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

% *Date of Decision: 10.01.2022*

+ **O.M.P. (T) (COMM.) 3/2020 & I.A. 765/2020 & I.A. 3168/2020**

BW BUSINESSWORLD MEDIA PVT. LTD. Petitioner
Through Ms. Ritwika Nanda, Advocate

versus

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LIMITED Respondent
Through Mr. Nikhil Majithia, Advocate

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. (ORAL)

[Hearing Held Through Videoconferencing]

1. The petitioner has filed the present petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, praying that the mandate of Mr Harsh Kumar, learned Sole Arbitrator, be terminated and another Arbitrator be appointed in his place.

2. The respondent company issued a Notice Inviting Tenders (NIT) dated 26.04.2018 inviting tenders for publishing and distribution of "On- Board Magazine for Indian Railways-Rail Bandhu". The petitioner submitted its bid pursuant to the said NIT along with the earnest money of ₹2,00,000/-. The said bid was

accepted by a Letter of Award (LOA) dated 14.08.2018 and the petitioner was awarded the contract for publishing and distribution of “*On- Board Magazine for Indian Railways-Rail Bandhu.*” (hereafter the ‘Contract’)

3. Certain disputes have arisen between the parties in connection with the Contract. On 12.03.2019, the respondent terminated the Contract. Thereafter, on 15.05.2019, the petitioner issued a notice under Section 21 of the A&C Act invoking the Arbitration Agreement as embodied in Clause 10 of the Terms and Conditions as applicable to the Contract.

4. The petitioner states that pursuant to the notice invoking arbitration, the Chairman-cum-Managing Director of the respondent proceeded to unilaterally appoint the learned Arbitrator by a letter dated 14.06.2019. The learned Arbitrator appointed by the respondent, is a former employee of the Railways and at the time of his superannuation, was holding the post of the Financial Advisor, Northern Railways.

5. It is stated that the petitioner did not file any application under Section 13 of the A&C Act to challenge the appointment of the learned Arbitrator. The petitioner did not object to his appointment at the material time and participated in the arbitral proceedings before the learned Arbitrator. However, the petitioner has filed the present petition in view of the decisions rendered by the Supreme Court in ***TRF Limited v. Energo Engineering Project Ltd.:* (2017) 8 SCC 377**

and *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd.: 2019 SCC Online SC 1517*.

6. Mr Majithia, learned counsel appearing for the respondent, states that the Arbitrator was appointed prior to the decision of the Supreme Court in *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd. (supra)* and therefore, the said appointment cannot be challenged. He also referred to Section 4 of the A&C Act and submitted that since the petitioner had not raised any objection at the material time, it is precluded from challenging the appointment of the Arbitrator.

7. This Court is of the view that the controversy as raised is squarely covered by the decision of the Supreme Court in *Bharat Broadband Network Limited v. United Telecoms Limited: (2019) 5 SCC 755*. In that case, the respondent had invoked the arbitration clause by a notice dated 03.01.2017, whereby it had called upon the Chairman cum Managing Director (CMD) of Bharat Broadband Network Limited (BBNL) to appoint an independent and impartial arbitrator. Pursuant to the aforesaid notice, the CMD of BBNL had proceeded to appoint one Mr Khan as the sole arbitrator to adjudicate the disputes between the parties. The parties had thereafter, participated in the arbitral proceedings without any reservation. However, subsequently, BBNL filed an application before the arbitral tribunal requesting the learned arbitrator to withdraw from the proceedings. BBNL contended that the learned arbitrator had become *de jure* unable to perform his functions as he was ineligible to do so in

view of the decision of the Supreme Court in *TRF Limited v. Energo Engineering Project Ltd.* (*supra*). The said application was rejected by the learned arbitrator. Aggrieved by the same, BBNL filed a petition under Sections 14 and 15 of the A&C Act before this Court praying that the mandate of the learned arbitrator be terminated. This Court did not accept BBNL's contention. It further held that BBNL was estopped from challenging the appointment of the arbitrator as its CMD had appointed the arbitrator and BBNL had also participated in the arbitral proceedings without reservations.

8. BBNL impugned the decision of this Court before the Supreme Court. The Supreme Court referred to its earlier decision in *TRF Limited v. Energo Engineering Project Ltd.* (*supra*) and held that the said decision made it clear that “*an appointment made by an ineligible person is itself void*”. The Supreme Court further held that “*since such appointment goes to “eligibility” i.e. the root of the matter, it is obvious that Shri Khan's appointment would be void*”.

