Via video conferencing

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

Date of Decision:- 01.09.2020

\+ O.M.P. (T) (COMM.) 35/2020 & I.A.6153/2020

M/S. OMCON INFRASTRUCTURE PVT. LTD. ..... Petitioner

Through Mr.Gopal Jain, Sr.Adv. with Mr.Alok Kumar, Mr.Shivang Singh, Advs

versus

INDIABULLS INVESTMENT ADVISORS LTD. ..... Respondent

Through Mr.Rudreshwar Singh , Adv.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. This a petition under Sections 14 & 15 of the Arbitration and Conciliation Act, 1996 seeking termination of the mandate of the learned Arbitrator, unilaterally appointed by the respondent. The petitioner also seeks quashing of order dated 03.02.2020 passed by the learned Arbitrator, whereby the petitioner's application under Section 12 of the Act has been rejected.

2. The dispute arises out of an agreement entered into between the parties on 01.07.2017, whereby the respondent was appointed by the petitioner as its marketing representative for the development of its project "Reign Forest" at Visakhapatnam. The said agreement provides for the resolution of disputes by way of arbitration under Clause 7.2 which reads as under:-

> *"7.2 Notwithstanding anything to the contrary in this Agreement, the Parties agree that if any dispute/*

disagreement/ differences ("Dispute") arises between the Parties during the subsistence of this Agreement and/ or thereafter, in connection with, inter alia, the validity, interpretation, implementation and/ or alleged breach of any provision of this Agreement, jurisdiction or existence/ appointment of the arbitrator or of any nature whatsoever, then, the Dispute shall be referred to a sole arbitrator who shall be nominated/ appointed by the Company only. The Parties expressly agree that, in any circumstance, the appointment of the sole arbitrator by the Company shall be and shall always be deemed to be the sole means for securing the appointment/ nomination of the sole arbitrator without recourse to any other alternative mode of appointment/ nomination of the sole, arbitrator."

3. Upon disputes having arisen between the parties, the respondent, vide its legal notice dated 15.02.2019, called upon the petitioner to pay a sum of Rs.4,11,44,163/- towards refund of security fee and marketing fee, which the petitioner refused to pay. The respondent then invoked arbitration on 14.06.2019 and simultaneously appointed Justice S.K. Katriar, a former Judge of Patna High Court, as its sole Arbitrator by exercising its power under Clause 7.2 of the agreement.

4. Upon receiving information about the unilateral appointment of the Arbitrator by the respondent, the petitioner, vide its letter dated 25.08.2019, informed the learned Arbitrator that the said unilateral appointment was not acceptable to it. However, it appears that since the petitioner did not appear before the learned Arbitrator on 26.08.2019, *i.e.,* the date of the first sitting; the learned Arbitrator

adjourned the matter and vide its subsequent order passed on 25.09.2019, fixed the schedule for conduct of further proceedings and also directed the parties to deposit his fees in accordance with the terms of para 5 thereof. The petitioner, however, did not appear before the learned Arbitrator even on the next date and on 20.01.2020, filed an application under Section 12 of the Act before the learned Arbitrator, challenging his very jurisdiction to continue with the arbitration. In the said application, the primary plea of the petitioner was that the unilateral appointment of the arbitrator by the respondent, by resorting to clause 7.2 of the agreement dated 01.07.2017, was contrary to the decision of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC & Anr. V. HSCC India Ltd., [2019 SCC Online SC 1517]***.

5. Vide his order dated 03.02.2020, the learned Arbitrator had rejected the petitioner's application by holding that the same was barred by delay and laches and that the decision of the Apex Court in ***Perkins Eastman Architects DPC & Anr. (supra)*** was not applicable to the present case, as the authority to nominate the arbitrator in the present case was vested in a Company, and not in an individual.

6. Assailing the aforesaid order passed by the learned Arbitrator, the present petition has been filed praying for the termination of his mandate.

7. In support of the petition, learned senior counsel for the petitioner submits that once it is an admitted position that the respondent had unilaterally appointed the sole Arbitrator on 14.06.2019 and that the petitioner had, even before the first date of

hearing before the learned Arbitrator *i.e.* 26.08.2019, informed the learned Arbitrator that his appointment was not acceptable to the petitioner, its objection could not be rejected on the ground of delay and laches. He further submits that the learned Arbitrator has failed to appreciate the ratio of the decision in ***Perkins Eastman Architects DPC & Anr. (supra)*** and has, erroneously come to the conclusion that the same would not be applicable to the facts of the present case. He, therefore, prays that the mandate of the learned Arbitrator be terminated and an independent Arbitrator be appointed by this Court.

8. Though a counter affidavit has been filed opposing the petition, learned counsel for the respondent is unable to dispute the fact that the petitioner had objected to the unilateral appointment of the learned Arbitrator by the respondent at the very first instance. He also does not dispute that the ratio of the decision in ***Perkins Eastman Architects DPC & Anr. (supra)*** would also be applicable to a situation like in the present case, wherein the appointment is made by a Company, instead of a named individual.

