IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.01.2023

\+ **FAO (COMM) 136/2022 and CM Nos. 41441/2022 & 41443/2022**

GOVIND SINGH ..... Appellant

versus

M/S SATYA GROUP PVT LTD AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Abhinav Sharma, Advocate.
For the Respondents : Ms Kaadambari, Mr Sonu Kumar, Mr Amitender Tiwari, Mr Sahil Khanna and Ms Ayushi, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The appellant, Mr. Govind Singh, has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 07.12.2021 (hereafter '**the impugned order**') passed by the learned Commercial Court, whereby the appellant's application under Section 34 of the A&C Act [being ARBTN No. 16 of 2019], seeking to set aside an arbitral award dated 17.01.2019 (hereafter '**the impugned award**'), was rejected.

Factual Context

2. In the month of January 2014, the appellant had received a message from a broker regarding the availability of a property for sale. Thereafter, on 03.02.2014, the appellant gave a cheque for an amount of ₹50,000 to Mr. Ankush Chawla and Mr. Manish Chawla (brokers) to book a flat in a building developed by M/s Satya Group Pvt Ltd. (hereafter '**the respondent company**') named 'The Hermitage' bearing no. T8-804, 2-1 BHK situated in Sector-103, Dwarka Gurugram Expressway, Gurgaon (hereafter '**the property'**).

3. Subsequently, on 30.06.2014, the appellant and the respondent company executed an agreement (Buyer Agreement) in respect of the property. The appellant states that on receiving the said Buyer Agreement, he noticed that the cost of the flat was mentioned as ₹92 lakhs, which was much higher than the price of ₹70 lakhs informed to him earlier. The appellant claims that he sought to cancel the transaction to purchase the property but was informed that the amount paid by him would be forfeited.

4. The appellant claims that the parties agreed to transfer the said amount towards the purchase of a smaller unit. A new Buyer Agreement was executed between the parties on 29.08.2017, the appellant submits that contrary to the understanding, the same did not contain the adjustment of the amount already paid by him towards the property. The appellant claims that he did not agree to the changes made in the Buyer

Agreement dated 29.08.2017 but was coerced to sign the same by the respondent company.

5. The appellant claims that after signing the Buyer Agreements, the respondent company did not implement the required changes in the property, therefore, he did not wish to proceed with the transaction to purchase the property.

6. The impugned award indicates that the appellant had appeared before the Arbitral Tribunal on 24.02.2019 and had objected to the procedure adopted for appointment of the Arbitrator. Thereafter, the appellant and the proxy counsel accompanying him had left the proceedings. Notwithstanding the objections raised by the appellant, the learned Arbitrator proceeded *ex parte* and delivered the impugned award. He found in favour of the respondent company and against the appellant. The operative part of the impugned award is set out below:

> "i. The Buyer's Agreement dated 29.08.2017 between the Respondent Company and the Claimant is cancelled / terminated.
>
> ii. The Developer Company is entitled to forfeit 20% of the basic sale price of the said unit in terms of the Buyer's agreement dated 30.06.2014 as the earnest money and deductions towards the losses suffered by the Respondent company towards Brokerage and tax(es).
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> iii. The Claimant has proceeded ex-parte and has not paid arbitration fees of their share and therefore the Respondent Company is entitled to further deduct the arbitration fees of the

C1aimant's share to the tune of Rs.50,000/- and litigation cost of Rs.50,000/- over and above the earnest money and deductions towards the losses suffered by the Respondent company towards Brokerage and tax(es).

iv. The Respondent Company is directed. to pay the balance amount to the Claimant after deductions as mentioned in Para (ii) and (iii) above if any.

v. The Claimant shall be left with no right, claim and interest in the residential Unit No. 03 on 02nd Floor in Tower-09 in the Hermitage, Sector-103, Gurgaon, Haryana and the Respondent Company shall be free to sale / allot the same to any person."

Reasons and Conclusions

7. The principal question that falls for consideration for this Court is whether the impugned award is liable to be set aside on the ground that the learned Arbitrator was ineligible to be appointed as an arbitrator. The learned Commercial Court had found that the learned Arbitrator had complied with the provisions of Section 12 of the A&C Act by making the necessary disclosures before accepting his appointment as the Sole Arbitrator. The appellant had not challenged the said appointment and therefore, the learned Arbitrator's appointment was in accordance with the provisions of the A&C Act.

8. It is apparent that the learned Commercial Court failed to address the crucial question – whether the learned Arbitrator was ineligible for being appointed as an arbitrator. It is the petitioner's case that the learned Arbitrator was unilaterally appointed by the Managing Director

of the respondent company, which was not permissible. He was ineligible to act as an arbitrator and therefore, the impugned award was liable to be set aside.

9. Ms. Kaadambari, learned counsel appearing for the respondent, earnestly contended that the learned Arbitrator had been appointed at the instance of the appellant. She contended that the appellant had neither raised any objections to the appointment of the Arbitrator nor challenged his appointment during the course of the proceedings and therefore, was precluded from doing so after the impugned award was rendered. She also referred to the decision of the learned Single Judge of this Court in ***Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited: (2021) 284 DLT 722***; and on the strength of the said decision contended that it is not open for the appellant to raise the question regarding the applicability of Section 12(5) of the A&C Act after the arbitral award has been delivered.

