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

\+ O.M.P. (T) (COMM.) 59/2021 & I.A. 8324/2021

LARSEN AND TOUBRO LIMITED ..... Petitioner

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Rajat Malhotra, Mr. Vivek Kumar Karn, Ms. Deboshree, Ms. Nitya Gupta , Advocates.

versus

HLL LIFECARE LIMITED ..... Respondent

Through: Mr. Ratan K. Singh, Sr. Adv., with Mr. Nikhilesh Krishanan, and Mr. Raghav Mudgal, Advs.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

O R D E R (ORAL)

% 20.09.2021

O.M.P. (T) (COMM.) 59/2021

1. The arbitral proceedings, forming subject matter of the present petition, emanate out of a contract agreement dated 25th February, 2010, between the petitioner and the respondent. Clause 21 of the General Conditions of Contract (GCC), forming part of the said agreement, provided for arbitration as the mode of resolution of disputes and read thus:

> "21. **Arbitration Settlement of Disputes & arbitration**
> Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions orders or these conditions or otherwise

concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:-

(i) If the contractor considers that he is entitled to any extra payment or compensation in respect of the works over and above the amounts admitted as payable by HLL or in case the contractor wants to dispute the validity of any deductions or recoveries made or proposed to be made from the contract, the contractor shall forthwith give notice in writing of his claim, in this behalf to the Engineer-in-Charge within 30 days from the date of disallowance thereof for which the contractor claims such additional payment or compensation or disputes the validity of any deduction or recovery. The said notice shall give full particulars of the claim, grounds on which it is based and detailed calculations of the amount claimed and the contractor shall not be entitled to raise any claim nor shall HLL be in any way liable in respect of any claim by the contractor unless notice of such claim shall have been given by the contractor to the Engineer-in-Charge in the manner and within the time as aforesaid. The contractor shall be deemed to have waived and extinguished all his rights in respect of any claims not notified to the Engineer-in-Charge in writing in the manner and within the time aforesaid.

(ii) The Engineer·-in-Charge shall give his decision in writing on the claims notified by the contractor within 30 days of the receipt of the notice thereof. If the contractor is not satisfied with the decision of the Engineer-in-Charge, the contractor may within 15 days of the receipt of the decision of the Engineer-in-Charge submit his claims to the conciliating authority named in Schedule 'F' for conciliation along with all details and copies of correspondence exchanged between him and the Engineer-in-Charge.

(iii) If the conciliation proceedings are terminated without settlement of the disputes, the contractor shall, within a period of 30 days of termination thereof shall give a notice, in the form prescribed by HLL, to the Chairman & Managing Director, HLL Lifecare Limited for appointment of an arbitrator to adjudicate the notified claims failing which the claims of the contractor shall be deemed to have been considered absolutely barred and waived.

(iv) Except where the decisions have become final, binding and conclusive in terms of the contract, all disputes arising out of the notified claims of the contractor as aforesaid and all claims of HLL

shall be referred for adjudication through the arbitration by the Sole Arbitrator appointed by the Chairman & Managing Director, HLL Lifecare Ltd. It will also be no objection to any such appointment that the Arbitrator so appointed is a HLL Employee and that he had to deal with the matters *to* which the Contract relates in the course of his duties as HLL Employee. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid by the said Chairman & Managing Director. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each dispute along-with the notice for appointment of arbitrator.

It is also a term of this contract that no person other than a person appointed by such Chairman & Managing Director, HLL Lifecare Ltd as aforesaid should act as arbitrator and if for any reasons that is not possible, the matter shall not be referred to arbitration at all.

The conciliation and arbitration shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act 1996 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each disputes and claim referred to him. The arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to

any, by whom and in what manner, such costs or any part thereof, shall be paid and fix or settle the amount of costs to be so paid.