9. Having heard the learned counsel for the parties, I have no hesitation in holding that the unilateral appointment of the learned sole Arbitrator by the Respondent Company on 14.06.2019, in terms of Clause 7.2, cannot be sustained. The ratio of the decision in ***Perkins Eastman Architects DPC & Anr. (supra)*** cannot be read in such a narrow manner as has been sought to be done by the learned Arbitrator. In my view, once the Managing Director of the Respondent Company was ineligible to appoint the arbitrator in the light of the decision in ***Perkins Eastman Architects DPC & Anr.***

(supra), the same would also bar the Company itself from unilaterally appointing the sole arbitrator. In this regard, reference may also be made to the decision in ***Proddatur Cable TV Digi Services v. Siti Cable Network Limited [OMP T (COMM) 109/2019]***, wherein while dealing with a similar clause, a Coordinate Bench of this Court held as under:-

> *"25. Insofar as the reliance by the respondent on the judgments permitting unilateral appointment by the Authority designate of one party to the agreement is concerned, in my view, the same will have no relevance in view of the judgment of the Supreme Court in the case of Perkins (supra). The argument of the respondent that in the Arbitration Clause before the Supreme Court in the case of Perkins was with regard to the power of a Managing Director to appoint an Arbitrator whereas in the present case it is the Company only merits rejection. First and foremost, one has to see the rationale and the reasoning behind the judgment in the case of Perkins (supra). The Supreme Court held that the Managing Director was ineligible from appointing an Arbitrator on the simple logic that a Managing Director of a Company would always have an interest in the outcome of the arbitration proceedings. The interest in this context takes the shape of bias and partiality. As a natural corollary, if the Managing Director suffers this disability, even if he was to appoint another person as an Arbitrator, the thread of biasness, partiality and interest in the outcome of the dispute would continue to run. Seen in this light, it can hardly be argued that the judgment in Perkins (supra) will not apply only because the designated Authority empowered to appoint an Arbitrator is other than a Managing Director. Moreover, as brought out by the respondent itself, Company here is run by the Board of Directors. The „Board of Directors" is defined in Section 2(10) of the Companies Act, 2013 as under:*

"2(10) "Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company."

Thus, the Company is run none other than the Directors collectively. Duties of the Directors have been stipulated in Section 166 of the Companies Act, 2013. A bare perusal of the duties clearly reveals that the Director at all times, has to act in good faith to promote the objects of the Company and in the best interest of the Company, its employees and the shareholders. A Director shall not involve in a situation in which he may have a direct or an indirect interest that conflicts or possibly may conflict with the interest of the Company. It goes without saying that the Directors of the Company as a part of the Board of the Directors would be interested in the outcome of the Arbitration proceedings. The Company therefore, acting through its Board of Directors would suffer the ineligibility under Section 12(5) read with Schedule VII of the Act. The same ineligibility would also apply to any person appointed by the said Company. Thus, in my view, for the purposes of Section 11(6) and Section 12(5) read with Schedule VII, there cannot be a distinction based on the appointing authority being a Company.

26. Insofar as the argument of applicability of the judgment in Perkins (supra) case to on-going arbitration proceedings is concerned, the Supreme Court in the case of Bharat Broadband (supra) has already decided the said issue. Relevant paras of the judgment in the case of Bharat Broadband (supra) have been extracted above.

Thus, following the ratio of said judgment, once the Supreme Court has laid down the law under Section 12 (5) of the Act, Section 14 of the Act gets attracted and the mandate of the Arbitrator is terminated de jure.

27. The respondent is not right in its contention that only because the arbitration agreement was entered into on 30.08.2015, i.e. before the coming into force of the Amendment Act, 2016, the judgment of Perkins (supra) and Section 12(5) of the Act would not apply. First and foremost, Section 12(5) of the Act itself begins with a nonobstante clause stipulating that Section 12(5) would apply notwithstanding any prior agreement to the contrary. Secondly, the relevant date to decide the applicability of Section 12(5) is not the date of the agreement but the date on which the Arbitration commences. By virtue of Section 21 of the Act, the Arbitration commences when the notice invoking arbitration is sent. In the present case, the notice invoking the arbitration agreement was sent by the petitioner on 28.10.2018, which is after the insertion of Section 12(5) of the Act by the Amendment Act, 2016. Thus, there is no doubt that Section 12(5) would apply to the present case and the Company is debarred in law from appointing the Arbitrator. I am fortified in my view by the judgment of the Supreme Court in the case of Board of Control for Cricket in India vs. Kochi Cricket Private Limited & Ors. (2018) 6 SCC 287, the relevant paras of which read as under:

"39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the

amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force."

10. I am also unable to agree with the conclusion arrived at the by the learned Arbitrator that there was any inordinate delay on the part of the petitioner in raising an objection to his appointment. The petitioner had admittedly conveyed its objection to the learned Arbitrator even before the first sitting was held by him and, therefore, it cannot be stated that the petitioner was in any way guilty of delay, laches or negligence.

11. For the aforesaid reasons, the mandate of the learned Arbitrator, namely Justice (Retd.) S.K. Katriar is terminated, and Justice Reva Khetrapal, a former Judge of this Court (Mobile No. 9871300030) is appointed as the sole Arbitrator for adjudication of the disputes between the parties in relation to the Agreement dated 01.07.2017. It is, however, made clear that the termination of the mandate of Justice

(Retd.) S.K. Katriar, will not be seen as a reflection on his impartiality and fairness.

12. At this stage, learned senior counsel for the petitioner fairly submits that since the respondent had paid a fee of about 5 lakhs to the earlier Arbitrator so appointed, the petitioner volunteers to contribute a sum of Rs.1 lakh towards the fees paid by the respondent to the erstwhile Arbitrator.

13. It is made clear that this Court has not considered the rival claims of the parties on merits and it will, therefore, be open for them to file claims/counter claims and raise all pleas permissible in law, before the learned Arbitrator, which will be decided in accordance with law.

14. Before commencing arbitration proceedings, the Arbitrator will ensure compliance of Section 12 of the Act.

15. A copy of this order be sent to the learned Arbitrator through electronic means.

16. The petition along with pending application is disposed of.

REKHA PALLI, J

SEPTEMBER 1, 2020
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