10. The appellant contends that he has raised an objection regarding the unilateral appointment of the Arbitrator. He also contends that the manner in which the proceedings were conducted, violated the principles of natural justice and indicated that respondent no.2 was biased in favour of the respondent company. Needless to state that the learned counsel appearing for the respondent company disputes the said contention.

11. The appellant invoked the Arbitration Agreement (Arbitration Clause in the Builder Buyer Agreement dated 30.06.2014) by a notice

dated 13.01.2018. The said notice was a common notice issued by the appellant and one Sh. Sumit Singh, raising disputes in respect of the respective agreements entered into by them. The said notice is clumsily worded; however, it expressly called upon the respondent company to take note that the appellant was willing for his concerns to be addressed by an arbitrator. The appellant had, in the said notice, raised various allegations against the respondent company.

12. Thereafter, the Managing Director of the respondent company addressed a letter to respondent no.2 referring to the Arbitration Agreement (Arbitration Clause) between the parties and indicating his desire to appoint respondent no.2 as the Sole Arbitrator to adjudicate the disputes that had arisen between the parties in respect of the Buyer Agreement. Respondent no.2, a practicing advocate, accepted the appointment and declared that there were no circumstances that gave rise to any justifiable doubts as to his independence or impartiality.

13. For the purpose of addressing the principal question involved in this appeal, it would be apposite to proceed on the facts as admitted. Admittedly, respondent no.2 was appointed unilaterally by the Managing Director of the respondent company. It is also conceded that there was no agreement in writing after the disputes had arisen, whereby the parties had concurred on appointing respondent no.2 as the Sole Arbitrator to adjudicate the disputes between the parties.

14. In ***TRF Ltd. v. Energo Engineering Projects Ltd.: 2017 8 SCC 377***, the Supreme Court had authoritatively held that a person who is

ineligible to act as an arbitrator is also ineligible to be appointed as an arbitrator. It is important to note that the controversy before the Supreme Court was addressed in the context of Section 12(5) of the A&C Act. The relevant extract of the said decision, which clearly indicates the above, is set out below:-

> "50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by nor impartiality operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the

Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa v. Commr. of Land Records & Settlement*, In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

> "25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand v. State of Punjab*. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revisions by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of that State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate."

(emphasis in original)

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

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 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. One 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."

15. In ***Perkins Eastman Architects DPC & Ors. v. HSCC (India) Ltd.: (2020) 20 SCC 760***, the Supreme Court referred to the earlier decision in ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*) and held that in the cases where the arbitration clause provided that the party

or its official would appoint an arbitrator, the element of ineligibility would also extend to the persons so appointed. The relevant extract of the said decision reads as under:-

> "21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]"

> "28. In TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of the aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the applicants."

16. It is important to note that the Supreme Court also held that in the cases where the arbitrator appointed by a party is ineligible to be appointed as an arbitrator, the counter-party is not precluded from approaching the court for appointment of an arbitrator under Section 11 of the A&C Act.

17. Following the aforesaid decision of the Supreme Court in ***Perkins Eastman Architects DPC & Ors. v. HSCC (India) Ltd.*** (*supra*), a learned Single Judge of this Court in ***Proddatur Cable TV Digi Services v. Citi Cable Network Limited: (2020) 267 DLT 51*** held that it would be impermissible for a party to unilaterally appoint an arbitrator. In terms of Section 12(5) of the A&C Act read with the Seventh Schedule of the A&C Act, an employee would be ineligible to act as an arbitrator by virtue of the law as explained by the Supreme

Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*) and ***Perkins Eastman Architects DPC & Ors. v. HSCC (India) Ltd.*** (*supra*). Such ineligibility would also extend to a person appointed by such officials who are otherwise ineligible to act as arbitrators.

18. In view of the law as noted above, the learned Arbitrator unilaterally appointed by the respondent company was ineligible to act as an arbitrator under Section 12(5) of the A&C Act.

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:-

> "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:
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> > "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..."

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.

21. In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person who is ineligible to act

as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction.

22. In ***Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited: (2021) 284 DLT 722*** the learned Single Judge of this Court had declined to interfere with the arbitral award, which was challenged on the ground that the arbitrator was ineligible to act as an arbitrator, on the ground that the parties had participated in the arbitral proceedings. The learned Single Judge had observed that the decision of the Supreme Court in ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*) was not applicable as the said matter had travelled to the Supreme Court against the decision of this Court, rejecting the petition under Section 14 and 15 of the A&C Act.

23. We are unable to agree that the decision in ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*) can be distinguished on the aforesaid ground. The said decision had authoritatively held that in terms of the proviso of Section 12(5) of the A&C Act, the ineligibility of an arbitrator under Section 12(5) of the A&C Act could be waived only by an express agreement in writing and cannot be inferred by the conduct of the parties. Thus, the fact that the

parties had participated before the arbitral tribunal cannot be construed as a waiver of their rights to object to the ineligibility of the arbitrator(s). We are unable to accept that while such a right could be exercised prior to the delivery of the award, it would cease thereafter. If the arbitrator is ineligible to act as an arbitrator, the arbitral award rendered by the arbitral tribunal would be without jurisdiction.

24. In view of the above, the appeal is allowed. The impugned order and the impugned award are set aside.

25. It is clarified that since the impugned award is being set aside on the ground that the learned Arbitrator was ineligible to act as an arbitrator, the parties are not precluded from re-agitating their claims/counter-claims afresh before another arbitral tribunal.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 06, 2023
Ch