solar Water Heating, Solar Power Generation, Conducting for Telephone/LAN, etc.). Agreement No. 01/EE/IIIDEMPD/2015-16. Whereas M/s M. V. Omni Projects (India) Ltd. has written vide letter no MVOPIL/19-20/CPWD-IIIDEM/667 dated 16.05.2019 that certain disputes have arisen between the above noted parties in respect of the above noted work. I, Shashi Kant, ADG(PRD), CPWD by powers conferred on me under clause 25 of the said Agreement hereby appoint Shri Anil Kumar Sharma Arbitrator B-99, Sector-30, Noida, Gautam Budh Nagar, U.P. 201303 as Sole Arbitrator to decide and make his award regarding the claims/disputes by the contractor, if any, as shown in the statements enclosed, subject always, however, to their admissibility under clause 25 of the aforesaid agreement, copy of which is enclosed. The Arbitrator shall give reasons for the award. Encl.: List of claims and counter claims.	
 (Shashi kant) Addl. Director General Project Region Delhi	
To, 1. Shri Anil Kumar Sharma Arbitrator B-99, Sector-30, Noida, Gautam Budh Nagar, U.P. 201303 2. M/s M. V. Omni Projects (India) Ltd. Contractor, with reference to his letter no MVOPIL/19-20/CPWD-IIIDEM/667 dated 16.05.2019.	



6. The Sole Arbitrator entered reference and the parties herein participated in the arbitration proceedings, lead evidence and the Sole Arbitrator passed the impugned Award dated 30.05.2023 and corrected on 19.06.2023 allowing the partial claims of the respondent.

7. Mr. Mehendru, learned counsel for the petitioner while relying on the judgment of **TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377, Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755** and **Telecommunication Consultants India Ltd. v. Shivaa Trading, 2024 SCC OnLine Del 2937** contends that the appointment of the Sole Arbitrator is hit by section 12(5) of the Arbitration and Conciliation Act, 1996 and the Addl. Director General, Project Region, Delhi was ineligible to appoint an Arbitrator and the entire proceeding held by the Sole Arbitrator is a nullity.

8. On the other hand, Mr. Pathak, learned counsel for the respondent opposes the present petition and states that the appointment is not made by the petitioner but the appointment is made pursuant to an order passed by this Court in ARB. P. 199/2019. He relies upon the judgment passed by the Calcutta High Court in **McLeod Russel India Ltd. v. Aditya Birla Finance Ltd., 2023 SCC OnLine Cal 330** and more particularly para 41 and 53 which reads as under:-

“41. The petitioners’ present challenge to the appointment of the arbitrator is also contrary to section 12(4) of the Act. Under section 12(4), a party may challenge an arbitrator in whose appointment he has participated only for reasons of which he becomes aware after the appointment has been made. The petitioners participated in the arbitration for almost 2 years before lodging the challenge. The petitioners have also



not disclosed any facts which came to the petitioners' knowledge after the appointment warranting termination of the Arbitrator's mandate. The petitioners were parties to the Arbitration Agreement containing the clause of the appointment made by the respondent no. 1; the petitioners were also aware of the disclosures/declarations made by the Arbitrators in May, 2019 and June, 2020. The petitioners were also aware of Perkins from 26th November, 2019 onwards. Section 12(4) also makes it clear that the reasons calling for the challenge must be under section 12 read with the Fifth and Seventh Schedules. Hence, the petitioners' challenge to the appointment after full participation in the arbitration falls foul of section 12(4) of the Act.

