IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Present:

The Hon'ble Justice Shekhar B. Saraf

A.P. No. 156 of 2022

YASHOVARDHAN SINHA HUF AND ANR.

Versus

SATYATEJ VYAPAAR PVT. LTD.

For the Petitioners : Mr. Utpal Bose, Sr. Advocate,
Mr. Saahil Memon, Advocate
Mr. Suvam Sinha, Advocate

For the Respondent : Mr. Rajarshi Dutta, Advocate,
Mr. Nirmalya Dasgupta, Advocate
Mrs. Anupama Sahay, Advocate
Ms. Sharfaa Ahmed, Advocate

Last Heard on : July 25, 2022

Judgment on : August 24, 2022

Shekhar B. Saraf, J.:

1. The petitioners seek an order for termination of the mandate of the Learned Arbitrator under Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). Section 14(1)(a) of the Act states that the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay.

2. The facts of the matter are as follows :-

a) The petitioner no. 1 is a Hindu Undivided Family ('HUF') and is being represented by its Karta, Mr. Yashovardhan Sinha being the petitioner No. 2 to the present petition (hereinafter collectively referred to as the "petitioner").

b) The Respondent is a Non-Banking Financial Company (hereinafter referred to as "NBFC") incorporated under the provisions of the Companies Act, 1956 and is in the business of providing financial facilities, personal loans, commercial loans, etc.

c) The disputes between the parties arise out of a loan agreement dated August 29, 2016, wherein the respondent company disbursed a sum of INR 5,50,00,000/- to the petitioners.

d) On September 27, 2021, the respondent issued a legal notice to the petitioners for seeking repayment of the principal amount along with the interest accrued. The petitioners issued their reply dated October 19, 2021 to the aforementioned legal notice.

e) Be that as it may, on December 08, 2021, the respondent company issue a notice under Section 21 of the Act invoking arbitration contained in clause 19 of the said agreement and appointed Justice Aloke Chakraborty (Retd.), a former Judge of

this Court as the Sole Arbitrator to adjudicate upon the disputes and differences that have arisen between the parties.

f) On February 25, 2022, the learned arbitrator accepted his appointment which was subsequently objected to by the petitioners. On learning about the present application before this Court, the learned arbitrator on March 22, 2022, stayed the arbitral proceedings *sine die.*

g) Among other prayers, the present application seeks termination of the mandate of the Ld. Sole Arbitrator under Section 14(1)(a) of the Act.

3. Mr. Utpal Bose, Senior Advocate, appearing on behalf of the petitioners has made the following arguments:

a) The counsel submits that as the sole arbitrator has been unilaterally appointed by the respondent, the mandate of such a tribunal must be terminated on account of being *de jure* unable to perform his functions under Section 14(1)(a) of the Act. Reliance has been placed on ***TRF Limited -v- Energo Engineering Projects Ltd.*** reported in ***(2017) 8 SCC 377*** and ***Perkins Eastman Architects DPC & Anr. -v- HSCC (India) Ltd.*** reported in ***(2019) SCC Online SC 1517***, wherein the Apex Court held that the unilateral appointment of a sole arbitrator is vitiated under the provisions of Section 12(5) read with

Schedule VII of the Act as any such unilateral power of appointment will be impermissible in law and one party cannot be given the sole right to appoint an arbitrator as its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Further reliance has been placed on ***Bharat Broadband Network Ltd. -v- United Telecoms Ltd.*** reported in ***(2019) 5 SCC 755*** to contend that the mandate of such an arbitrator stands automatically terminated under Section 14(1)(a) of the Act.

b) Reliance has been placed on ***HRD Corporation (Marcus Oil and Chemical Division) –v- GAIL (India) Limited*** reported in ***(2018) 12 SCC 471*** by the counsel to argue that the learned arbitrator does not have the power to decide on the objection regarding his ineligibility under section 14(2) of the Act due to lack of inherent jurisdiction to proceed any further and the same has to be dealt with only by this Court.

c) The counsel submits that the since the Apex Court has declared unilateral appointment of the sole arbitrator as impermissible and those portions of such an arbitration clause as ex-facie invalid and illegal, therefore, the entire arbitration clause itself is erased and eliminated from the agreement between the parties. Hence, this Court ought not to exercise its powers under Section 14(1) of the Act by appointing a substitute

arbitrator in the absence of a valid arbitration agreement between the parties.

d) The counsel for the petitioners points out that the respondent has failed to produce a copy of the alleged loan agreement despite multiple requests made by them before and during the pendency of the arbitration; and that it is only upon the specific directions of this Court that the respondent placed on record a copy of the said loan agreement. The counsel further argues that in the absence of the original loan agreement and consequent absence of an arbitration agreement, a substitute arbitrator cannot be appointed by this Court in the present application.