CLAUSE 21(a)
Arbitration clause for all contracts with Central Government Departments and Central PSUs:

"In the event of any dispute or difference relating the interpretation and application of the provisions of the contract, such dispute or difference shall be referred by either party to the Arbitration of one of the Arbitrators in the Department of Public Enterprises to be, nominated by the Secretary to the Government of India in charge of the Bureau of Public Enterprises. The Award of the Arbitrator shall be binding upon the parties to the dispute provided; however, any party aggrieved by such award may take a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/ Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The parties to the dispute will share equally the cost of Arbitration or intimate by the Arbitrator."

2. No resolution of the dispute having been possible by recourse to the pre-arbitral mechanism envisaged by Clause 21, the petitioner wrote, to the respondent, on 4th June, 2019, calling on the respondent, to appoint its nominee arbitrator so that the petitioner could, therefore, appoint its nominee arbitrator and a three member arbitral tribunal could be constituted. This request was reiterated by a communication dated 10th July, 2019.

3. The petitioner is aggrieved by the fact that the respondent, *vide* letter dated 20th July, 2019, unilaterally appointed a retired Chief Engineer of the Public Works Department, Government of Maharashtra, as the sole arbitrator to arbitrate on the disputes.

4. This, contends the petitioner, is in the teeth of Section 12(5) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), read with the decisions of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***[1], ***Bharat Broadband Network Ltd v. United Telecoms Ltd***[2], and ***Haryana Space Application Centre v. Pan India Consultants Pvt Ltd***[3], as well as several decisions of this Court which have followed the said authorities.

5. Mr. Singh, learned Senior Counsel for the respondent, on the other hand, seeks to invoke the proviso to Section 12(5), of the 1996 Act to oppose the petition. Section 12(5) of the 1996 Act, read thus:

> **"12. Grounds for challenge**
> [(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.]"

6. On the applicability of the proviso to Section 12(5), this Court has already taken a view, in its decision in ***JMC Projects (India) Ltd. v. Indure Pvt. Ltd.***[4] Paras 27, 28, 30 to 32 and 34 to 40 of the said report in the said case may be reproduced thus:

> **"27.** In ***Bharat Broadband Network Ltd***[2]., the same principle was reiterated. Without adverting to the facts of the case, one may reproduce, directly, paras 15, 17 and 20 thus:

[1] **AIR 2020 SC 59**
[2] **(2019) 5 SCC 755**
[3] **AIR 2021 SC 653**
[4] **2020 SCC Online Del 1950**

"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 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 sub-section 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 sub-section 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.

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17. The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to

perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

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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 Indian 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. 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.***[5] (supra) which, as we have seen hereinabove, was only on 3-07-2017. 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 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in ***TRF Ltd***[5] (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 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 incorrect 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."

[5] **AIR 2017 SC 3889**

(emphasis supplied)

28. The import of these decisions is as unequivocal as it is inexorable. An "express agreement in writing", waiving the applicability of Section 12(5), is the statutory *sine qua non*, for a person, who is otherwise subject to the rigour of Section 12(5), to remain unaffected thereby. Nothing less would suffice; no conduct, howsoever extensive or suggestive, can substitute for the "express agreement in writing". Sans such "express agreement in writing", Section 12(5), by operation of law, invalidates the appointment, of any person whose relationship, with the parties to the disputes, falls under any of the categories specified in the Seventh Schedule of the 1996 Act. The invalidity, which attaches to such a person would also, *ipso facto*, attach to her, or his, nominee.

30. Conscious of the statutory interdict, Mr. Prashant Mehta, learned counsel appearing for the respondent, sought to pitch his case on the proviso to Section 12(5) of the 1996 Act, which excepts the applicability of the said sub-section to cases in which, subsequent to the arising of disputes, the parties waived the applicability of sub-subsection by an express agreement in writing.

31. A reading of the afore-extracted passages from ***Bharat Broadband Network Ltd.***[2], however, make it abundantly clear that, unlike Section 4 of the 1996 Act, the agreement in writing, to which the proviso to sub-Section 12(5) refers, has to be express. Agreement, by conduct, is excluded, *ipso facto*, from the applicability of the said proviso.

