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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P. (COMM) 33/2024, I.A. 1167/2024, I.A. 1169/2024
M/S PATNA HOME APPLIANCE CO. & ORS. Petitioners

Through: Mr Anirudh Bakhru, Ms Disha
Thakkar, Mr Akshat Agrawal, Mr
Mohit Agarwal, Ms Vijay Lakshmi
and Ms Pragya Choudhary, Advs.

versus

ORIENT ELECTRIC LTD. Respondent

Through: Mr. Angad Singh Dugal, Mr. Govind
Singh Grewal, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

ORDER
25.01.2024

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I.A. 1168/2024

1. Exemption is granted subject to all just exceptions.
2. The petitioner shall file legible and clearer copies of exempted documents, compliant with practice rules before the next date of hearing.
3. The application is disposed of.

O.M.P. (COMM) 33/2024

4. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 07.08.2021 passed by the learned Sole Arbitrator.
5. It is stated by Mr. Bhakru, learned counsel for the petitioner that the award is vitiated in view of Section 12(5) of the Arbitration and Conciliation Act, 2006.
6. He states that the respondent company has unilaterally appointed the arbitrator which is contrary to the judgment of the Hon'ble Supreme Court in "*Bharat Broadband Network Limited vs. United Telecoms Ltd.*" [2019



5 SCC 755]. The said judgment has been followed by the Division Bench of this Court in “**Govind Singh vs. Satya Group Pvt. Ltd.**” [2023 SCC OnLine Del 37]. Relevant extracts are produced below:

“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 ”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:

"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...."

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23. We are unable to agree that the decision in Bharat Broadband Network Limited v. United Telecoms Limited (supra) can be distinguished on the aforesaid ground. The said decision had authoritatively held that in terms of the proviso of Section 12(5) of the A&C Act, the ineligibility of an arbitrator under Section 12(5) of the A&C Act could be waived only by an express agreement in writing and cannot be inferred by the conduct of the parties. Thus, the fact that the parties had participated before the arbitral tribunal cannot be construed as a waiver of their rights to object to the ineligibility of the arbitrator (s). We are unable to accept that while such a right could be exercised prior to the delivery of the award, it would cease thereafter. If the arbitrator is ineligible to act as an arbitrator, the arbitral award rendered by the arbitral tribunal would be without jurisdiction."

7. A reading of the aforesaid shows that the Arbitrator was *de jure* ineligible to act as such and the Award passed by the learned Arbitrator is void and unenforceable as in the present case there was no express waiver by the petitioners. Relying on the said judgement and for the reasons stated, the Arbitration Award dated 07.08.2021 is set aside. With consent of the parties, following directions are passed:

- i) Mr. S.K. Tandon (Retd. ADJ) (Mob. No. 9811719888) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.



iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

v) The parties shall approach the learned Arbitrator within two weeks from today.

vi) The arbitrator will enter reference not before 01.03.2024, giving the petitioner and the respondent time to mutually settle their disputes if possible.

8. With these directions, the petition is disposed of.

JASMEET SINGH, J

JANUARY 25, 2024/DM

Click here to check corrigendum, if any