e) Continuing this line of submission, the counsel argues that there is no express or automatic substitution of an arbitrator upon termination of the ineligible arbitrator. Following the termination of the arbitrator under Section 14(2) of the Act, the Court is required to refer to Section 15(2) of the Act for appointment of a substitute arbitrator. The clause is extracted below -

> *"15(2). Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced."*

Reliance has been placed on ***Rajasthan Small Industries Corp. Ltd. -v- Ganesh Containers Movers Syndicate*** reported in ***(2019) 3 SCC 282*** to submit that the term 'rules' in Section 15(2) of the Act would only mean that the appointment of the substitute arbitrator must be done according to the original agreement or the provision applicable to the appointment of the arbitrator at the initial stage. Therefore, reading Section 15(2) of the Act with principles governing Sections 8 and 11 of the Act, the counsel submits that this Court has no right to appoint an arbitrator disregarding the requirement of producing the original agreement to refer the parties to arbitration.

f) Lastly, the counsel contends that the said loan agreement itself is forged and fabricated, and that counterfeit stamp has been used by the respondent company to show existence of a purported loan agreement. They rely upon ***Rashid Raza -v- Sadas Akhtar*** reported in ***(2019) 8 SCC 710*** and ***A. Ayyasamy -v- A. Paramasivam & Ors.*** reported in (***2016) 10 SCC 386*** *to* press their contention that when there are serious allegations of fraud or where allegations of fraud are complicated that it becomes essential that such complex issues should be decided by civil court on the appreciation of the voluminous evidence. The counsel further contends that the arbitral tribunal is not competent to decide upon the validity of the loan agreement including the arbitration clause as the same

is marred by allegations of fraud and forgery. Therefore, the petitioners deny the existence and execution of any such loan agreement, and submit that the respondent has raised a bogus and sham claim.

4. Mr. Rajarshi Dutta, counsel appearing on behalf of the respondent has made the following arguments:

a) He submits that unilateral appointment of the learned arbitrator is not hit by provisions of Section 12(5) of the Act read with Schedule VII thereof as none of the grounds as contained in the aforesaid provisions are attracted in the present matter. Therefore, the mandate of the arbitrator does not get terminated under Section 14(1)(a) of the Act on account of being *de jure* unable to perform his functions under Section 12(5) of the Act.

b) The counsel relies on Section 14(1) of the Act to submit that a substitute arbitrator must be appointed by the Court, if the mandate of the present arbitrator gets terminated under Section 14(1)(a) of the Act. Further, the counsel opposed the reliance placed by the petitioners on Section 15 of the Act for appointment of substitute arbitrator by the Court and argued that Section 15 has no manner of application in the facts of the present case which is clearly evident from the bare reading of the provision.

c) The counsel places reliance on ***Perkins Eastman Architects DPC & Anr -v- HSCC (India) Limited (supra)*** to refute the argument of the petitioners that no substitute arbitrator can be appointed by this Court as the arbitration clause itself from the agreement gets erased on account of holding the clause illegal and invalid. The counsel adds that had that been the case, the Apex Court in the aforementioned case would not have appointed a sole arbitrator to decide all the disputes arising out of the agreement being the subject matter of the proceeding.

d) Lastly, the counsel for the respondent argues that any question with regards to the existence and validity of the arbitration agreement including the jurisdiction of the arbitral tribunal must be raised before the arbitral tribunal under Section 16 of the Act. Further, the counsel also points out that the petitioners have not disclosed any particulars of fraud and forgery, and not only did they not deny that they received the sum of money under the loan agreement, but were also unable to produce any alternative agreement or any evidence whatsoever to buttress their claim of forged and fabricated loan agreement.

Observations & Analysis

5. I have heard the counsel appearing for the respective parties and perused the materials on record.

6. At the very onset, I attach a caveat herein. Through the course of the hearing, both sides have relied on multiple judgments of the Supreme Court as well as High Courts in India to buttress their respective arguments. However, I would like to refer to ***L.C. Quinn –v- Leathem*** reported in ***1901 AC 495*** wherein the UK House of Lords had chosen to observe the following:

> *"….that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides…."*

Bearing the principles outlined in ***L.C. Quinn (supra)***, I am of the view that while certain judgments are merely robust reiterations of the principles of the judgments that I have considered in greater detail through the course of this judgment, some judgments are either not relevant or are distinguishable on facts. I have considered such judgments which were absolutely necessary for deciding this case lest I jeopardized the brevity and coherence of this judgment with the persistent fear of making it too 'voluminous'.

