

HON'BLE SRI JUSTICE K. LAKSHMAN

ARBITRATION APPLICATION No.144 OF 2021

ORDER:

The present Arbitration Application is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter ‘the Act, 1996’) for appointment of a sole arbitrator to resolve the disputes between the parties.

2. Heard Sri Praveen Vyapari, learned counsel for the petitioner and Mrs. Vedula Chitralekha, learned counsel appearing for respondents. Perused the record.

3. The Respondents claim to be the owners of land admeasuring Ac.15.31 Gts. comprising of land in various survey numbers including Sy. Nos. 288, 289, 99A, 300A & 301 situated at Chilkur Village, Moinabad Mandal, R.R. District (hereinafter ‘subject property’).

4. The Applicant and the Respondents entered into a Memorandum of Understanding cum agreement (hereinafter ‘MOU’) dated 06.09.2018 wherein the Applicant on the terms specified agreed to develop the subject property into housing plots. As per the terms of the MOU, the

Respondents agreed to sell the subject property for Rs. 2,50,00,000/- per acre and in this regard the Applicant paid an amount of Rs. 1,00,00,000/- (Rs. 50 lakhs in cash and remaining Rs. 50 lakhs through cheques dated 06.09.2018).

5. The terms of the MOU also stated that the Applicant shall pay an amount of Rs. 5,00,00,000/- within 45 days and 35% share in profits earned by the Applicant to the Respondents. The payment of 5,00,00,000/- and 35% share in profits shall be continued to be paid every two months.

6. The MOU also provided that the Respondents are solely responsible to cure the defect in title over the subject property and shall provide a defect free title to the Applicant. Time taken to resolve the claim or objection over the subject property shall be excluded from the time fixed for completion.

7. Further, Clause 13 of the MOU provided for an arbitration clause naming one Mr. Javeed Mohammed Janjua as the arbitrator to resolve the disputes between the parties. The said clause is extracted below:

That if any dispute is arising between both the parties regarding the interpretation of terms of Agreement, both the parties shall appoint a sole Arbitrator Mr.Javeed Mohammed Janjua and the final decision of the Arbitrator shall be binding on both the parties.

8. According to the Applicant, it had completed 80% of the work by investing an amount of Rs. 60,00,000/- However, when the remaining work was in progress, the Applicant came across a caution notice dated 25.11.2018 issued on behalf of one Meherunnisa Begum in Siyasat Newspaper. The said caution notice cautioned the general public not to deal with the subject property stating that the Applicant and the Respondents are not the owners and there are cases pending over the subject property.

9. The Applicant states that on verifying the caution notice, it came to know about various cases pending before Rajendar Nagar Court and the High Court. According to the Applicant, suppression of the pending cases was brought to the notice of the Respondents, who assured that all the claims and objections over the subject property will be settled. However, the Respondents failed to settle the same and a legal notice dated 21.09.2020 was issued by the Applicant expressing its willingness to complete the contract upon production of proof of clearance of all pending cases.

10. In October 2020, the Respondents replied denying the completion of works and receipt of payment of Rs. 50,00,000/- in cash and alleging that Rs. 5,00,00,000/- and 35% of profit as agreed were not paid. The reply also stated that the Applicant was aware of the pending cases over the subject property. Therefore, they terminated the MOU on 04.01.2019 and stated that any dispute has to be resolved by Javeed Mohammed Janjua, who was named as the arbitrator.

11. The Applicant issued another legal notice dated 19.10.2020 seeking the address of Mr. Javeed Mohammed Janjua to appoint him as the arbitrator. Since no reply was received, the Applicant issued another arbitration notice dated 21.06.2021 nominating an arbitrator. To the said notice, the Respondents replied on 10.07.2021 denying all the allegations and stating that arbitration notice dated 21.06.2021 is contrary to Clause 13 of the MOU which names Javeed Mohammed Janjua as an arbitrator.

12. The Applicant filed the present arbitration application alleging collusion between the Respondents and the named arbitrator Javeed Mohammed Janjua. In their counter affidavit, the Respondents denying the averments made by the Applicant seek dismissal of the present

arbitration application on the ground that once an arbitrator is named in the arbitration agreement, he/she shall be appointed as per the terms of the agreement.

