

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

Reserved on: 29th July, 2022

Pronounced on: 31st August, 2022

+ **ARB.P. 133/2019**
GEETA PODDAR

..... Petitioner

Through: Mr. Rajiv Dalal, Mr. Sanjeev Sharma,
Ms. Kamal Dalai and Mr. Vikas
Bhardwaj, Advocates.

versus

SATYA DEVELOPERS PRIVATE LIMITED Respondent

Through: Ms. Kaadambari with Mr. Uttam
Kumar, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.:

1. The issue for consideration is whether this Court can appoint an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 [*hereinafter*, “*the Act*”], considering the fact that a final award has already been passed, during the pendency of this petition, by a unilaterally appointed sole arbitrator.

BRIEF FACTS

2. The facts, insofar as are necessary for deciding the present petition, are set out hereinbelow:

2.1. The parties entered into a Builder Agreement on 06th September, 2014 [*hereinafter*, “*the Agreement*”] in respect of a dwelling unit in a residential complex being developed by the Respondent [*hereinafter*,

“*the Project*”].¹ The Agreement contained an arbitration clause, which reads as under:

“20. ARBITRATION

20.1 *It is agreed between the parties that any dispute which may be in relation to this present Agreement would not be taken up by the parties against each other in any criminal complaint either to the police or any Court.*

Both parties specifically waive their rights to do so against each other. The Buyer also waives his right to file Consumer Complaint on any issue which may be connected or arise out of this Agreement Parties agree to resolve their entire disputes through the Dispute Resolution Mechanism agreed hereinbelow.

20.2 *That in case of any dispute or controversy arising out of or in connection with this Agreement the same shall be referred to the Arbitration of a Sole Arbitrator to be appointed by the Managing Director of the Developer.*

The arbitration proceedings shall be held in accordance with the Arbitration & Conciliation Act, 1996, and the Rules made there-under as amended from time to time. The place of Arbitration shall be New Delhi only and the language of the arbitration shall be English.

The cost of arbitration including the arbitrator’s fee shall be shared jointly by the Developer and the Buyer. The parties agree that during the pendency of the Arbitration, the parties shall continue to discharge their respective obligations under this Agreement.

20.3 *The rights and obligations of the parties under or arising out of this Agreement shall be construed and enforced in accordance with the laws of India.”* [Emphasis supplied]

2.2. Disputes arose between the parties *qua* development of the Project, which led to Respondent issuing a notice dated 15th April, 2017, demanding payment of outstanding dues and offering possession of the unit. Upon visiting the Project site, *vide* letter dated 02nd May, 2017, Petitioner informed the Respondent that the Project was incomplete in

¹ Penthouse/ flat bearing No. 07, located on 11th floor, Tower-08 having a built-up area of approx. 1916 sq. ft. and common area of 639 sq. ft., totalling to 2555 sq. ft. in Hermitage, Sector – 103, Gurgaon, Haryana.

terms of the Agreement and advertising brochure. While raising her grievances against delay in completion, Petitioner also requested for expeditious completion of the Project and handing over of possession of the unit. On the other hand, Respondent claimed that Petitioner defaulted in performing her contractual payment obligations. In these circumstances, *vide* notice of invocation dated 21st November, 2017, Respondent unilaterally appointed the first sole arbitrator.

2.3. The first sole arbitrator entered upon the reference on 19th December, 2017, and notified parties of his appointment through a letter dated 22nd November, 2017. Petitioner denies the receipt of such communication and avers that instead, on 28th December, 2017, she replied to the notice of invocation objecting to the unilateral right of appointment vested in the Managing Director of the Respondent. Thereafter, *vide* letter dated 26th February, 2018, the Petitioner objected to the arbitration proceedings stating that the disputes were criminal in nature and hence, non-arbitrable.

