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

**Date of Decision: 23.03.2021**

+ O.M.P. (T) (COMM.) 60/2020, I.As. 9526/2020 & 2949/2021

RAKSHA VIGYAN KARAMCHARI SAHKARI AWAS SAMITI  
LTD. .... Petitioner

Through: Mr. Ravi Ranjan, Advocate.

versus

PROTO DEVELOPERS AND TECHNOLOGIES PVT. LTD.  
..... Respondent

Through: Mr. Ranjit Singh, Advocate.

**CORAM:**  
**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**SANJEEV NARULA, J. (Oral):**

1. The present petition under Section 14(2) of the Arbitration and Conciliation Act, 1996, seeks termination of the mandate of the Sole Arbitrator appointed unilaterally by the Respondent.
2. It is apposite to note the factual background before dealing with the contentions of the parties. The same is narrated below in brief:
  - i. The Petitioner is a group housing co-operative society, formed and registered in the year 1991 under the Uttar Pradesh Co-operative Societies Act, 1965.

- ii. It entered into a 'collaboration agreement' on 23<sup>rd</sup> June, 2006 with a partnership firm M/s. Rose Enterprises (through its partner Mr. S. L. Maloo) for construction of residential flats/ bungalows/ commercial construction for its members. Later, M/s. Rose Enterprises was incorporated into the Respondent company with Mr. S. L. Maloo as its Director, and its responsibilities under the abovesaid agreement were assigned to the Respondent.
- iii. Under Clause 3 of the abovesaid agreement, it was *inter alia* agreed that the Respondent would be entitled to introduce 25 new members in the place of existing members who exhibited their desire to withdraw from the Petitioner-Society. Under such terms, Mr. S. L. Maloo was inducted to the Managing Committee, and went on to become the President, taking full control of the Petitioner-Society.
- iv. Petitioner alleges that Mr. Maloo, by misusing his position as the President: (a) started inducting members in the Petitioner-society without the knowledge of its Managing Committee or its members, and (b) on behalf of the Petitioner-Society, entered into a tripartite agreement titled 'Indenture of Collaboration' dated 09<sup>th</sup> February, 2010 with M/s. Antriksh Realtech Pvt. Ltd. [*hereinafter referred to as 'Antriksh Realtech'*] and the Respondent for development, construction and finishing of the housing society.
- v. In the year 2016, the members of Petitioner-Society came to know that Mr. S. L. Maloo was involved in unlawful activities against the

Petitioner-Society such as siphoning off, mismanagement and misappropriation of funds of the society, awarding membership of the society unlawfully, opening and maintaining secret bank accounts in the name of the society. On this ground, a complaint u/S. 38 of the U.P. Cooperative Societies Act, 1965 was filed against him before the Housing Commissioner/Sub-Registrar of Awas and Vikas Parishad, Lucknow. Thereafter, Mr. S. L. Maloo was removed from the post of President of the Managing Committee of the Petitioner-Society *vide* an order dated on 27<sup>th</sup> October, 2016 passed by the Housing Commissioner.

- vi. It is alleged that after being ousted, Mr. Maloo, through the Respondent company, initiated numerous arbitration proceedings against the Petitioner-Society, impleading Antriksh Realtech as well as various government departments as Respondents thereto.
- vii. Sometime in 2017, the Respondent herein, without serving any notice invoking arbitration, unlawfully and unilaterally appointed a panel of three arbitrators, under the agreement dated 9<sup>th</sup> February 2010. The Arbitral Tribunal accepted such appointment, without making statutory disclosures under Section 12 and without going through the arbitration clause of the agreement which says that the dispute was to be referred to the Arbitral Tribunal consisting of two arbitrators - one to be appointed by the Petitioner and the other to be appointed by respondent.