13. It is clear from the facts of the case that various disputes relating to the cancellation of the MOU, payments of amounts and completion of works have arisen between the parties. It is also not in dispute that Clause 13 of the MOU names Mr. Javeed Mohammed Janjua as the arbitrator to resolve the disputes. The Applicant consented to the appointment of Javeed Mohammed Janjua by seeking his address. However, in the present application an averment is made that he is in collusion with the Respondents. Therefore, the question before this Court is whether this Court can refuse to appoint a named arbitrator on the ground of collusion and appoint a substitute arbitrator under an application filed under Section 11 of the Act, 1996.

14. To decide the issue at hand, it is relevant to note Section 12 and Section 13 of the Act, 1996 provide for the grounds and procedure to challenge appointment of an arbitrator. The said provisions are extracted below:

12. Grounds for challenge.--(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,--

- (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
- (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in Sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if--

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(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:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing.

13. Challenge procedure.--(1) Subject to Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in Sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged Under Sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure Under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made Under Sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made Under Sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."

15. As per the said provisions, a person proposed to be appointed as an arbitrator shall make disclosures regarding certain aspects mentioned under Section 12(1) & (2) of the Act, 1996. If such

disclosures give rise to any justifiable doubts or the arbitrator fails to possess the requisite qualifications, a party may challenge the appointment of such arbitrator. Section 12(4) of the Act, 1996 provides that a party can challenge the appointment of the arbitrator only on the grounds of which he becomes aware after such appointment. Further, it is relevant to note that challenge of an arbitrator is not required if the arbitrator is disqualified under the seventh schedule of the Act, 1996.

16. Section 13 provides the procedure to be followed by a party seeking to challenge the appointment of an arbitrator. A party intending to challenge appointment of an arbitrator can do it only after the constitution of the tribunal or after becoming aware of the circumstances giving rise to such challenge. The challenge is to be made only before the arbitral tribunal. If the challenge is successful, the arbitrator shall withdraw from the tribunal. If the challenge is unsuccessful, the proceedings shall continue and the same tribunal shall decide the matters on merits. However, the unsuccessful party can challenge the award under Section 34 of the Act, 1996 based on the grounds mentioned in Section 12(1) & (2) of the Act, 1996.

17. The Apex Court in **HRD Corp. v. GAIL (India) Ltd.**¹, explaining the procedure of challenging the appointment of arbitrator has observed as follows:

12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. 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. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral

¹2018) 12 SCC 471.

award in accordance with Section 34 on the aforesaid grounds.
It is clear, therefore, that any challenge contained in the Fifth
Schedule against the appointment of Justice Doabia and Justice
Lahoti cannot be gone into at this stage, but will be gone into
only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

18. Coming to the facts of the case, the Applicant after agreeing on the name of Mr. Javeed Mohammed Janjua, as the arbitrator cannot now seek appointment of a substitute arbitrator under Section 11 of the Act, 1996. Further, no specific averments regarding any collusion have been made. A party cannot seek appointment of a substitute arbitrator on mere allegations of collusion. Further, such allegations even if exist cannot be decided in an application filed under Section 11 of the Act, 1996.

19. As stated by the Supreme Court in **Vidya Drolia v. Durga Trading Corporation²**, the power of this Court under Section 11 of the Act, 1996 is extremely limited. The Court only has to satisfy itself regarding *prima facie* existence of arbitration agreement. The question whether an arbitrator is biased or is in collusion or whether circumstances raising justifiable doubts exist under Section 12(1) & (2) of the Act, 1996

²(2021) 2 SCC 1.

have to be decided by the arbitral tribunal itself under Section 13 of the Act, 1996. Further, if the party is unsuccessful in challenging the appointment of the arbitrator before the tribunal, it also has a remedy to challenge award passed by such arbitrator under Section 34 of the Act, 1996.

20. In the present case, it is the duty of the Court to enforce the terms of the arbitration agreement. Therefore, the named arbitrator has to be appointed who shall follow the procedure under Section 12 of the Act, 1996 and make the necessary disclosures. If the Applicant feels that such disclosures raise justifiable doubts, it is at liberty to challenge the appointment of the arbitrator under Section 13 of the Act, 1996. As stated above, this Court cannot decide the allegations of collusion under an application filed under Section 11 of the Act, 1996 and Mr. Javeed Mohammed Janjua being the named arbitrator has to be appointed to decide the disputes between the parties.

21. In light of the aforesaid discussion, the present arbitration application is disposed of appointing **Mr. Javeed Mohammed Janjua** as per Clause 13 of the MOU.

Consequently, miscellaneous Petitions, pending if any, shall stand closed.

K. LAKSHMAN, J

Date: 01.09.2022

vvr