2.4. Noting the objections of Petitioner/Claimant, the first sole arbitrator, *vide* 8th Procedural Order signed on 07th October, 2018, concerning “*Minutes and Directions made at the hearing held on 01st Sept 2019*”, [hereinafter, ‘**8th Procedural Order**’], withdrew from office, and issued following directions:

“Notwithstanding the above the Arbitrator notes that the conduct of the Claimant in the proceedings suggests that he has no faith in the Arbitrator due to reasons best known to her and therefore considers it expedient to “recuse himself” from the proceedings directs the parties to appoint any other Arbitrator if so.”

2.5. Thereafter, second/substitute arbitrator was appointed by the Managing Director of the Respondent, again unilaterally, in terms of Clause 20 of

the Agreement, by way of a letter dated 09th October, 2018, which reads as under:

“Subject: Appointment of Arbitrator

Dear Sir,

A Buyer’s Agreement dated 06.09.2014 (hereinafter referred to as the “Said Buyer’s Agreement”) was executed between M/s. Satya Developers Pvt. Ltd. and Ms. Geeta Poddar (hereinafter referred to as “Allottee/s”), towards allotment of Unit No. No. 07 on 11th Floor in Tower-08, in Hermitage, Sector – 103, Gurgaon, Haryana.

I was informed that certain disputes arose between the Allottee and Satya Developers Private Limited and efforts to resolve the disputes amicably were failed.

Therefore, GP. Capt. (Retd.) Rajan Mathur was appointed as a sole arbitrator to adjudicate upon disputes arisen between the parties to said Buyer’s Agreement. However, vide order date 07.10.2018, GP. Capt. (Retd.) Rajan Mathur has recused himself from the said arbitration.

The Said Buyer’s Agreement provides that in case of disputes arising out of or in connection to the said Buyer’s Agreement amongst the parties shall be referred to arbitration of a Sole Arbitrator to be appointed by the Managing Director of Satya Developers Private Limited. The said Clause of Contract is reproduced as under:-

xx ... xx ... xx

In light of the aforesaid, I hereby wish to appoint you as the Sole Arbitrator to adjudicate upon disputes which have been arisen between the parties to the Buyer’s Agreement. I in turn request you to accept the said appointment and duly enter reference and communicate with the parties at the correspondence address mentioned below and arbitrate their disputes in accordance with the said Buyers Agreement and the law applicable;

xx ... xx ... xx

Manish Agarwal

s/d

(Managing Director)

M/s. Satya Developers Pvt. Ltd.”

2.6. Aggrieved by the above, the Petitioner filed the present case on 21st February 2019 praying for appointment of an independent arbitrator and stay of on-going arbitral proceedings.

Previous Orders

3. Before advertng to the contentions urged by the counsel for the parties, it would be appropriate to take note of the history of this litigation:

3.1. The instant petition, at first instance, was dismissed *vide* order dated 25th

February, 2019, with following observations:

“9. To my mind, in order to appreciate the ratio of the judgment of the TRF Limited, one would have to advert to the arbitration agreement which obtained between the parties in that case.

9.1 Para 8 of the judgment refers to Clause 33 which incorporated the arbitration agreement.

9.2 For the sake of convenience, the same is extracted herein.

xx ... xx ... xx

10. A close perusal of Clause 33 would show that in the TRF Limited case the reference of disputes was to be made to the Managing Director of one of the parties i.e. the buyer or his nominee.

11. In the instant case, the Managing Director of the respondent is not the Arbitrator.

12. Under Clause 20 of the subject -Buyers Agreement, the Managing Director has been given the authority to appoint an arbitrator.

13. In my view, this presents a materially different circumstance in contradistinction to what obtained in TRF Limited case.

14. Therefore, the ratio of the judgment in TRF Limited case has to be understood in the light of Clause 33 which captured the arbitration agreement obtaining between parties in that case.

15. Thus, the observations made in paragraph 54 to my mind, would not come to the aid of the petitioner.

16. In these circumstances, I find no merit in the petition.

17. The petition is, accordingly, dismissed.

18. The petitioner will, however, have the liberty to challenge the appointment of the Arbitrator by taking recourse to appropriate provisions of the 1996 Act if they are otherwise available to her.”