- viii. In the said arbitral proceedings, an order dated 08<sup>th</sup> March, 2017 was passed by the Tribunal, *inter alia* staying the Order dated 27<sup>th</sup> October, 2016 passed by the Housing Commissioner/ Sub-Registrar of Awas and Vikas Parishad, Lucknow.
- ix. On 10<sup>th</sup> May, 2017, the Petitioner raised a challenge to the appointment and jurisdiction of the Tribunal. However, by virtue of non-appearance of the Claimant/Respondent herein, the arbitration proceedings were terminated due to non-prosecution on the same date.
- x. On the very same day i.e., 10<sup>th</sup> May 2017, the Respondent-Company again unilaterally appointed another Sole Arbitrator (one Mr. Pankaj Garg, Advocate), without giving notice, to the Petitioner or to other Respondents including M/s Antriksh Realtech.
- xi. M/s Antriksh Realtech applied Section 11(6) of the Arbitration and Conciliation Act, 1996 before this Court seeking appointment of Arbitral Tribunal and termination of the illegal proceedings.<sup>1</sup> This Court, *vide* order dated 16<sup>th</sup> March, 2018, with joint consent, referred the parties to the Delhi International Arbitration Centre (DIAC) with a direction to appoint a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Indenture of Collaboration dated 9<sup>th</sup> February, 2010. In pursuance of the same, Mr. Sanjay Jain, Senior Advocate, was appointed as the Sole Arbitrator.

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<sup>1</sup> Arbitration Petition No. 435/2017.

- xii. Now, during the pendency of above-noted arbitral proceedings, the Respondent has appointed one Mr. Pradeep Kumar Kaushik, Advocate, as a Sole Arbitrator, again without prior notice or consent, and made (i) Petitioner, (ii) Corporation Bank, and (iii) Additional Commissioner (Housing)-cum-Additional Registrar Co-operative Societies and Uttar Pradesh Awas Vikas Parishad, parties thereto. This Sole Arbitrator, *vide* order dated 03<sup>rd</sup> January, 2020 has frozen the bank account of the Petitioner and stayed the order of the Additional Commissioner dated 11.12.2019. The Sole Arbitrator has also dismissed the applications made by the Petitioner-Society challenging his appointment and seeking vacation of *ex-parte* stay, on 19<sup>th</sup> February, 2020 *inter alia* holding that under para 6 of the collaboration agreement dated 05.09.2016 the respondent has right to appoint sole arbitrator unilaterally.
- xiii. Being aggrieved by the order of the Arbitral Tribunal dated 3<sup>rd</sup> January, 2020, the Petitioner filed an appeal under Section 37 of the Act. The said appeal was, however, dismissed by an order of this Court dated 21<sup>st</sup> January, 2021. The Petitioner has since challenged the order of 19<sup>th</sup> February, 2020 passed by the Sole Arbitrator, before Ld. District and Session Judge, Patiala House Court, New Delhi.
- xiv. Independently, the Petitioner filed an Arbitration Petition No. 445 of 2020 under Section 11(6) of the Arbitration and Conciliation Act, 1996 before this Court, for the appointment of an Arbitral Tribunal in accordance with the arbitration clause of the agreement between the

parties. The same was disposed of by this Court *vide* order dated 30<sup>th</sup> September, 2020 by giving liberty to the Petitioner to seek termination of the mandate of the Sole Arbitrator by filing an appropriate petition and hence, the present petition has been filed.

3. Learned counsel for the Petitioner has made the following submissions:

- i. That the appointment of Mr. Pradeep Kumar Kaushik is an abuse of the process of the law, as the Respondent could not have invoked arbitration afresh during the pendency of the arbitral proceedings before the DIAC-appointed Arbitrator. The facts and circumstances raise serious doubts about the integrity and impartiality of the sole arbitrator.
- ii. The appointment is without notice to the Petitioner. Besides, the appointment was done unilaterally, which is in contravention of the judgment of the Supreme Court in *Perkins*.<sup>2</sup>
- iii. The Respondent could not have impleaded parties like Corporation Bank, Additional Commissioner (Housing)-cum- Additional Registrar Co-operative Societies, and Uttar Pradesh Awas Vikas Parishad, in the arbitration proceedings as there is no privity of contract with the Respondent and the said parties are not signatories to the arbitration agreement.

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<sup>2</sup> *Perkins Eastman Architects DPC v. HSCC India Ltd.*, AIR 2020 SC 59.

- iv. To highlight the abuse of process of law, the Petitioner invites attention to the order passed by Sole Arbitrator dated 3<sup>rd</sup> January, 2020 whereby the bank account of the Petitioner was frozen and the order of the Additional Commissioner dated 27<sup>th</sup> October, 2016 was injunctioned. Further attention is invited to the dismissal of the Petitioner's challenge under Section 13 which is contrary to the statutory provisions under the Act.
- v. Mr. Kaushik, the Sole Arbitrator, cannot be called impartial as he is, in fact, an advocate for a Director of the Respondent-company.

