IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 12.11.2021

\+ **O.M.P. (T) (COMM.) 16/2021 and IA No. 1482/2021**

DELHI INTEGRATED MULTI MODAL TRANSIT SYSTEMS LTD ..... Petitioner

versus

DELHI JAL BOARD ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sumit Bansal, Mr Udaibir Singh Kochar and Ms Tanya Aggarwal, Advocates.

For the Respondent : Ms Sangeeta Bharti, Standing Counsel for DJB with Ms Mehak Kanwar, Mr Hilal Haider, Ms Aishwarya Dobhal and Ms B. Khan, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 14(2) of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') praying that the mandate of the learned Sole Arbitrator (hereinafter 'Dr. RCM') be terminated and an independent and impartial arbitrator be appointed in substitution of the learned Arbitrator.

2. The petitioner claims that the mandate of Dr. RCM, a former civil servant, is required to be terminated as he has been unilaterally appointed by the Chief Executive Office (CEO) of the respondent and is, thus, ineligible to act as an arbitrator by virtue of Section 12(5) of the A&C Act.

3. Briefly stated, the relevant facts that are necessary to address the controversy are as under: -

4. On 10.06.2011, the petitioner and the respondent had entered into an agreement for the purpose of "*Design, Development, Implementation and Operation of WTDMS Project involving the development of Software, Supply, & Installation of System Software, Hardware Networks, establishment of WTDMS Service Centres and Operation & Maintenance of WTDMS Solution"* (hereinafter 'the Contract').

5. Admittedly, disputes have arisen between the parties in respect of the said aforesaid Contract.

6. By a letter dated 22.01.2018, the petitioner called upon the respondent to pay a sum of ₹25,90,46,662/- and claimed that the said amount was due and payable to the petitioner for the period, November 2013 to 15.01.2018, along with interest on delayed payment. The petitioner also claimed a sum of ₹9,96,17,465/- on account of cost of equipment and a sum of ₹87,79,000/- on account of refund of Performance Bank Guarantee, which was submitted by it.

7. On 28.02.2018, the petitioner, once again, requested the respondent to expedite the release of the balance outstanding amount of ₹33,58,25,549/- within fifteen days of receipt of the said letter. Further, the petitioner also invoked the agreement to refer the disputes to arbitration in terms of Article XI of the Contract (the Arbitration Clause) and requested the respondent to appoint an arbitrator to adjudicate the disputes between the parties.

8. On 26.03.2018 and 15.06.2018, the petitioner issued letters reiterating its demand as made in the notice dated 28.02.2018.

9. In view of the aforesaid disputes, by a letter dated 03.12.2018, the CEO of the respondent appointed Dr. RCM as the Sole Arbitrator to adjudicate the disputes between the parties.

10. Thereafter, the learned Arbitrator entered upon reference and on 10.04.2019, the Arbitrator submitted its declaration as required under Section 12 of the A&C Act.

11. On 30.04.2019, the petitioner filed its Statement of Claims and on 12.07.2019, the respondent filed its Statement of Defence. The respondent also filed counter-claims.

12. It is averred in the petition that during the pendency of the proceedings, the petitioner became aware that Dr RCM had been appointed as a whole-time member of the District Consumer Forum for Central Delhi on 08.03.2019. Subsequently, the petitioner also became

aware that Dr RCM was empaneled as an arbitrator on the panel maintained by the respondent.

13. Thereafter, on 13.08.2020, the petitioner filed an application before the Arbitral Tribunal under Sections 12 and 13 of the A&C Act seeking recusal of Dr RCM as an arbitrator on the sole ground that he was ineligible to act as such. Dr RCM rejected the said application by an order dated 12.01.2021.

14. Aggrieved by the impugned order, the petitioner has filed the present petition.

Submissions

15. Mr Bansal, learned counsel appearing for the petitioner has advanced contentions on, essentially, three fronts. First, he submits that in terms of the decisions of the Supreme Court in ***Perkins Eastman Architects DPC & Anr v HSCC (India) Ltd: 2019 SCC OnLine SC 1517,*** and ***Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755,*** the learned Arbitrator is ineligible to act as an arbitrator as he was unilaterally appointed by the CEO of the respondent. Mr Bansal also referred to the decision of this Court in ***City Lifeline Travels Pvt. Ltd. v. Delhi Jal Board ARB.P.4/2021, decided on 27.01.2021*** and ***Score Information Technologies Ltd. v. GR Infra Projects Ltd.: OMP (T) (COMM) 59/2020 decided on 28.01.2021,*** in support of his contention that the right under Section 12(5) of the A&C Act can be waived only by an express agreement in writing, as contemplated under Section 12(5) of the A&C Act. He submits that in

the present case, no such waiver in writing has been given by the parties. He also referred to the decision of ***JMC Projects (India) Ltd. v. Indure Private Limited: OMP (T) (COMM) 33/2020 decided on 20.08.2020*** and contended that filing of applications for extension of time for continuance and completion of the arbitral proceedings, or applications before the arbitrator, for extension of time to file the affidavit of evidence, etc., cannot be construed as an agreement as contemplated under proviso to Section 12(5) of the A&C Act.