3.2. Aggrieved with the above, Petitioner filed an appeal before the Supreme Court, which was disposed of *vide* order dated 29th March, 2019,² with liberty, as under:

“Learned counsel for the petitioner seeks permission to withdraw this petition

² SLP (C) No. 7125/2019.

with liberty to file review petition before the High Court.

Permission sought for is granted.

The special leave petition is dismissed as withdrawn with the above liberty.

In case the petitioner fails before the High Court, liberty is granted to the petitioner to move this Court once over again challenging the main order as well as the order passed in review petition.”

- 3.3. Exercising the liberty granted, a review petition was filed by the Petitioner before this court,³ challenging the interpretative application of the judgment in **TRF Limited** (*supra*), in which notice was issued on 24th January 2020. Then, on 09th December, 2020, when the matter came up, counsel for Petitioner informed the Court that the tribunal had passed its final award on 22nd January, 2020.
- 3.4. On 04th February, 2021, the Court took note of the subsequent judgment of Supreme Court delivered on 26th November, 2019, titled **Perkins Eastman Architects DPC v. HSCC (India) Ltd.**⁴ and allowed the review petition, thereby recalling the dismissal order dated 25th February, 2019, and listed the instant petition for *de novo* arguments.
- 3.5. On 04th January, 2022 parties sought time to explore amicable settlement but unfortunately did not succeed. Hence, the present proceedings.

Arbitration Agreement vis-à-vis Judicial Precedents

4. The first question that arises is whether the appointment of the second sole arbitrator, who has now passed the award, was *non-est*. To find an

³ Review Pet. 377/2019.

⁴ 2019 SCC OnLine SC 1517 [Relevant paragraphs – 19 to 21].

answer, interpretation of the arbitration clause (extracted above) is crucial. The arbitration clause, as worded, entails that any dispute and/or controversy arising out of or in connection with the Agreement, shall be referred to arbitration before a sole arbitrator, to be appointed by the Managing Director of Respondent. In other words, a unilateral right has been created in favour of the Managing Director of Respondent to appoint a sole arbitrator. There can be no cavil that such an arbitration clause is legally unenforceable in view of the 2015 Amendment to the Act.⁵ The right of unilateral appointment of a sole arbitrator, by the Managing Director of Respondent, is *ex-facie* contrary to Section 12(5) read with Seventh Schedule of the Act. This provision has been interpreted by the Supreme Court at various occasions, in circumstances which were nearly identical to the present case. Let us examine the same briefly.

5. In **TRF Limited** (*supra*), the Supreme Court held that by virtue of Section 12(5) of the Act, the Managing Director of any of the parties was ineligible to act as an arbitrator and therefore, was also ineligible to appoint or nominate another person as an arbitrator. The reasons thereof have been detailing therein, as under:

“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

⁵ The Arbitration and Conciliation (Amendment) Act, 2015 came into force on 23rd October, 2015. Pertinently, it introduced the Seventh Schedule to the Act, and inserted the following sub-section in Section 12:

(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.”

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. Once 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."
[Emphasis supplied]

6. This came to be further closely examined in *Perkins Eastman* (*supra*) in context of an arbitration clause which empowered the Chairman and Managing Director of HSCC (India) to appoint an arbitrator. The Apex Court, relying on the principle laid down in *TRF Limited* (*supra*), held that as the Managing Director would be interested in the outcome of the dispute, it was impermissible for him to unilaterally appoint an arbitrator. It was held that the moment a named Arbitrator fell within any of the categories enshrined in the Seventh Schedule, he become ineligible under Section 12(5), and could neither function as nor nominate another Arbitrator. This is the law as it stands today.⁶

7. In view of the foregoing settled position of law, there exists no doubt in the mind of the Court that unilateral appointment of the second sole arbitrator by the Managing Director of the Respondent was *non-est* in law, being in conflict with Section 12(5) read with Seventh Schedule of the Act,

⁶ Similar views have been expressed by co-ordinate benches of this Court in *Proddatur Cable Tv Digi Services v. Siti Cable Network Limited*, 2020 SCC Online Del 350, *City Lifeline Travels Private Limited v. Delhi Jal Board*, 2021 SCC OnLine Del 3526 and *Sivansh Infrastructure Development Pvt Ltd v. Army Welfare Housing Organization*, 2021 SCC OnLine Del 4798.

and thus void *ab initio*.

