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

Date of Decision: 09th April 2024

\+ O.M.P. (COMM) 311/2022

TELECOMMUNICATION CONSULTANTS INDIA LTD

..... Petitioner

Through: Mr. Nikhilesh Krishnan, Ms. Ritika Priya and Mr. Abhishek Bhushan Singh, Advocates.

versus

SHIVAA TRADING ..... Respondent

Through: Mr. Ajay Kumar Tiwari, Advocate.

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 34 of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner impugns Arbitral Award dated 17.12.2021 ('Arbitral Award') rendered by the learned Sole Arbitrator in disputes that had arisen between the petitioner (claimant) and the respondent (non-claimant) from a contract for construction of rural roads under the *Pradhan Mantri Gram Sadak Yojana*.

2. Briefly, the genesis of the disputes was a contract between the petitioner and Madhya Pradesh Rural Road Development Authority for construction of roads. Subsequently, in order to execute the contract, the petitioner and the respondent entered into a Memorandum of Understanding dated 10.09.2007 ('MoU'), pursuant

to which work orders were issued to the respondent for completion of the work. However, due to various defaults alleged to have been committed by the respondent, the petitioner terminated its contract with the respondent on 31.01.2013; and completed the balance work at the respondent's risk and cost.

3. In this backdrop, *vide* notice dated 11.10.2017 issued to the respondent, the petitioner invoked arbitration in view of clause 19 of the MoU, which reads as under :

> *"19. Arbitration: Any dispute in relation to or arising out of this MOU shall be resolved amicably by the parties. Unresolved disputes shall be referred to Arbitration.* ***The Arbitrator shall be appointed by the CMD, TCIL, New Delhi****. The* ***venue of Arbitration shall be New Delhi****. Laws of India shall be the governing laws under this MOU."*

(emphasis supplied)

4. Simultaneously, *vide* letter dated 10.09.2018, the petitioner appointed one Shri Manindra Chandra Pandaa as the learned Sole Arbitrator, to decide the disputes between the parties and proceeded to file their statement of claims before the learned Arbitrator on 17.12.2018. Thereupon, the respondent also filed its statement of defence on 15.08.2019 alongwith its counter-claims in the matter.

5. Arbitral proceedings carried-on for sometime, culminating in the passing of Arbitral Award dated 17.12.2021, which award has been challenged by way of the present petition.

6. Notice on the present petition was issued on 26.07.2022; following which, reply dated 03.11.2022 and rejoinder dated 03.01.2023 have been filed by the respective parties.

7. The court has heard Mr. Nikhilesh Krishnan, learned counsel appearing for the petitioner; and Mr. Ajay Kumar Tiwari, learned counsel appearing for the respondent.

8. Both parties have also filed written synopses of their respective submissions in the matter.

9. Mr. Krishnan, learned counsel appearing for the petitioner submits, that the petitioner would restrict its challenge to the award to the ground that the learned Arbitrator appointed by them was *de jure ineligible* to act as such, since his appointment was hit by section 12(5) of the A&C Act. Counsel argues, that though the arbitration provision comprised in clause 19 of the MoU did authorise the Chairman & Managing Director of the petitioner to appoint a Sole Arbitrator, and the learned Arbitrator was appointed under that provision *vide* letter dated 10.09.2018, yet the appointment made was *void* in law in view of section 12(5) of the A&C Act, as held by the Supreme Court and by Co-ordinate Benches of this court in various rulings.

10. Section 12(5) of the A&C Act reads as under :

> *12. Grounds for challenge.—*
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> *(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*
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> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.*
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> (emphasis supplied)

11. In support of his submissions, learned counsel for the petitioner relies upon the seminal decision of the Supreme Court in ***Bharat Broadband Network Ltd. vs. United Telecom Limited***[1] ,drawing attention *inter-alia* to the following paragraphs of the said ruling :

> *"3. Since disputes and differences arose between the parties, the respondent, by its letter dated 3-1-2017, invoked the aforesaid arbitration clause and called upon the appellant's Chairman and Managing Director to appoint an independent and impartial arbitrator for adjudication of disputes which arose out of the aforesaid APO dated 30-9-2014.* ***By a letter dated 17-1-2017, the Chairman and Managing Director of the appellant, in terms of the arbitration clause contained in the GCC, nominated one Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen between the parties****. He also made it clear that the parties would be at liberty to file claims and counter-claims before the aforesaid sole arbitrator."*
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> *"5. Given the aforesaid judgment,* ***the appellant itself having appointed the aforesaid sole arbitrator, referred to the aforesaid judgment, and stated that being a declaration of law, appointments of arbitrators made prior to the judgment are not saved. Thus, the prayer before the sole arbitrator was that since he is de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place.*** *By an order dated 21-10-2017, Shri Khan rejected the appellant's application after hearing both sides, without giving any reasons therefore. This led to a petition being filed by the appellant before the High Court of Delhi dated 28-10-2017 under Sections 14 and 15 of the Act to state that the arbitrator has become de jure incapable of acting as such and that a substitute arbitrator be appointed in his place. By the impugned judgment dated 22-11-2017 [Bharat Broadband Network Ltd. v. United Telecoms Ltd., 2017*

[1] (2019) 5 SCC 755

SCC OnLine Del 11905], this petition was rejected, stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. In any event, under the proviso to Section 12(5) of the Act, inasmuch as the appellant itself has appointed Shri Khan, and the respondent has filed a statement of claim without any reservation, also in writing, the same would amount to an express agreement in writing, which would, therefore, amount to a waiver of the applicability of Section 12(5) of the Act.