16. Second, he submits Rule 11(3) of the Consumer Protection (Salary, Allowances and Conditions of Service of President and Member of the State Commission and District Commission) Model Rules, 2020 (hereinafter the 'Model Rules 2020'), which came into force on 20.07.2020, bars any member of the District Forum to either continue with any ongoing arbitration or take up fresh ones, while functioning in their official capacity. The learned Arbitrator was appointed as a member of the District Forum in the year 2018 and hence, is governed by the Model Rules 2020. He further contended that in view of the provisions of Section 14 of the A&C Act, the learned Arbitrator has become *de jure* unable to perform his functions on his appointment as a member of the District Consumer Forum after the Model Rules, 2020 were notified.

17. Third, he submitted that the non-disclosure by the learned Arbitrator that he was an empaneled arbitrator of the respondent company and had also been appointed as a member of the District Consumer Forum, in the disclosure dated 10.04.2019, raises justifiable

doubts as to the arbitrator's impartiality and independence and, is thus, contrary to Section 12 of the A&C Act.

18. Ms Bharti, learned counsel appearing for the respondent has countered the aforesaid submissions. She stated that in view of the decisions of the Supreme Court in ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*** (*supra*) and ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*), it is no longer permissible for any party to unilaterally appoint an arbitrator. However, she contended that in the present case, the appointment of Dr RCM was not done unilaterally but at the instance and, with the concurrence of the petitioner. She referred to Article IX of the Contract and submitted that in terms of the said clause, the disputes were required to be referred to a sole arbitrator to be appointed by mutual consent of both parties. However, if the parties could not agree on the appointment of an arbitrator within a period of one month, the arbitrator was required to be nominated by the respondent.

19. She submitted that in the present case, the petitioner had requested the respondent to appoint an arbitrator and at its request, the respondent had appointed the learned Arbitrator for adjudicating the subject disputes in connection with the Contract. She submitted that the petitioner had accepted the said appointment and had, by a letter dated 26.12.2018, requested the learned Arbitrator to hold a meeting to discuss the way forward. The learned Arbitrator had held an introductory meeting on 28.01.2019 and had scheduled the next hearing on 28.02.2019 for filing of the claims by the petitioner. The petitioner

did not raise any dispute at that stage. The petitioner had acquiesced in the appointment of Dr RCM as the Arbitrator and had participated in the arbitration proceedings without any reservation. The petitioner had not raised any objections regarding the ineligibility of the learned Arbitrator at the material time and only raised this issue at a belated stage. She submitted that in the aforesaid circumstances, the petitioner had consented to the appointment of the learned Arbitrator and had waived its right to object to his appointment.

20. In addition, she submitted that the respondent has no connections/relation with the learned Arbitrator and further, the Arbitrator had verbally informed the parties about his appointment to the post of Member (Consumer) District Consumer Forum on 17.06.2019, however, no objection was raised at the material time.

21. Next, she contended that the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Member) Rules, 2017 framed under the Finance Act, 2017, which were referred by Mr Bansal, had no application in the present case as the said Rules may have an application regarding the terms and conditions of service of President and Members of the National Consumer Disputes Redressal Commission (NCDRC) but, has no application for Members and Presiding Officers of the State and District Consumer Forums.

22. She further submitted that the appointment of Dr RCM as a member of the District Consumer Forum affords no ground of challenge

to an arbitrator under Section 12 of the A&C Act. She submitted that as far as the Model Rules, 2020 are concerned, the same had been made under the Consumer Protection Act, 2019. However, the learned Arbitrator was appointed as a member of the District Consumer Forum under the Consumer Protection Act, 1986 and the Rules made thereunder. Thus, the Rules relied upon by the petitioner, which came into force on 20.07.2020, would have no application, insofar as the appointment of the learned Arbitrator is concerned.