9. The question whether participation in arbitral proceedings constitute a waiver was also considered by the Supreme Court in that decision. In that regard, the Supreme Court observed as under:

“**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...”

10. The question whether the rights under Section 12(5) of the A&C Act can be repealed by conduct is now no longer *res integra*. The language of the proviso to Section 12(5) of the A&C Act makes it amply clear that any waiver is required to be made by an agreement in writing and that too, after the disputes have arisen. This is a distinct departure from the language of Section 4 of the A&C Act. Thus, the contention that the petitioner has waived its right to object to the appointment of the learned Arbitrator, cannot be accepted.

11. Mr Majithia has also referred to the decision in *Quippo Construction Equipment Ltd. v. Janardan Nirman Pvt. Ltd.: 2020 SCC Online SC 419*. The reliance on the said decision is misplaced. In that case, the question was whether the petitioner had waived its right to object to the jurisdiction having participated in the arbitral proceedings at New Delhi. The Supreme Court had referred to Section 4 of the A&C Act and held that the conduct of the petitioner therein, would amount to waiver of its objection regarding jurisdiction. As noted above, Section 4 of the A&C Act does not apply in case of ineligibility of an arbitrator under Section 12(5) of the A&C Act as the proviso to Section 12(5) of the A&C Act expressly provides that any waiver, must be made by an agreement in writing.

12. The contention that the learned Arbitrator was appointed prior to the decision in *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd. (supra)*; therefore, his mandate cannot be terminated based on the said decision, is also unmerited. In *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd. (supra)*, the Supreme Court read the provisions of Section 12(5) of the A&C Act, which were introduced by virtue of the Arbitration and Conciliation (Amendment) Act 2015, in an expansive manner and did not enact new law. In view of the subsequent decisions of the Supreme Court in *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited and Others v. Ajay Sales and Suppliers: (2021) SCC OnLine SC 730* and *Ellora Paper Mills Limited v. State of Madhya Pradesh: (2022) SCC OnLine SC 8*, the aforesaid controversy is no longer *res integra*. In

Ellora Paper Mills Limited v. State of Madhya Pradesh (*supra*), the Supreme Court set aside the decision of the High Court, whereby the High Court had rejected the petition under Sections 14, 11 and 15 of the A&C Act for the appointment of an impartial tribunal, on the ground that the arbitral proceedings had commenced prior to the Arbitration and Conciliation (Amendment) Act, 2015 coming into force.

13. Mr Majithia, has further contended that the decision in *Bharat Broadband Network Limited v. United Telecoms Limited* (*supra*) would not apply as the clause in that case expressly provided for the CMD of BBNL to appoint an arbitrator. He has submitted that in this case, no objection can be raised on the ground that the Arbitrator is a former employee of the Railways as the Supreme Court has, in a number of decisions, held that the appointment of a former employee is not covered under any of the circumstances as provided under the Fifth or the Seventh Schedule of the A&C Act. This Court is unable to accept that the decision in the case of *Bharat Broadband Network Limited v. United Telecoms Limited* (*supra*) can be distinguished as aforesaid. It is clear that the decision in that case rests on the reasoning that the arbitrator was appointed by a person, who is otherwise ineligible to be appointed as an arbitrator. In *TRF Limited v. Energo Engineering Project Ltd.* (*supra*), the Supreme Court had reasoned that a person, who is ineligible to act as an arbitrator, cannot appoint an arbitrator by following the principle of *qui facit per alium facit per se* (any act that one does through another is done by oneself). The

ineligibility of an arbitrator considered in *Bharat Broadband Network Limited v. United Telecoms Limited* (*supra*) was solely on the basis that the arbitrator had been appointed by the CMD of BBNL and was thus, ineligible to act as an arbitrator. In this case as well, the Arbitrator has been unilaterally appointed by the Principal Officer of the respondent company.

14. In view of the above, the mandate of Mr Harsh Kumar to act as an arbitrator is terminated. Justice (Retired) Indermeet Kaur Kochhar, former Judge of this Court (Mobile No. 9910384614) is appointed as an Arbitrator in place of Mr Harsh Kumar. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

11. It is also clarified that the mandate of the learned Arbitrator is terminated solely for the reason that he is ineligible to act as an arbitrator as he was appointed by a person who is otherwise ineligible to act as an arbitrator.

12. The petition is allowed in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

JANUARY 10, 2022

p/v

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