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53. The above decisions disclose a common factual thread; namely of the arbitrator being a designated person of one of the parties, usually the MD/CMD, with the power to appoint another person to act as the arbitrator in his/her place. All the decisions therefore proceeded on the basis that if the designated person becomes ineligible under section 12(5) read with the Seventh Schedule, the ineligibility would extend to the person being appointed by the designated arbitrator. Once Perkins amplified the ineligibility to all unilateral appointments, the decisions post-Perkins proceeded to invalidate all unilateral appointments as an omnibus disqualification without fixing the ineligibility to one or more of the specific entries in the Seventh Schedule

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57. The alleged ineligibility of the appointment of the Ld. Arbitrator was regularised under the proviso to section 12(5) by the express written documents executed by the petitioners and their continuous participation in the arbitration. The petitioners continued to participate in the arbitration despite



having knowledge of the curable invalidity of the arbitration agreement and being aware of the implication of the judgments pronounced by the Supreme Court in TRF, Bharat Broadband and Perkins Eastman.”

9. I have heard learned counsel for the parties.
10. It is well settled principle that unilateral appointment of Arbitrator is not permissible under the law. Reliance is place on **Bharat Broadband Network Ltd. (supra)** and more particularly para 15 which reads as under:-

“15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an “express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that



such person is interdicted by the Seventh Schedule.”

11. Recently, this Court in ***Telecommunication Consultants India Ltd. (supra)*** relying on ***Bharat Broadband Network Ltd. (supra)*** has observed as under:-

“23. Upon a conspectus of the averments contained in the petition and in the reply; and having heard learned counsel for the parties, this court is of the view that the present case is squarely covered by the decision of the Supreme Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. (supra). Just as in Bharat Broadband, in the present case as well, the party that had appointed the Arbitrator had itself subsequently challenged the award on the ground that the Arbitrator was ineligible to act as such, in light of section 12(5) of the A&C Act.

24. The enunciation of the law by the Supreme Court on the point is clear and unequivocal, inasmuch as the challenge under section 12(5) is attracted in a case where the arbitrator becomes de jure ineligible to perform his function by reason of falling in one or more of the categories specified in the Seventh Schedule to the A&C Act. In such circumstances, the Supreme Court has held, that since an arbitrator so appointed inherently lacks jurisdiction to act as an arbitrator, the very appointment of the arbitrator and the arbitral proceedings conducted are rendered void ab-initio. The Supreme Court has also held that any waiver in terms of the proviso to section 12(5) of the A&C Act must be ‘express’ and ‘in writing’ and must have been granted ‘subsequent’ to disputes having arisen between the parties. These have been held to be necessary prerequisites for the waiver to section 12(5) being valid.

27. There also cannot be any cavil with the proposition of law that a defect of jurisdiction, which renders a decision void, can be challenged at any stage, since such defect strikes at the very foundation of the power of the court or tribunal to decide a dispute.

29. As a sequitur to be above, the court is persuaded to allow the present petition, solely on the ground that the learned Arbitrator appointed in the matter was de jure ineligible to act as such; and consequently, all proceedings in arbitration, including Arbitral



Award dated 17.12.2021 rendered by him, are void ab-initio and of no legal effect.”

12. It is not disputed that the appointment of the Sole Arbitrator was made by the petitioner which is clearly in violation of Section 12(5) of the Arbitration and Conciliation Act, 1996 and the judgments laid down by the Hon’ble Supreme Court and this Court.

13. The reliance of Mr. Pathak on the judgment of **McLeod Russel India Ltd. (supra)** is misconceived as the Hon’ble Calcutta High Court relying on **Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760** holds that the Arbitrator being a designated person with the power to appoint another person, the person so appointed would be ineligible.

14. With respect to the judgment of the Hon’ble Calcutta High Court, the Court therein fails to appreciate that no amount of conduct can regularise the absence of an agreement in writing, reference is made to paragraph 15 of **Bharat Broadband Network Ltd. (supra)**.

15. For the said reasons, I am of the view that the appointment of the Sole Arbitrator by the petitioner falls under entry 12 of Seventh Schedule and is hit by Section 12(5) of the Arbitration and Conciliation Act, 1996. Hence the said appointment cannot sustain.

16. As a result, the petition is allowed and the impugned Award dated 30.05.2023 and corrected on 19.06.2023 is set aside.

17. The petition is disposed of.

JASMEET SINGH, J

MAY 8, 2024/NG