Reasons and Conclusion

23. At the outset, it is relevant to refer to Article IX of the Contract (the Dispute Resolution Clause). The same is set out below:

> "**DISPUTE RESOLUTION**
>
> l. Any dispute arising out of or in connection with this Agreement shall in the first instance be dealt with in accordance with the escalation procedure as set out in the Governance Schedule.
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> 2. Any dispute or difference whatsoever arising between the parties to this Contract out of or relating to the construction. meaning. scope, operation or effect of this Contract or the validity of the breach thereof, which cannot be resolved through the application of the provisions of the Governance Schedule, shall be referred to a sole Arbitrator to be appointed by mutual consent of both the parties herein. If the parties cannot agree on the appointment of the Arbitrator within a

> period of one month from the notification by one party to the other at existence of such dispute, then the Arbitrator shall be nominated by DJB. The provisions of the Arbitration and Conciliation Act. 1996 will be applicable and the award made there under shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996, or of any modifications. Rules or re-enactments thereof. The Arbitration proceedings will be held at Delhi, India.

24. It is clear from the language of the said clause that the dispute was required to be referred to a sole arbitrator to be appointed by mutual consent of both parties. However, in cases where the parties were unable to agree on the appointment of an arbitrator within a period of one month of the notification of the dispute, the respondent would appoint an arbitrator.

25. The petitioner had invoked the Arbitration Clause by a letter dated 28.02.2018, and had sought appointment of an arbitrator to adjudicate the disputes between the parties. The petitioner had thereafter, sent another letter dated 26.03.2018 addressed to the Executive Engineer requesting that DJB "*recommend and appoint the sole Arbitrator as per the provisions of Arbitration and Conciliation Act, 1996*". The respondent did not take any steps for the appointment of an arbitrator and consequently, the petitioner sent another letter dated 15.06.2019, once again requesting the respondent to recommend and

appoint the sole arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996. The petitioner further stated that in the event it did not hear form the respondent regarding the appointment of an arbitrator within a period of seven days, it would be constrained to seek judicial remedy for the appointment of an arbitrator.

26. The respondent did not take any steps for the appointment of an arbitrator within the said period of seven days. However, it issued an Office Order on 03.12.2018 (Office Order No. 18) stating that "*the competent authority of Delhi Jal Board i.e. CEO has appointed Dr. Ramesh Chand Meena, DANICS (Retd.) sole arbitrator for adjudication of the dispute arisen in respect of the work of …"*.

27. In view of the above, the principal question to be addressed is whether the appointment of Dr RCM as an arbitrator was by concurrence of the petitioner or unilaterally by the respondent as contended on behalf of the petitioner. Ms Bharti had contended that the learned Arbitrator was appointed "*by mutual consent of both the parties*" as contemplated under Article IX of the Contract. However, this Court is unable to accept the aforesaid contention. There is no material on record to indicate that the respondent had recommended the name of Dr RCM to the petitioner and the petitioner had accepted the same. On the contrary, Office Order no. 18 dated 03.12.2018 issued by the respondent indicates that the CEO of the respondent company had appointed the learned Arbitrator. Prior to such appointment, the respondent had also constituted a panel of arbitrators for DJB by an Office Order No. 43 dated 08.11.2018. The said panel comprised of ten

former officers of the State Government/Central Government or entities under their administrative control, and one Advocate. The name of the learned Arbitrator was included at Serial No. 10 of the said Office Order. Undisputedly, the respondent had appointed the learned Arbitrator pursuant to the petitioner invoking the Arbitration Clause and requesting that an arbitrator be appointed to adjudicate its claims. The letters sent by the petitioner invoking the Arbitration Clause and requesting for the appointment of an arbitrator does not mean that the petitioner had concurred that Dr RCM be appointed by the respondent. This Court is of the view that the appointment of the learned Arbitrator was made unilaterally by the respondent without reference to the petitioner.

28. The contention that the petitioner is deemed to have concurred with the appointment of the learned Arbitrator as it had participated in the arbitral proceedings without any protest or reservation, is also unpersuasive.

29. In ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*), the Supreme Court had considered the question whether participation in an arbitral proceeding would constitute a waiver of the right under Section 12(5) of the A&C Act. The relevant observations made by the Court are set out below:

> "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:

> "**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."

30. Clearly, there is no agreement in writing as contemplated under proviso to Section 12(5) of the A&C Act whereby the petitioner had

expressly agreed to waive its right regarding the applicability of Section 12(5) of the A&C Act.