7. Before delving into the details of the present matter, it is important to reproduce the relevant portion of the arbitration clause in the loan agreement –

> *"19. Any disputes or differences between the parties arising out of or in relation to or in connection with or in anyway related to this Agreement or in relation to dealings and transactions under this Agreement shall be referred to the sole arbitration of a person to be nominated by Lender and the arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996. The Borrower and/or the Guarantor shall not be entitled to have any objection regarding the personnel of the Sole Arbitrator for the reasons that he may be an associate or advisor of Lender or connected or related to Lender and/or its directors or executives on personal, business or professional basis……"*

At the first instance, one may state that the position of law on unilateral appointment of sole arbitrator is well settled after the decisions of the Supreme Court in ***TRF Limited -v- Energo Engineering Projects Ltd. (supra)*** and ***Perkins Eastman Architects DPC & Anr. -v- HSCC (India) Ltd. (supra).*** In ***TRF Limited,*** the Apex Court held that an individual who himself is ineligible under the provisions of the Act to be appointed as an arbitrator, cannot himself/herself nominate a sole arbitrator. The relevant portion has been extracted below –

> *"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only*

concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

8. In ***Perkins Eastman,*** the Apex Court extended the approach taken in ***TRF Limited*** and held that an individual who has an interest in the outcome of a dispute also cannot nominate a sole arbitrator. The Court took the view that in an arbitration agreement providing for adjudication by a sole arbitrator, the appointment of the sole arbitrator cannot be made unilaterally by one of the parties, and to maintain absolute fairness and impartiality, the competent court could alone effect the said appointment in exercise of powers under Section 11 of the Act. The relevant portions have been reproduced below –

"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. where the Managing Director

himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

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."*

Therefore, the dicta laid down in these judgments makes it crystal clear that there cannot be unilateral appointment of a sole arbitrator by the respondent as per Clause 19 of the loan agreement as the same is illegal and defeats the very purpose of unbiased and impartial adjudication of the dispute between the parties. The guiding principle is transparency, fairness, neutrality and independence in the selection process and hence, appointment of a sole arbitrator can either be with mutual consent of parties or by an order of the competent court. There can be no third way.

9. Now the next question which is before me is whether the mandate of such an arbitrator, whose appointment is impermissible and illegal as per the law laid down in ***Perkins Eastman***, is automatically

terminated under Section 14(1)(a) of the Act on account of being *de jure* unable to perform his functions. For this, reliance can be placed on Supreme Court decision in ***Bharat Broadband Network Ltd. -v- United Telecoms Ltd. (supra).*** The relevant portions have been reproduced below –

> *"17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his*

functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated……."

10. Further reliance can be placed on another decision of the Supreme Court in ***HRD Corporation (Marcus Oil and Chemical Division) –v- GAIL (India) Limited (supra),*** wherein the Court held that the arbitrator does not have the power to decide on the objection regarding his ineligibility under section 14(2) of the Act due to lack of inherent jurisdiction to proceed any further and the same has to be dealt with only by this Court. The relevant portion has been extracted below –

> *"12. ……..Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground……."*

Therefore, the mandate of the arbitrator in the present matter becomes automatically terminated under Section 14(1)(a) of the Act on account of being *de jure* unable to perform his functions. Further, the

learned arbitrator does not have the power to decide on the objection regarding his ineligibility under section 14(2) of the Act due to lack of inherent jurisdiction to proceed any further, the same has to be dealt with only by this Court on an application by the aggrieved party.

11. Moving forward, the counsel for the respondent submitted that in case the Court terminates the mandate of the present arbitrator, a substitute arbitrator may be appointed for adjudication of the disputes between the parties. To buttress this submission, the counsel has placed reliance on Section 14(1) of the Act which provides that a substitute arbitrator shall be appointed. The relevant portion of the aforesaid provision has been reproduced below -

> *"14. Failure or impossibility to act—*
> *(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—*
> *(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and*
> *(b) he withdraws from his office or the parties agree to the termination of his mandate.*
> *(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.*
> *……"*

However, the petitioners plead that on account of the arbitration clause in the said loan agreement being declared as prima facie illegal, null and void, the same is erased and extinguished from the loan

agreement. As a corollary, this Court ought not to exercise its powers under Section 14(1) of the Act to appoint a substitute arbitrator in the absence of a valid arbitration agreement between the parties.

