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

***Date of decision: 21.08.2024***

\+ **O.M.P. (COMM) 442/2018**

SUPREME INFRASTRUCTURE INDIA LTD .....Petitioner

Through: Mr. Akshat Bajpai, Mr Shobhit Trehan, Ms. Renuka Permanand, Ms. Ishanee, Advs.

versus

CENTRAL PUBLIC WORKS DEPARTMENT .....Respondent

Through: Ms. Anubha Bhardwaj, CGSC with Mr. Dev P Bhardwaj, Mr. Ujjwal, Mr. Vishal Sharma, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE JASMEET SINGH**

: **JASMEET SINGH, J (*ORAL*)**

1. This is a petition filed under Section 34 (4) of the Arbitration and Conciliation Act, 1996 seeking to set aside the Arbitral Award dated 05.06.2018.
2. The brief facts are that the petitioner i.e. M/S Supreme Infrastructure India Ltd. is a company incorporated under the provisions of the Companies Act, 1956 engaged in the business of infrastructure development and construction of buildings across various states in the India. Respondent is a department under Ministry of housing and urban

Affairs in charge of public sector works.

3. The respondent invited bids for the purposes of construction of Additional Office Complex for the Supreme Court of India adjoining Pragati Maidan, New Delhi, SH: RCC Frame-work including Three Level Basement ("project").

4. The petitioner participated in the bidding process and was declared as a successful bidder and subsequently, the parties entered into an Agreement dated 15.10.2012 for the execution of the said project. The Stipulated Date of completion for the project was 06.08.2014.

5. Pursuant to the execution of the agreement, the petitioner started the construction process, however, the said project got delayed due to various hindrances which were duly intimated by the petitioner to the respondent by way of various communications. The petitioner had also requested for extension of time for completion of the project. However, since the project was never completed by the petitioner, the respondent issued a termination letter on 24.07.2014 under Clause 3 of the Agreement dated 15.10.2012 and the respondent also invoked the bank guarantees submitted the petitioner.

6. Since disputes arose between the parties, the parties resorted to arbitration for adjudication of disputes arisen between the parties and the Arbitral Award came to be passed on 05.06.2018. The Arbitral Award was passed in favour of the respondent whereby the arbitral tribunal held that the termination letter 24.07.2014 was justified and rejected the counter claims of the petitioner.

7. Hence, the present petition has been filed.

8. Mr. Bajpai, learned counsel for the petitioner has raised a preliminary

objection that the Arbitral Award is liable to be set aside as the learned arbitrator was appointed by the Chief Project Manager of the respondent and the same is contrary to the law laid down by the Hon'ble Supreme Court in "***Bharat Broadband Network Ltd. vs. United Telecom Ltd.***" [(2019) 5 SCC 755], "***M/s TRF Ltd. vs. Energo Engineering Projects Ltd.***" [(2017) 8 SCC 377) and "***Perkins Eastman Architects DPC vs. HSCC (India) Ltd.***" [(2020) 20 SCC 760].

9. In this regard, learned counsel for the petitioner has drawn my attention to Clause 25 (Clause of Contract) of the Agreement dated 15.10.2012 which reads as under: -

> ***"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) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings; record or decision given in writing by the Engineer-in- Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the*

*receipt of the contractor's letter.*

*If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, falling which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.*

*(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 Director General of Works, 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 alongwith 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 Director General of works, 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 conducted 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 thereunder 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 of 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 hall 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."*

10. He further states that Chief Project Manager of the respondent appointed the Sole Arbitrator *vide* letter dated 15.07.2016 and in this regard, draws my attention to the preamble of the Arbitral Award dated 05.06.2018 which reads as under: -

*"**1.0. PREAMBLE***

*A. The work of construction of additional office complex for the Supreme Court of India adjoining Pragati Maidan, New Delhi. SH: RCC frame work including three level basement was awarded to the claimant by respondent after inviting bids from eligible contractors/firms. Formal agreement was executed between the parties on 15.10.2012 of the contract value of the work was Rs. 267,13,53,435/-. Stipulated period for completion of work was 660 days. There ws delay in completion of work and work was terminated on 24th July 2014. Disputes having arisen in regard to termination and payments, claimant sought arbitration in the matter in terms of G.C.C. 25 of the contract agreement. <u>I was appointed as sole arbitrator by chief Project Manager, Supreme Court Project Zone; CPWD vide his letter no. 54(1)/ab/arb/cpm/scpz/cpwd/2016-17/357 dated 15.07.2016 and appointment was accepted by me</u>. Required declarations* *in terms of sub-section (1) of section 12 of the arbitration and conciliation act, 1996 as amended by the arbitration and conciliation (amendment) act, 2015 (3 of 2016), were sent to both parties.*

*B. I entered into reference on 18.07.2016 vide letter number No. KK/ARBN/CPWD – 01/16/01 dated 18.07.2016. The first preliminary hearing in the case was held on 11.08.2016 at 1100 hrs in New Delhi.*

*The preliminary hearing was attended by the representative of both parties and counsel of claimant."*

11. I have heard learned counsel for the parties.

12. In the present case, it is pertinent to mention that the petitioner has never challenged the eligibility of the learned arbitrator during the pendency of the arbitral proceedings and the said plea has only been raised before this court. However, this issue is no longer res integra that the objection to the appointment of the Arbitrator can be taken at any stage and **even orally**.