31. In ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*), the Supreme Court had held that the Managing Director is ineligible to act as an arbitrator and therefore, he would also be ineligible to appoint an arbitrator. In ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*** (*supra*), the Supreme Court applied the aforesaid rationale and held that even if the arbitration clause did not contemplate the Chairman and Managing Director to act as an arbitrator but only as the authority to appoint the sole arbitrator, the said appointment would also run contrary to Section 12(5) of the A&C Act. It was authoritatively held that if a person is ineligible by operation of law to act as an arbitrator, he would also be ineligible to nominate or appoint an arbitrator.

32. In ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*), the respondent had invoked the arbitration clause by a notice dated 03.01.2017 and called upon the CMD of Bharat Broadband Network Limited (BBNL) to appoint "*an independent and impartial arbitrator*". The Chairman cum Managing Director had thereafter, proceeded to appoint one Mr Khan as the Sole Arbitrator to adjudicate the disputes between the parties. Undisputedly, the parties had participated in the arbitral proceedings. BBNL (the appellant) had thereafter, filed an application before the Arbitral Tribunal requesting him to withdraw from the proceedings, as according to it, the learned Arbitrator was *de jure* unable to perform as an arbitrator. The learned

arbitrator had rejected BBNL's application. Aggrieved by the same, BBNL filed a petition under Sections 14 and 15 of the A&C Act before this Court praying that the mandate of the learned arbitrator be terminated and another arbitrator be appointed in his place. This Court did not accept BBNL's contention and held that it was estopped from challenging the arbitrator as its Chairman cum Managing Director had appointed the arbitrator and BBNL had participated in the arbitration proceedings.

33. BBNL impugned the said decision before the Supreme Court. The Supreme Court referred to the decision of ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*) and held that the said decision made it clear that "*an appointment made by ineligible person is itself void*". The Supreme Court further held that "*since such appointment goes to eligibility i.e. to the roof of the matter, it is obvious that Shri Khan's appointment would be void".*

34. This Court is of the view that the decision in ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*) is applicable in the facts of this case. Although the petitioner had participated in the arbitral proceedings before the learned Arbitrator, the same cannot be construed as the petitioner waiving its right under Section 12(5) of the A&C Act. Once it is held that the appointment of the learned Arbitrator has been made unilaterally by the CEO of the respondent, it would follow that the said appointment is *void ab initio*.

35. Thus, the mandate of the learned Arbitrator is required to be terminated and an arbitrator is required to be appointed in his place.

36. In view of the above, it is not necessary to address other contentions. It is not necessary to go into the question whether the conditions of service as applicable to the learned Arbitrator disabled him from taking any assignment as an arbitrator or continuing as such. This is for the reason that if acting as an arbitrator is in violation of the terms and conditions of his service as a member of the District Consumer Forum, the consequence for violating the said conditions of service would follow. However, that does not mean that the mandate of the learned Arbitrator stands automatically terminated.

37. The contention that the mandate of the learned Arbitrator is required to be terminated as he had not disclosed that he was placed on the panel of the arbitrators maintained by the respondent, is also unmerited. The petitioner had challenged the learned Arbitrator on the aforesaid ground by filing an application under Sections 12 and 13 of the A&C Act. It is well settled that if a challenge to the arbitrator is not accepted by the arbitral tribunal, the arbitral tribunal is required to proceed and deliver an award. The parties challenging the learned arbitrator have to await the declaration of the award before seeking any recourse in that regard.

38. In ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited:(2018) 12 SCC 471***, the Supreme Court had held as under:

"12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(*a*), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of

> the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."
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> [emphasis supplied]

39. In view of the above, it is not open for the petitioner to challenge the learned Arbitrator on the ground that there are justifiable doubts as to his independence and impartiality in terms of the Guidelines set out in the Fifth Schedule read with Section 12(1) of the A&C Act, in these proceedings.

40. In view of the above, this Court considers it apposite to allow the present petition. The pending application is disposed of. Accordingly, the mandate of Dr RCM is terminated. It is clarified that this is for the sole reason that he had been appointed by the CEO of the respondent

and not on account of any of the apprehensions expressed by the petitioner.

41. Justice (Retd.) Jayanth Nath, a former Judge of this Court, (Mobile No.: 8527959494) is appointed as the Sole Arbitrator. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act. The arbitral proceedings shall proceed from the same stage as currently obtaining.

42. It is clarified that all rights and contentions of the parties are reserved.

VIBHU BAKHRU, J

NOVEMBER 12, 2021
RK

Click here to check corrigendum, if any