8. In this background, the limited question which requires determination is whether, an award which has been passed by a person ineligible to act as an arbitrator, can preclude this court from deciding a petition under Section 11 of the Act. Before proceeding with determination of the same, it would be apposite to briefly note the submissions made by the parties on this issue.

9. Mr. Rajiv Dalal and Mr. Sanjeev Sharma, counsel appearing on behalf of Petitioner, made the following submissions:

9.1. On receipt of the notice of invocation, Petitioner duly objected to the unilateral appointment by Respondent *vide* her reply dated 28th December, 2017. On the first hearing before the arbitrator, Petitioner raised a preliminary objection regarding his disqualification under Section 12(5) of the Act. Objection was reiterated *vide* communication dated 26th February, 2018. On 30th August, 2018, she filed an application under Section 12 of the Act, which was taken up for hearing by the first sole arbitrator *vide* the 8th Procedural Order, wherein he recused from the office and directed the “*parties to appoint any other Arbitrator*”. In order to appoint a *de novo* arbitrator, Petitioner tried contacting the Respondent, but instead, they proceeded to hastily appoint a second sole arbitrator on 09th October, 2018, once again unilaterally.

9.2. The subsequent appointment is contrary to Section 12(5) of the Act, as well as, the direction issued by the erstwhile arbitrator who, while upholding the objections raised by the Petitioner under Section 12 of the Act, directed that subsequent appointment must be by ‘*mutual*’ consent.

9.3. The Petitioner filed the instant proceedings seeking fresh appointment without demur, hence there can be no laxity attributable to her and it cannot be said that her rights stand pre-closed.

9.4. The arbitral proceedings and the final award passed by the second sole arbitrator are *non-est* since his appointment is itself illegal and without authority. Reliance is placed on the judgment of the Apex Court in ***Harshad Chiman Lal Modi v. DLF Universal Ltd.***⁷

10. *Per contra*, Ms. Kaadambari, counsel for Respondent, made the following averments:

10.1. Since challenge to arbitral appointment under Section 11 was dismissed by this Court vide order dated 25th February, 2019, the appointment of the second sole arbitrator stood affirmed, and the ensuing proceedings cannot be called illegal. Thus, the award rendered is also valid and legal. In this regard, reliance is placed on ***Perkins Eastman*** (*supra*).⁸

10.2. Even in the appeal filed before the Supreme Court against the order of dismissal dated 25th February, 2019, no stay/adverse order has been passed in respect of the arbitral proceedings, and thus, the same continued lawfully, which eventually culminated into the final award passed on 22nd January, 2020.

10.3. In absence of any proceedings initiated by Petitioner under Section 14 of the Act, coupled with the deliberate delay on her part in filing the review petition, she has waived her legal right to avail the remedies

⁷ (2005) 7 SCC 791.

⁸ Reliance on paragraphs No. 21 and 22.

available under the Act.