12. In my view, this contention put forward by the petitioners is untenable in law for the simple reason that this Court has the power to severe portion(s) of the arbitration agreement and invalidate only those specific portion(s) that are hit by illegality, viz., "*...shall be referred to the sole arbitration of a person to be nominated by Lender...The Borrower and/or the Guarantor shall not be entitled to have any objection regarding the personnel of the Sole Arbitrator for the reasons that he may be an associate or advisor of Lender or connected to related to Lender.....*". From the remaining portions of the arbitration clause, it is patently clear that the parties had always intended to have their disputes and/or differences adjudicated by way of arbitration and have the arbitral proceedings governed by the Arbitration and Conciliation Act, 1996. Therefore, I am convinced that effect must be given to the intention of the parties to arbitrate on the disputes or differences which may arise between them by way of appointment of a substitute arbitrator under Section 14(1) of the Act.

13. The final argument of Mr. Utpal Bose, Senior Advocate, is that when the Court is required to substitute an arbitrator under Section 14 of the Act, the principles of the Act with reference to Sections 11 and 15(2) of the Act are required to be followed. One need not join issue

with this argument as I am of the view that when the substitution is to be made, it is to be made in terms of Section 11 of the Act, and if the Court finds that the issue itself is not arbitrable or falls under one of the categories wherein the dispute is not required to be sent for arbitration, the Court can, in certain cases, choose not to carry out the said substitution. In spite of the words '*shall be substituted*' having being used in Section 14 of the Act, it is axiomatic that any appointment of an arbitrator even in the case of a substitution has to be made keeping the principles of Section 11 of the Act in mind.

14. Lastly, the counsel for the petitioners had submitted that the said loan agreement itself is forged and fabricated, and that counterfeit stamps have been used by the respondent company to show existence of a purported loan agreement. Therefore, in the absence of any loan agreement, there exists no arbitration agreement, and as such this Court cannot appoint a substitute arbitrator under the Act.

15. Following the principle laid down by the Supreme Court in the case of ***Vidya Droalia -v- Durga Trading Corporation*** reported in ***(2021) 2 SCC 1***, this Court has to refer a matter to arbitration or appoint an arbitrator (*substitute arbitrator in the present case*), unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding. Further, reliance can also be placed on the decision of ***A. Ayyasamy –v- A Paramasivam & Ors.***

reported in ***(2016) 10 SCC 386***, wherein the Apex Court stated that mere allegation of fraud is not sufficient to detract parties from the obligation to submit their disputes to arbitration. The relevant paragraph has been reproduced below –

> ***Para 45.1*** *"…. Hence, it is necessary to emphasise that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability. The burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration…."*

16. In the present case, the facts clearly indicate that the petitioners not only did not deny receiving the said sum of money from the respondent company, but also could not produce any other document or agreement under which they had received the said sum of money. In my opinion, the aforesaid contention by the petitioners of forged and fabricated agreement is merely a dilatory tactic as it is manifestly evident from the facts in hand that they have failed to provide any evidence in favour of their claim of fabrication and forgery in reference to the authenticity of the loan agreement. The petitioners could have presented strong cogent evidence such as bank account statements, income tax returns, etc. to refute that they have received the said sum of money from the respondent and to prima facie establish a case of

non-existence of a valid arbitration agreement. But that ship has long sailed.

17. Additionally, I must add, it is preposterous for the petitioners to rely on the same arbitration clause in the loan agreement to contend that the present arbitrator cannot *de jure* perform his functions and seek his termination under section 14 of the Act, and at the same time claim that both the arbitration clause and the loan agreement do not exist at all especially since the factum of receipt of the loan amount is not in dispute. The petitioner can always take recourse to section 16 of the Arbitration and Conciliation Act, 1996 which empowers the arbitral tribunal to rule on its own jurisdiction and provides an opportunity to the parties to approach the tribunal with objections in respect to the existence and validity of the arbitration agreement.

18. For the reasons discussed above, the mandate of the present arbitrator is terminated and the arbitrator is discharged from his duty. Furthermore, in terms of Section 14 of the Act, I appoint Justice Jyotirmay Bhattacharya, former Chief Justice of Calcutta High Court, as sole arbitrator to resolve the disputes which have arisen between the parties. The learned arbitrator will be guided by the Arbitration and Conciliation Act, 1996, and shall make positive efforts to complete the arbitration proceedings at the earliest. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before

the Registrar, Original Side of this Court within four weeks from today.

19. The Registry is directed to send a copy of this order to the sole arbitrator. The learned counsels for the parties are also at liberty to bring it to the notice of the learned arbitrator.

20. A.P. No. 156 of 122 is, accordingly, disposed of. There shall be no order as to costs.

21. I would like to place my appreciation to counsel appearing for both parties for the painstaking research and consequent assistance provided to this Court. In addition to the above, the aplomb and adversary skills of both counsel was truly welcome and pleasing to the Court.

22. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SHEKHAR B. SARAF, J.)