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"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.*** *Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act.* ***As a matter of law, it is important to note***

that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.*"*

* * * * *

"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*. .....****Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties*** *wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be*

allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator…"

(emphasis supplied)

12. Counsel points-out, that as is seen from a close reading of *Bharat Broadband* (supra), in the said case also the Arbitrator has been appointed by the petitioner *i.e.* Bharat Broadband Network Ltd itself. Despite that being so, the Supreme Court held that, unless there *is an express agreement in writing* between the parties *subsequent to disputes having arisen* between them, the mandate of learned Arbitrator appointed unilaterally by one of the parties falling within the relationships as contemplated in section 12(5) of A&C Act read with the Seventh Schedule "... ... *automatically terminates* ... ..." by reason of *de jure* ineligibility.

13. The court has further held, that the concept of *deemed waiver of the right to object by conduct under section 4 of the A&C Act* does not apply to a situation under section 12(5), which requires *express waiver in writing subsequent to the disputes* having arisen between the parties.

14. Counsel further relies upon the decision of a Division Bench of this court in ***Govind Singh vs. Satya Group (P) Ltd.***[2] and of judgments of Co-ordinate Benches in ***HLL Lifecare Ltd. vs. ESI Corporation and other connected matters***[3], ***Larsen and Toubro Limited vs. HLL***

[2] (2023) SCC OnLine Del 37 at paras 20, 21, 22 and 23.

[3] 2022 SCC OnLine Del 740 at paras 7 and 19

Lifecare Limited [4] and ***Hari Krishan Aggarwal vs. Technology Development Board***[5] in support of his proposition.

15. Furthermore, it is urged, that in light of the verdict of the Supreme Court in ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd***[6], the appointment of an arbitrator made unilaterally by one of the parties, is *de-jure* untenable.

16. Insofar as the question of delay in filing the present petition is concerned, Mr. Krishnan has placed reliance on a judgment of the Supreme Court in ***Balvant N. Viswamitra & Others vs. Yadav Sadashiv Mule (dead) through LRs & Others***[7], to argue that as in the case of a decree, if a court inherently lacks jurisdiction in passing a decree or making an order, such decree or order would be without jurisdiction, *non-est* and *void ab-initio*; and since a defect of jurisdiction goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order, the validity of such decree or order can be challenged at any stage, even in an execution or other collateral proceedings.

17. Counsel accordingly submits, that where there is inherent lack of jurisdiction, the question of delay or latches does not arise.

18. On the other hand, Mr. Tiwari, learned counsel appearing for the respondent submits, that the petitioner's arguments are untenable in view of the fact, *firstly,* that the learned Sole Arbitrator had been

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[4] (2021) SCC OnLine Del 4465 at paras 7, 9, 10, 12 and 13

[5] (2024) SCC OnLine Del 1841 at paras 7, 11 and 17

[6] (2020) 20 SCC 760

[7] (2004) 8 SCC 706 at para 9

appointed by them; and *secondly*, that the petitioner did not raise any objection in the course of the arbitral proceedings as regards the learned Arbitrator's ineligibility to act as such; and *thirdly*, that the petitioners have only chosen to challenge the Award now since it has gone against them.

19. Counsel for the respondent submits that it is against all tenets of fairness and justice, that a party which has appointed the learned Arbitrator without challenging his jurisdiction, should now be permitted to challenge the award on the ground that the arbitrator who they appointed inherently lacked jurisdiction to render the award.

20. Counsel further argues, that had the petitioner received an award in its favour, they would never have challenged it on the ground that section 12(5) of the A&C Act had been violated.

21. Mr. Tiwari submits that the petitioner cannot be permitted to blow hot and cold and cannot be permitted to approbate and reprobate on the question of jurisdiction.

22. Counsel also submits that the precedents cited on behalf of the petitioner have no application to the present case.

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. vs. 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.

25. The judgments of the Division Bench of this court and of other Co-ordinate Benches referred to above, also make for a consistent and unbroken line of case-law on the point.

26. Admittedly, no such waiver was granted by the parties to the appointment of the arbitrator in the present case.

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.

28. It may also be observed that in the present case, both the claims as well as the counter-claims filed by the parties, have been rejected by the learned Arbitrator.

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.

30. Arbitral Award dated 17.12.2021 is accordingly set-aside; leaving the parties to bear their own costs.

31. Needless to add that the parties shall be at liberty to avail all further legal remedies as may be available to them, in accordance with law.

32. The petition is disposed-of.

33. Pending applications, if any, also stands disposed-of.

ANUP JAIRAM BHAMBHANI, J

APRIL 09, 2024/ak