4. Mr. Ranjit Singh, learned counsel for the Respondent, on the other hand, controverts the above submissions on the following grounds:

- i. The petition, as framed, is not maintainable as the Petitioner has already availed the remedies available under the statute as the Petitioner has filed an appeal under Section 37.
- ii. The Petitioner has been participating in the arbitration proceedings initiated by the Respondents before the Sole Arbitrator, without raising any objection challenging the jurisdiction of the Sole Arbitrator within the statutory period of 15 days as provided under the Act, and thus the Petitioner's silence must be treated as acquiescence.
- iii. The dispute which is now sought to be referred to Mr. Pradeep Kumar Kaushik, arises out of an 'agreement of collaboration' dated 27<sup>th</sup>

August, 2016 and a 'supplementary agreement' dated 5th September, 2016, which has no connection with the dispute that has been referred to arbitration by this Court before the DIAC on 16<sup>th</sup> March, 2018. Further, the parties in the present proceedings before the arbitration are also different.

- iv. The objections sought to be raised herein can be urged before the Tribunal under Section 16 of the Act. Reliance was placed upon the judgment of the Supreme Court in *S.B.P. and Co. v. Patel Engineering Ltd.*<sup>3</sup>

5. In rejoinder thereto, the Counsel for the Petitioner disputes the existence and validity of the 'agreement of collaboration' dated 27<sup>th</sup> August, 2016 and the 'supplementary agreement' dated 5th September, 2016, on the ground that the abovesaid agreement are fabricated documents, made-up by the Respondent to justify the unilateral appointment of Mr. Kaushik as sole arbitrator.

6. This court has given due consideration to the submissions advanced by the parties. The appointment of Mr. Pradeep Kumar Kaushik is without invocation under section 21 of the Act. The Petitioner has taken specific objection to this effect, yet the Respondent, in its reply, has not filed a copy of the notice. This is clearly an attempt to avoid the scrutiny of the Court. In the absence of a notice invoking arbitration, the Arbitration Agreement sought to be invoked and the nature of disputes sought to be referred for



adjudication before Mr. Pradeep Kumar Kaushik, cannot be ascertained with clarity.

7. Be that as it may, the Respondent in the reply to the Petition has relied upon a document titled ‘Supplementary to the Development Co-operation’, dated 5<sup>th</sup> September, 2016, which contains an arbitration clause. The same is worded as under:

*“The provision in earlier bipartite agreements for appointment of two Arbitrators one each by Raksha and Proto-stands modified to the extent that even a sole Arbitrator appointed by either party first can function as such and once appointed the other party shall be bound to join the arbitration proceedings without questioning such appointment.”*

8. According to the counsel for the Petitioner, this agreement was never pleaded by the Respondent in the proceedings which are pending before the Sh. Pradeep Kumar Kaushik and draws the attention of this court to the claim petition filed by Respondent. Upon a perusal of the same, it is noted that the only contracts that were sought to be placed on record were: (i) copy an ‘agreement’ dated 23<sup>rd</sup> June, 2006, and (ii) copy of a ‘collaboration agreement’ dated 21<sup>st</sup> January, 2010, and (iii) copy of a ‘collaboration agreement’ dated 27<sup>th</sup> August, 2016.

9. Let us examine the aforesaid agreements. The ‘collaboration agreement’ dated 23<sup>rd</sup> June, 2006, and the ‘collaboration agreement’ dated 27<sup>th</sup> August, 2016, have identical arbitration clauses, which are reproduced below:

*“All disputes arising out of this Agreement will be settled mutually or else per provisions of Arbitration Act, 1996. The jurisdiction of Delhi Court will prevail.”*

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<sup>3</sup> AIR 2006 SC 450.

10. The ‘indenture of collaboration’ dated 09<sup>th</sup> February, 2010 and the ‘agreement of development collaboration’ dated 21<sup>st</sup> January, 2010, contain identical arbitration clauses, that read as follows:

*“That in the event of any question or dispute arising under, in connection with, incidental to, and/or interpretation or scope of this Indenture of Collaboration or relating thereto, the same shall be referred to Arbitration of two persons, one to be appointed by the Developers and the other to be appointed by the Owners and the decision of the Arbitrators shall be final and conclusive. The provisions of the Arbitration & Conciliation Act, 1996 and the statutory modifications, amendments and/or re-enactment thereof from time to time shall apply to such arbitration. The parties shall bear and pay their own costs, charges, and expenses of the proceedings before the Arbitrators.*