32. Mr. Prashant Mehta has invited my attention to the fact that, by seeking extension, twice, for the completion of arbitral proceedings by the existing learned sole arbitrator, as well as by communicating, via e-mails, to the learned sole arbitrator, on 6th January, 2020 and 20th January, 2020, seeking, *inter alia*, extension of time to file the affidavit by way of evidence of its witnesses, the petitioner has expressly consented, in writing, to the functioning of the learned sole arbitrator, as the arbitrator to adjudicate the disputes between the petitioner and the respondent.

34. -Express waiver of rights", as a jurisprudential concept, has invoked judicial cogitation, on more than one occasion. In

Inderpreet Singh Kahlon v. State of Punjab[6], it was held thus:

"Waiver is the abandonment of a right, and thus is a defence against its subsequent enforcement. Waiver may be express or, where there is knowledge of the right, may be implied from conduct which is inconsistent with the continuance of the right. A mere statement of an intention not to insist on a right does not suffice in the absence of consideration; but a deliberate election not to insist on full rights, although made without first obtaining full disclosure of material facts, and to come to a settlement on that basis, will be binding."

35. Thus, even where waiver was allowable by consent - which, notably, the proviso to Section 12(5) of the 1996 Act *does not permit* - the Supreme Court opined that a mere statement not to insist on a right was insufficient to constitute waiver. In ***Mademsetty Satyanarayana v. G. Yelloji Rao***[7], the Supreme Court quoted, approvingly, the definition of "waiver", as devised by the Privy Council in ***Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha***[8], as "an agreement to release or not to assert a right". Emphasizing that "waiver" involved "intentional relinquishment of a known right", it was underscored, in ***Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh***[9], that "there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights". Waiver, whether express or implied, necessarily requires "an intentional act with knowledge." Even more emphatic is the following exposition, to be found in ***State of Punjab v. Davinder Pal Singh Bhullar***[10] (in para 41 of the report):

"Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with

[6] AIR 2006 SC 2571
[7] AIR 1965 SC 1405
[8] AIR 1935 PC 79
[9] AIR 1968 SC 933
[10] AIR 2012 SC 364

full knowledge about the same, he intentionally abandons them. (Vide ***Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha***[8], ***Basheshar Nath v. CIT***[11], ***Mademsetty Satyanarayana v. G. Yelloji Rao***[7], ***Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh***[9], ***Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corpn.***[12], ***Sikkim Subba Associates v. State of Sikkim***[13], and ***Krishna Bahadur v. Purna Theatre***[14]"

"Waiver", held ***Joginder Singh Sodhi v. Amar Kaur***[15], "is a question of fact which must be expressly pleaded *and clearly proved*." To the same effect, as the above decisions, is ***A.P.S.R.T.C. v. S. Jayaram***[16]**.**

36. In the face of the law laid down in the aforesaid decisions, chiefly, in ***Bharat Broadband Network Ltd.***[2], it is not possible to accede to the submissions of Mr. Mehta.

37. The Supreme Court has laid down clearly and unmistakably, that the "express agreement in writing", to which the proviso to Section 12(5) alludes, has to be exactly that, and no less; in other words, the parties must expressly agree in writing to a waiver of Section 12(5) of the 1996 Act.

38. The said agreement in writing must reflect awareness, on the parties, to the applicability of the said provision as well as the resultant invalidation, of the learned arbitrator, to arbitrate on the disputes between them, as well as a conscious intention to waive the applicability of the said provision, in the case of the disputes between them.

39. It is obvious that the filing of applications for extension of time for continuance and completion of the arbitral proceedings, or applications to the arbitrator, for extension of time to file the affidavit of evidence, etc., cannot constitute an "agreement in writing" within the meaning of the proviso to Section 12(5) of the 1996 Act.

