



\$~15

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

+ O.M.P. (COMM) 239/2022

ALKA SACHDEVA

..... Petitioner

Through: Mr. R.L. Syngal & Mr. Manoj
Pandey, Advocates.

versus

BHASIN INFOTECH AND
INFRASTRUCTURE PVT. LTD.

..... Respondent

Through: Mr. Ravinder Singh & Ms.
Raveesha Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

%

04.03.2024

1. By way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner assails an Arbitral Award dated 06.01.2020 by which disputes between the parties under an Agreement dated 27.10.2008 were adjudicated by the learned Sole Arbitrator. The learned Arbitrator has rejected the claims and counter claims of the parties.

2. The principal ground taken in support of the petition is that the learned Arbitrator was unilaterally appointed by the respondent, and that the impugned Award is therefore a nullity, as it is in breach of Section 12 of the Act. In support of his contention, Mr. R.L. Syngal, learned counsel for the petitioner, draws my attention to the judgments of the Supreme Court in *TRF Limited vs. Energo Engineer Projects Limited* [(2017) 8



SCC 377] and *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Limited* [(2020) 20 SCC 760].

3. The facts of the present case in this regard are largely undisputed. The respondent invoked arbitration by a communication dated 19.12.2018 and appointed the learned Sole Arbitrator, in purported exercise of its rights under the arbitration clause. It is accepted that the learned Arbitrator was appointed by the respondent without any consultation with the petitioner.

4. Mr. Ravinder Singh, learned counsel for the respondent, takes only two objections to the relief sought in this petition. The first is that the petition is barred by delay, and the second is that the petitioner participated in the arbitration proceedings without demur.

5. As far as the first objection is concerned, the Award was rendered on 06.01.2020. The petitioner originally approached the District Court under Section 34 of the Act. It filed the petition before the District Court on 12.03.2021 and withdrew it on 16.11.2021, on account of the pecuniary jurisdiction being of this Court. The petitioner filed a petition under Section 34 of the Act before this Court on 03.01.2022 which was in defects, and the present petition was filed on 12.05.2022.

6. The period of 90 days provided under Section 34(3) of the Act would have lapsed on 06.04.2020, by which time, the Supreme Court order dated 23.03.2020 in *Suo Moto Writ Petition (Civil) 3/2020 [In Re: Cognizance for Extension of Limitation]* extending limitation in view of the COVID-19 pandemic, w.e.f. 15.03.2020, had come into play. By the final order dated 10.01.2022, the Supreme Court made it clear that the entire period of delay from 15.03.2020 to 28.02.2022 would be excluded



for the computation of period of limitation, and all parties would have 90 days from 01.03.2022 for filing of proceedings. Even keeping aside the time spent in prosecuting proceedings before the District Court, it is clear that in the present case, the entire period of delay is covered by the aforesaid order of the Supreme Court. The objection of Mr. Singh on this count is therefore unsustainable.

7. On the second ground also, the matter is covered against the respondent by judgments of the Division Bench of this Court, following the judgment of the Supreme Court in *Bharat Broadband Network Limited v. United Telecoms Limited* [(2019) 5 SCC 755]. In *Ram Kumar vs. Shriram Transport Finance Co. Ltd.* [(2022) SCC OnLine Del 4268] this Court held as follows:

“28. Clearly, an award rendered by a person who is ineligible to act as an arbitrator would be of little value; it cannot be considered as an arbitral award under the A&C Act. While it is permissible for the parties to agree to waive the ineligibility of an arbitrator, the proviso to Section 12(5) of the A&C Act makes it clear that such an agreement requires to be in writing. In Proddatur Cable TV Digi Services v. Siti Cable Network Limited : (2020) 267 DLT 51, the learned Single Judge of this Court, following the decision in TRF Ltd. v. Energo Engineering Projects Ltd. (supra) and Perkins Eastman Architects DPC v. HSCC (India) Ltd. (supra), held that unilateral appointment of an arbitrator by a party is impermissible.

29. In Bharat Broadband Network Limited v. United Telecoms Limited : (2019) 5 SCC 755, the Supreme Court rejected the contention that the waiver of a right to object the ineligibility of an arbitrator, under Section 12(5) of the A&C Act, could be inferred by conduct. The relevant observations made by the Supreme Court are set out below:

“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.”

8. The aforesaid position has subsequently been reaffirmed by another judgment of the Division Bench of this Court in *Govind Singh vs. Satya Group Pvt. Ltd.* [(2023) SCC Online Del 37], which holds as under:

*“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 conduct or otherwise. The relevant extract of the said decision reads as under:*

xxxx

xxxx

xxxx

20. Thus, it is not necessary to examine the question whether the appellant had raised an objection to the appointment of the learned



Arbitrator. Even if it is assumed that the appellant had participated in the arbitral proceedings without raising any objection to the appointment of the learned Arbitrator, it is not open to hold that he had waived his right under Section 12(5) of the A&C Act. Although it is not material, the record does indicate that the appellant had objected to the appointment of respondent no. 2 as an arbitrator.”

9. In view of the above, the present impugned Award is *non-est* in law and is set aside. It is open to the parties to invoke arbitration afresh in respect of any claims that they may have against each other.

10. All rights and contentions of the parties on maintainability or merits of the claims are left open.

11. The petition stands disposed of in these terms.

PRATEEK JALAN, J

MARCH 4, 2024

‘pv’/