- 10.4. Despite receipt of the final award, Petitioner took no steps to challenge the same under Section 34 within the statutory timelines specified therein. Thus, the award has now become final and binding.
- 10.5. Courts have no power to extend limitation, even on equitable grounds. Reliance is placed on ***P.K. Ramachandaran v. State of Kerala and Ors.***⁹
- 10.6. Reliance is also placed on ***Antrix Corporation v. Devas Multimedia Pvt. Ltd.***,¹⁰ wherein the Supreme Court opined that post-appointment of an Arbitrator, remedy of the aggrieved party does not lie under Section 11(6).
- 10.7. Reliance was further placed on ***Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal***,¹¹ wherein it was held that when an arbitration agreement is invoked and an arbitrator appointed with mutual consent, the same agreement cannot be invoked for the second time.
- 10.8. It is well-settled that when the right of a party has been considered and declared by the Court, then the proceedings cannot be re-opened merely because the basis thereof has been overruled. Reliance is placed on the decision of the Supreme Court in ***Union of India v. Madras Telephone SC & ST Social Welfare Association***.¹²

11. This court has given its anxious consideration to the contentions urged

⁹ (1997) 7 SCC 556.

¹⁰ (2014) 11 SCC 560.

¹¹ 2020 SCC OnLine SC 556.

¹² (2006) 8 SCC 662 [Reliance on paragraph No. 21].

before it, keeping in mind the peculiar circumstances mentioned, the previous orders cited, as well as the intervening events, including the culmination of arbitral proceedings into an award.

12. Petitioner, all throughout, has contested such appointment. Indeed, the first sole arbitrator recused himself *vide* the 8th Procedural Order in response to the Petitioner's objections *qua* his eligibility. Post recusal, the situation reverted to as if arbitration had never commenced – the mandate of the first arbitrator stood terminated as per Section 32(2)(c) read with Section 15(1)(a) of the Act. The Managing Director of the Respondent, who was ineligible to appoint an arbitrator, instead of approaching the Court, yet again, *vide* communication dated 09th October 2018, unilaterally proceeded to appoint a second sole arbitrator. Concededly, Petitioner's consent was not sought or obtained prior to the said appointment.

13. As discussed above, the second unilateral appointment by Respondent was also *ex-facie* contrary to law and thus, *non-est*. Ineligibility could have been waived off only by an express Agreement in writing entered into by the parties, after the disputes had arisen. No such averment has been made or document shown to the court. Petitioner's participation in the first arbitral proceedings was also under protest, and she did not participate in the second proceedings *ab initio*. Thus, in absence of any express agreement to the contrary, in the opinion of the Court, Petitioner cannot be deprived of her right to seek appointment of an independent and impartial arbitrator under Section 11(6) of the Act, notwithstanding the progression of the *non-est* arbitral proceedings towards the eventual culmination into a final award.

14. A crucial facet that requires consideration is the passing of an award during the pendency of this petition. In the opinion of the Court, the above-stated contentions of the Respondent do not render the present petition unsustainable. It has time and again been held by the Supreme Court that unless the appointment of the arbitrator is *ex-facie* valid, and to the satisfaction of the Court exercising jurisdiction under Section 11(6) of the Act – acceptance of such appointment is *fait-accompli* to bar the jurisdiction under Section 11(6) of the Act. Even in the facts of ***Perkins Eastman (supra)***, although the Tribunal stood appointed, yet a petition under Section 11(6) of the Act was entertained. In the present case, at first instance, the Court, rejected the petition, perhaps in light of view taken by this Court in ***Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineering Pvt. Ltd. and Ors.***,¹³ wherein party autonomy and right of unilateral appointment, was acknowledged, notwithstanding the judgment rendered by the Supreme Court in ***TRF Limited (supra)***. The Court did not deem it necessary to interfere and instead gave liberty to Petitioner to challenge the appointment of arbitrator by taking recourse under appropriate provisions of the Act. The Petitioner instead assailed the decision of this Court before the Supreme Court and then filed a review petition. In the meantime, the law stood well established *qua* unilateral appointments of arbitrators. Accordingly, the said review was allowed *vide* order dated 24th January, 2020 and consequently, the earlier order of dismissal, was recalled. As of today, no reliance can be placed thereon to make a case in favour of the Respondents. As the matter stands, arbitrator's appointment is *non-est*, and by necessary corollary, the proceedings

¹³ (2018) 249 DLT 619.

conducted and award so rendered by him, would have no legal effect and are also *non-est*.

