REPORTABLE

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CMPMO Nos.58, 59 & 60 of 2023

Decided on: 27th February, 2023

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1. CMPMO No.58 of 2023

Divisional Manager, H.P. State Forest Development Corporation Ltd.

....Petitioner

Versus

Prem Lal

...Respondent

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2. CMPMO No.59 of 2023

Divisional Manager, H.P. State Forest Development Corporation Ltd.

....Petitioner

Versus

Rakesh Parkash

...Respondent

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3. CMPMO No.60 of 2023

Divisional Manager, H.P. State Forest Development Corporation Ltd.

....Petitioner

Versus

Rakesh Parkash

...Respondent

Coram

Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge

[1] *Whether approved for reporting? Yes.*

[1] *Whether reporters of Local Papers may be allowed to see the judgment?*

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For the petitioner(s): Mr. Rajesh Verma, Advocate.

Jyotsna Rewal Dua, Judge

These three petitions involve identical questions of law and are based on similar facts, hence have been taken up together for decision. In all these petitions, challenge has been laid to separate but similar orders passed by the learned District Judge on 25.07.2022, whereby, petitioners' applications in all the petitions moved under Section 36 of the Arbitration and Conciliation Act, 1996 (the Act, in short) for enforcement of arbitral awards (dated 11.12.2017 in CMPMO No.58 of 2023, 14.09.2017 in CMPMO No.59 of 2023 and 26.08.2017 in CMPMO No.60 of 2023), were dismissed. The arbitral awards were held un-executable. Aggrieved against the dismissal of the execution applications, the petitioners have preferred these three petitions.

2. For convenience, reference to CMPMO No.58 of 2023 has been made hereinafter for the purpose of factual matrix.

2(i) Respondent-Prem Lal was Forest Labour Supply Mate. The petitioner entered into an agreement with him on 20.03.2012 regarding extraction of resin and delivery thereof.

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According to the petitioner, the respondent did not engage adequate labour for extracting resin, hence, he could not supply the required yield from the lot allotted to him. For the shortfall in the supply of resin, the petitioner assessed the due compensation payable to it by the respondent at Rs.1,76,972/-. The respondent did not deposit the compensation despite issuance of notice to him. Consequently, invoking Clause 36 of the agreement dated 20.03.2012, the Managing Director of the petitioner-corporation on 24.09.2015, appointed its Director (South) as an Arbitrator for adjudicating the dispute, which statedly arose from the said agreement. The Arbitrator-Director (South) of the petitioner-corporation passed the award on 11.12.2017 awarding a sum of Rs.1,76,972/- in favour of the petitioner-corporation alongwith interest @ 9% per annum from the date of filing of the claim petition i.e. 07.11.2015.

2(ii) Application under Section 36 of the Act was moved by the petitioner before the learned District Judge for enforcement of arbitral award dated 11.12.2017. This application was dismissed vide order dated 25.07.2022. While dismissing the application, it was held that appointment of the Arbitrator as well as the arbitral award passed by the

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concerned Arbitrator was in violation of Section 12(5) and Seventh Schedule of the Act. The arbitral award, being sought to be enforced by the petitioner was void and un-executable. The execution application was dismissed giving cause of action to the petitioner to institute the present petition.

3. Learned counsel for the petitioner has forcefully urged that the agreement was executed between the parties on 20.03.2012. Clause 36 of this agreement provided reference of dispute between the parties, arising out of the agreement, to the Managing Director, H.P. State Forest Development Corporation Ltd./Director concerned. The agreement came into force prior to the amendment of the Act whereby Sub-section 5 was inserted in Section 12 w.e.f. 23.10.2015. Learned counsel for the petitioner further submitted that Section 12(5) of the Act, therefore, could not be applied in the instant case. He further submitted that the parties had consented for appointment of the Arbitrator by signing the agreement dated 20.03.2012. Hence, in view of the proviso to Section 12(5) of the Act, the arbitral award passed by the Director (South) of the petitioner-corporation was saved. The arbitral award dated 11.12.2017 was lawfully

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passed and was required to be executed. The impugned order dated 25.07.2022, dismissing the petitioner's application for enforcement of the arbitral award is illegal and is required to be set aside.

4. Having heard learned counsel for the petitioner and ongoing through the case file, I am of the considered view that these petitions lack merit. This is for the following reasons: -

4(i) Section 12(5) of the Act was inserted by the Act No.3 of 2016. It came into force w.e.f. 23.10.2015 and reads as under: -

> *"12(5) Notwithstanding any prior agreement to be 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*
>
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."*

A plain reading of Section 12(5) of the Act makes it apparent that 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. It is not in dispute that the Director (South) i.e. the person appointed as

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an Arbitrator in the instant matter falls in the category specified in the Seventh Schedule of the Act.

4(ii) Any person who becomes ineligible to act as an Arbitrator in terms of Section 12(5) read with Seventh Schedule of the Act cannot appoint/nominate another Arbitrator for determining the dispute. Any appointment of other person nominated by such person as an Arbitrator for determining the dispute arising under the arbitration agreement is void *ab initio*. The proceedings so conducted will be *non est.* The awards passed by such person, if any, are also void. [refer to ***(2017) 8 SCC 377, TRF Ltd. Vs. Energo Engineering Projects Ltd.; (2019) 5 SCC 755, Bharat Broadband Network Limited Vs. United Telecoms Limited***.]