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[11] AIR 1959 SC 149
[12] AIR 1991 SC 2130
[13] (2001) 5 SCC 629
[14] (2004) 8 SCC 229
[15] (2005) 1 SCC 31
[16] (2004) 13 SCC 792

> **40.** In view of the aforesaid discussion, it is apparent that, by the operation of Section 12(5) of the 1996 Act, in the light of the decisions of the Supreme Court in ***TRF Ltd.***[5] , ***Perkins Eastman Architects DPC***[1] and ***Bharat Broadband Network Ltd.***[2], the learned sole arbitrator, appointed by Mr. N.P. Gupta, before whom the arbitral proceedings have been continuing thus far, has been rendered *de jure* incapable of continuing to function as arbitrator, within the meaning of Section 14(1)(a) of the 1996 Act."

7. Mr. Singh, essentially predicates his opposition, to the petition, on two facts. Firstly, he draws my attention to the procedural order dated 5th August, 2019, passed by the learned arbitral tribunal, Para 5 of which records thus:

> **"5.** The Sole Arbitrator declared under Section 12 of the Arbitration & conciliation Act 1996 that there are no circumstances likely to give rise to any Justifiable doubts as to their independence and impartiality. Both the parties confirmed that they have no objection to the Arbitral Tribunal."

8. Secondly, Mr. Singh, relies on a communication, dated 3rd December, 2020, from the petitioner to the learned arbitrator, whereby the petitioner provides its consent for extension of six months for completion of the arbitral proceedings.

9. Neither of these considerations can operate as an express waiver in writing, of the applicability of Section 12(5) of the 1996 Act. In fact, similar contentions, including the contention regarding the request for extension of time operate as a waiver to Section 12(5) were advanced before this Court and narrated in ***JMC Projects (India) Ltd. v. Indure Pvt. Ltd.***[4], as is apparent from the paragraphs extracted hereinabove.

10. Clearly, therefore, the learned arbitrator is *de jure* rendered incapable of continuing with the arbitral proceedings.

11. This order does not seek, in any manner, to comment on the competence or independence of the learned arbitrator. If the learned arbitrator has been rendered incapable of proceeding with the dispute, that is by operation of Statute and not for any other reason. This Court, has, no reason to dispute the competence or impartiality of the learned arbitrator.

12. Mr. Ratan Singh also seeks to emphasize the fact that the arbitral proceedings are in an advanced stage, and that this petition, is met by laches.

13. That contention, unfortunately, is not available to the petitioner, in view of the statutory right conferred by Section 12(5) of the 1996 Act. That right cannot be divested by the Court, merely on the grounds that the petitioner has approached this Court. Be it noted, I am not examining the aspect of whether the present petition is belated or otherwise, as that cannot be as ground to reject the petition.

14. In view thereof, the present petition is allowed. The mandate of the learned arbitrator, presently in *seisin* of the dispute between the parties, stands terminated. As such, this Court requests Hon'ble Ms.Justice Indu Malhotra, an eminent retired Judge of the Supreme Court, to arbitrate on the disputes between the parties. The contact details of the learned Arbitrator are as under:

Cell No. : 9810026757
E-mail ID : indu.malhotra@gmail.com

15. The learned arbitrator is requested to file the requisite disclosure under Section 12(2) of the 1996 Act, within a week of entering on reference.

16. The fees of the learned arbitrator would be decided in consultation with the learned Counsel for both sides.

17. With the aforesaid observations, this petition stands allowed accordingly, with no orders as to costs.

18. It is also mentioned that the respondent, which is a Public Sector Undertaking, has already incurred costs of arbitration to the tune of over ₹ 35 lakhs.

19. Apropos this aspect, the parties are at liberty to take up the issue before the learned arbitrator, who would continue with the proceedings as would be decided by her in consultation with the parties.

C.HARI SHANKAR, J

SEPTEMBER 20, 2021
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