*In the event, it is revealed that provisions of U.P. Cooperative Societies Act and Rules framed thereunder are applicable to any such disputes, then and in that event provisions of said Act shall apply.”*

11. None of the aforesaid agreements confer any right on the Respondent to unilaterally appoint an Arbitrator. Thus, the Respondent cannot justify the appointment of Mr. Kaushik, basis the afore-noted agreements. In these circumstances, the Respondent has relied upon the document titled as “Supplementary to Development Co-operation”, dated 5<sup>th</sup> September, 2016, to justify the unilateral appointment. This agreement, however does not form the basis of the claim before Mr. Pradeep Kumar Kaushik. Pertinently, in the absence of any pleadings to that effect, it is incomprehensible as to how Mr. Pradeep Kumar Kaushik, has assumed jurisdiction. The court thus finds merits in the contention of the Petitioner that the agreement that is annexed with the reply is only an attempt justify the initiation of arbitration

proceedings behind the back of the Petitioner. Further, the arbitration clause in agreement dated 5<sup>th</sup> September, 2016, as extracted above gives unilateral right to any one party to appoint the Arbitral Tribunal. This is clearly in conflict with the judgment of the Supreme Court in *Perkins (supra)*, where it has been held that the unilateral appointment of an Arbitral Tribunal by any one party who is interested in the outcome or decision of the dispute is impermissible. Thus, following the ratio of the judgment in the case of *Perkins (supra)*, it is clear that a unilateral appointment of Mr. Pradeep Kumar Kaushik by the Respondent is invalid.

12. The other objections of the Respondents are also misconceived. The objections made by the Petitioner under Section 13 before the Arbitrator do not hinder the Petitioner in invoking the jurisdiction of this Court to seek termination of the mandate of the Arbitrator, on the ground of his appointment is conflicting with Section 12 of the Act. The scope and ambit of objections under Section 12 (1) read with Section 13 of the Act is distinct from objections under Section 12(5) read with Section 14 of the Act. Therefore, it cannot be said that by not filing objections before the Arbitral Tribunal under Section 13 of the Act, the Petitioner has waived its objections under Section 12(5) of the Act. Besides, the Petitioner has been continuously contesting the appointment of Mr. Pradeep Kumar Kaushik, as is evident from the facts as noted above, and thus no case for delay or laches is made out.

13. The manner in which the Respondent has proceeded in the appointment of the Arbitrator, during an on-going arbitration is inexcusable and cannot

be countenanced. In view of the foregoing, the Court has no hesitation in holding that the Respondent's actions clearly amount to grave abuse of the process of law. Accordingly, Mr. Pradeep Kumar Kaushik presently conducting the arbitration proceedings is declared to be ineligible to act as an Arbitrator and his mandate is hereby terminated, with cost of Rs.50,000/- to be deposited by the respondent with the Delhi Legal Services Authority within a period of four weeks from today.

14. The counsel for the Petitioner states that the court may not proceed to appoint a substitute Arbitrator and let the matter rest with the termination of the mandate. However, in the opinion of the court, the provision of Section 14 of the Act is unequivocal towards the appointment of a substitute Arbitrator once the mandate of an Arbitral Tribunal has been terminated by this Court under the said provision. As the parties are already before an Arbitral Tribunal consisting of a Sole Arbitrator under the aegis of DIAC, it is considered appropriate that the said Sole Arbitrator, be also appointed as an Arbitrator to adjudicate the disputes that were purportedly raised by the Respondent and were the subject matter of adjudication before Mr. Pradeep Kumar Kaushik. Accordingly, Mr. Sanjay Jain, Senior Advocate is appointed as the substitute Sole Arbitrator.

15. Further, having regard to the facts noted above, and pertinently, since no notice invoking arbitration has been placed on record before this Court, it is considered appropriate to direct that the Sole Arbitrator shall conduct the arbitral proceedings between the parties *de-novo*.

16. Needless to say, none of the observations made herein for the purpose of deciding the present petition shall come in the way of Arbitral Tribunal to adjudicate the disputes that have arisen between the parties.

17. The present petition is allowed in the above terms, and the pending applications are also disposed of.

**MARCH 23, 2021**

*v/nk*

*(corrected and released on 1<sup>st</sup> April, 2021)*

**SANJEEV NARULA, J**

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