15. The instant petition under Section 11(6) of the Act stood revived by virtue of the review order dated 04th February, 2021. The effect of review is to set-aside the previous order and make a fresh direction considering the material facts omitted from consideration earlier.¹⁴ As the review order dated 04th February, 2021 recalled the previous order dated 25th February, 2019, its effect would relate back to the date of original filing of the petition, on which date, the arbitral proceedings were still pending. In absence of stay, the intervening fact of making of arbitral award would not effect the maintainability of the present proceedings, particularly when the unilateral appointment of the arbitrator is *ex-facie* contrary to law. The passing of the award cannot make right the wrongful appointment of the arbitrator, and it cannot render the remedy of the Petitioner under Section 11(6) of the Act to be *non-est*. [See: **TRF Limited** (*supra*)].

16. At this juncture, reference to the judgment of the Supreme Court in **Bharat Broadband v. United Telecoms Limited**,¹⁵ would be profitable, as the facts therein were broadly similar. In the said case, the Chairman-cum-Managing Director of Petitioner therein had appointed an arbitrator and accordingly, the parties participated in the arbitral proceedings. However, Petitioner therein subsequently filed an application before the arbitrator

¹⁴ *Commissioner of Customs v. Sunil Ghosh*, MANU/WB/0535/2005.

¹⁵ (2019) 5 SCC 755.

requesting him to withdraw from the proceedings. The arbitrator rejected the said application, against which the Petitioner filed a petition under Sections 14 and 15 of the Act seeking termination of mandate. The High Court, relying on the ratio in **TRF Limited** (*supra*), rejected the said petition holding that the Petitioner therein was estopped from challenging the appointment, as it was done by the Chairman-cum-Managing Director. In appeal, the Apex Court set aside the decision of this Court and held that under the newly introduced Section 12(5) of the Act, it is clear that if a person falls within any of the categories set out under the Seventh Schedule, he/she is ineligible to be appointed as an arbitrator. In such a scenario, a party can, at the first instance, apply before the Court for declaration of the same and for a declaration that the mandate of the arbitrator stands terminated under Section 14(1) of the Act. During the pendency of petition, the Apex Court was also informed that an award had been passed by the arbitrator whose mandate was sought to be terminated. Regardless, the petition was allowed and a substitute arbitrator was appointed. The principle laid down in **Bharat Broadband** (*supra*) will apply to the present petition under Section 11(6) of the Act as well, since the appointment of second sole arbitrator herein too is *ex-facie* illegal. Thus, the Court can intervene and appoint an independent arbitrator under Section 11(6), notwithstanding the final award.

17. Lastly, it must also be noted that an award delivered by a unilaterally appointed arbitrator has been set aside under Section 34 of the Act by this Court, and has been held to be *void ab initio*.¹⁶ Thus, the argument of final

¹⁶ *Simmi Sethi v. Fullerton India Credit Co. Limited*, MANU/DE/1234/2022.

award granting sanctity to the *non-est* proceedings, too, does not convince the Court. The manner in which the Respondent has proceeded in the appointment of the Arbitrator is inexcusable and cannot be countenanced.

18. For the foregoing reasons, the instant petition deserves to be allowed. Accordingly, Ms. Manini Brar, Advocate [Contact No.: +91 9205591340] is appointed as the Sole Arbitrator to adjudicate the disputes that are stated to have arisen between the parties out of the Agreement.

19. The parties are directed to appear before the Sole Arbitrator as and when notified. This is subject to the Arbitrator making necessary disclosure(s) under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act. The Arbitrator will be entitled to charge their fee in terms of the provisions of the Fourth Schedule appended to the Act.

20. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the Arbitrator in accordance with law.

21. The petition is disposed of in the above terms. The date already fixed i.e. 2nd September, 2022, stands cancelled.

SANJEEV NARULA, J

AUGUST 31, 2022/as