13. In ***"Hindustan Zinc Limited vs Ajmer Vidyut Vitran Nigam Limited"*** (2019) 17 SCC 82**,** the Hon'ble Supreme Court held that the plea with respect to the lack of jurisdiction of the Arbitrator can be raised at any stage and even during the collateral proceedings. The coordinate bench of this court in "***Man Industries (India) Limited vs Indian Oil Corporation Limited"*** 2023 SCC OnLine Del 3537 while reiterating the said position of law *inter alia* held as under:

*"26. In Hindustan Zinc Limited (HZL) (supra), the Court held*

*that if there is an inherent lack of jurisdiction of the Arbitrator, the plea can be taken up any stage and also in collateral proceedings. Such plea can be taken even where the party has consented to the appointment of the Arbitrator.*

*27. Applying the above principles to the facts of the present case, the plea of the Arbitrator being de jure ineligible to act as such is a plea of lack of jurisdiction. This plea can be allowed to be raised by way of an amendment and even without the same."*

14. Now coming to the aspect of the appointment of the learned sole arbitrator, it is an admitted fact that the learned arbitrator was appointed by the Chief Project Manager of the respondent as the Agreement executed between the parties gives power to the Chief Engineer/Chief Project Manager to appoint an arbitrator as given under Clause 25(ii) (Clause of Contract) of the Agreement and the same has also been duly accepted by the arbitrator in the preamble of the Award.

15. The law in this regard is clear in "***Bharat Broadband Network Ltd. vs. United Telecom Ltd.***" [(2019) 5 SCC 755], "***M/s TRF Ltd. vs. Energo Engineering Projects Ltd.***" [(2017) 8 SCC 377] and "***Perkins Eastman Architects DPC vs. HSCC (India) Ltd.***" [(2020) 20 SCC 760].

16. The Hon'ble Supreme Court in "***Bharat Broadband Network Ltd."*** (supra) *inter alia* held 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. <u>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</u>. 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."*

*(Emphasis supplied)*

17. In addition, the Hon'ble Supreme Court in "**TRF**" (supra) *inter alia* held as under:

*"12. Sub-section (5) of Section 12, on which immense stress has been laid by the learned counsel for the appellant, as has been reproduced above, commences with a non-obstante clause. It categorically lays down that if a person whose relationship with the parties or the counsel or the subject matter of dispute falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. There is a qualifier which indicates that parties may, subsequent to the disputes arisen between them, waive*

*the applicability by express agreement in writing. The qualifier finds place in the proviso appended to sub-section (5) of Section 12. On a careful scrutiny of the proviso, it is discernible that there are fundamentally three components, namely, the parties can waive the applicability of the sub-section; the said waiver can only take place subsequent to dispute having arisen between the parties; and such waiver must be by an express agreement in writing.*

*13. At this stage, we think it appropriate to refer to the Seventh Schedule, which finds mention in Section 12(5). The Seventh Schedule has three parts, namely, (i) arbitrator's relationship with the parties or counsel; (ii) relationship of the arbitrator to the dispute; and (iii) arbitrator's direct or indirect interest in the dispute."*

*(Emphasis supplied)*

18. In my view, the emphasis while adjudicating the disputes between the parties is on the element of neutrality of the Arbitrator and the law is well settled by the Hon'ble Supreme Court in the aforementioned judgments.

19. Moreover, in "***Perkins Eastman Architects DPC & Anr. Vs HSCC (India) Ltd.***" (2020) 20 SCC 760, *inter alia* held as under:

*"21. But, in our view that has to be the logical deduction from TRF Ltd. Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but*

*must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd."*

20. In the present case, the appointment of Mr. Krishna Kant as the sole arbitrator was done by the Chief Project Manager of the respondent and since the Chief Project Manager was himself ineligible to appoint the arbitrator, therefore the appointment of the arbitrator and any proceedings conducted by the arbitrator are itself *void ab intito* and a nullity. The appointment of the Arbitrator is clearly hit by Entry 5 of the Seventh Schedule of the Arbitration and Conciliation Act, 1996

which reads as under:

*"The Arbitration and Conciliation Act, 1996*

*The Seventh Schedule*

*[See section 12(5)]*

*Arbitrator's relationship with the parties or counsel*

*.....*

***5**. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."*

21. To my mind, the Chief Project Manager of the respondent clearly falls under Entry 5 of the Seventh schedule of the Arbitration and Conciliation Act, 1996 and therefore, the Chief Engineer/Chief Project Manager was ineligible to appoint an Arbitrator.

22. This court has also taken a similar view in "***Union of India vs. M/s M.V. Omni Projects (India) Ltd.***" passed in O.M.P.(COMM) 355/2023 as well as "***M/s Upper India Trading Co. Pvt. Ltd. vs. M/s Hero Fincorp Ltd.***" passed in O.M.P.(COMM) 399/2022.

23. In this view of the matter, the appointment of the Arbitrator is hit by Section 12 (5) of the Arbitration and Conciliation Act, 1996 along with the Seventh Schedule of the Arbitration and Conciliation Act, 1996 and the Award so rendered by the Arbitrator cannot be upheld.

24. For the said reasons, the petition is allowed and the Award dated 05.06.2018 passed by the learned Arbitrator is set aside.

25. The respondent is at liberty to initiate appropriate legal proceedings in accordance with law.

26. The petition is disposed of in the aforesaid terms.

**JASMEET SINGH, J**

**AUGUST 21, 2024 / (MS) / (PP)**
***(Corrected and released on 03.09.2024)***

*Click here to check corrigendum, if any*