4(iii) In ***2021 (17) SCC 248 Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited & Ors. vs. Ajay Sales & Suppliers***, an argument was raised that Sub-section 5 of Section 12 read with Seventh Schedule to the Act shall not be applicable to the facts of the case, more particularly when the agreement between the parties therein was executed prior to the insertion of Sub-section 5 of Section 12 read with Seventh Schedule of the Act. This submission was not

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accepted by the Hon'ble Apex Court in view of the earlier decisions rendered in TRF Ltd. Vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377, Bharat Broadband Network Limited Vs. United Telecoms Limited and (2019) 5 SCC 377 Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665. The Hon'ble Apex Court observed that in the above precedents, it has been observed that the main purpose for amending the provision was to provide for 'neutrality of arbitrators'. In order to achieve this, Sub-section 5 of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls sunder any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an Arbitrator. It was further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provision i.e. Sub-section 5 of Section 12 read with Seventh Schedule of the Act, the appointment of an Arbitrator would be beyond pale of the arbitration agreement. Such would be the effect of non-obstante clause contained in Sub-section 5 of Section 12. The relevant paras from the judgment read as under: -

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4.1 *It is submitted that first of all Subsection (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable to the facts of the case on hand more particularly when the agreement between the parties was prior to insertion of Sub section (5) of Section 12 read with Seventh Schedule to the Act. It is further submitted that even otherwise the 'Chairman' being an elected member shall not come within Seventh Schedule to the Act. It is submitted that 'Chairman' is not included within disqualified/ineligible person to be appointed in Seventh Schedule of the Act.*

5 *………….*

6. *It is not in dispute that distributorship agreement between the parties was dated 31.03.2015 i.e. prior to the insertion of Subsection (5) of Section 12 and Seventh Schedule to the Act w.e.f. 23.10.2015. It also cannot be disputed that Clause 13 of the Agreement dated 31.03.2015 contained the arbitration clause and as per Clause 13, any dispute and differences arising out of or in any way touching or concerning distributorship agreement shall be resolved through arbitration. As per Clause 13 such a dispute shall be referred to the sole Arbitrator – the Chairman, Sahkari Sangh.*

6.1 *…………….*

6.2 *…………….*

6.3 *So far as the submission on behalf of the petitioners that the agreement was prior to the insertion of Subsection (5) of Section 12 read with Seventh Schedule to the Act and therefore the disqualification under Subsection (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator – Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing an arbitrator are concerned the aforesaid has no substance and can to be accepted in view of the decision of this Court in Trf Ltd vs Energo Engineering Projects Ltd, (2017) 8 SCC 377; Bharat Broadband Network Limited vs United Telecoms*

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> *Limited, (2019) 5 SCC 755; Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665. In the aforesaid decisions this Court had an occasion to consider in detail the object and purpose of insertion of Sub section (5) of Section 12 read with Seventh Schedule to the Act. In the case of Voestalpine Schienen GMBH (Supra) it is observed and held by this Court that the main purpose for amending the provision was to provide for 'neutrality of arbitrators'. It is further observed that in order to achieve this, Subsection (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions (Subsection (5) of Section 12 read with Seventh Schedule) the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the effect of non obstante clause contained in subsection (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement."*

Thus, contention of the petitioner that Sub-section 5 of Section 12 read with Seventh Schedule of the Act cannot be applied to the instant case in view of agreement executed between the parties prior to insertion of Section 12(5) read with Seventh Schedule of the Act, cannot be accepted. Any prior agreement executed by the parties contrary to the mandate of sub-Section 5 of Section 12 and

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Seventh Schedule of the Act, gets wiped out by the non-obstante clause in Section 12(5).

4(iv) The contention of the petitioner that the respondent had signed the arbitration agreement and participated in the arbitration proceedings are also of no avail in view of the legal position settled in the aforesaid pronouncements by the Hon'ble Apex Court. Proviso to Section 12 (5) can only be invoked in case of 'existence of express agreement in writing' of the parties to satisfy the requirements of proviso to Section 12(5) of the Act and not otherwise. It will be appropriate to quote following paras from *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited* case *supra* in this regard: -

> *10. Now so far as the submission on behalf of the petitioners that the respondents participated in the arbitration proceedings before the sole arbitrator – Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the same has also no substance. As held by this Court in the case of Bharat Broadband Network Limited (Supra) there must be an 'express agreement' in writing to satisfy the requirements of Section 12(5) proviso. In paragraphs 15 & 20 it is observed and 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*

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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 subsection 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. 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. 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 subsection 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.

xxx xxx xxx

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 subsection (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

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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 Indian Contract Act, 1872 becomes important. It states:

"9. Promises, express and implied.—In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far 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. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17.01.2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 03.07.2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 07.10.2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express

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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. The judgment under appeal is also in correct in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

There is no pleading that any express agreement in writing satisfying the mandate of Sub-section 5 of Section 12 inclusive of its proviso and Seventh Schedule was ever executed by the respondent. The Director (South) continued to hold the arbitration proceedings even after enforcement of Sub-section 5 of Section 12 & Seventh Schedule of the Act and passed the award on 11.12.2017 in CMPMO No.58 of 2023, 14.09.2017 in CMPMO No.59 of 2023 and 26.08.2017 in CMPMO No.60 of 2023

In view of the above pronouncements, it is amply clear that the arbitration proceedings conducted by the Arbitrator-Director (South) are *non-est.* The awards passed by such Arbitrator were void. The awards were not

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enforceable. The learned District Judge did not commit any error in dismissing the execution applications filed by the petitioner, seeking enforcement of the void awards. Hence, I find no merit in the instant petitions and the same are dismissed so also the pending miscellaneous application(s), if any.

Jyotsna Rewal Dua
Judge

February 27, 2023
R.Atal

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