

Abraham Memorial Education Trust vs Prodigy Development Institution ... on 23 March, 2021

Author: Sanjeev Narula

Bench: Sanjeev Narula

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision

+ O.M.P. (COMM) 391/2020 & I.A. 2736/2020 (for stay)

ABRAHAM MEMORIAL EDUCATION TRUST

Through: Ms. Aditi Mohan, Advocate

versus

PRODIGY DEVELOPMENT INSTITUTION (EARLIER KNOWN
AS ATNT INFRASTRUCTURE SERVICES PVT. LTD.)

..... Respondent

Through: Mr. Saurabh Kirpal, Senior Advocate,
with Mr. Siddhesh Kotwal,
Bansuri Swaraj and Ms.
Hasija, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34(2) of the Arbitration and Conciliation Act, 1996, has been filed to assail the arbitral award dated 19th November, 2019 passed by the Sole Arbitrator in favour of the Respondent herein, in respect of the disputes arising out of Agreement to Sell dated 10th October 2012 executed between the parties. The principal and key ground for challenge to the award is premised on the constitution of the Arbitral Tribunal, which, according to the Petitioner, is contrary to arbitration agreement between the parties as well as the provisions of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the 'Act'].

2. Although the parties have not argued on the merits of the case, yet for setting the context herein, the brief facts as laid out in the petition are being noted as follows:

i. On 23rd September, 2012, the Petitioner entered into a Term Sheet with one Global Indian Holdings PTE [hereinafter referred to as 'GIH'], a group company of the Respondent incorporated in Singapore, whereby, GIH agreed to take over an

educational institution (school) situated at Bangalore, run by the Petitioner, along with all the assets and liabilities thereof, for an aggregated sum of Rs. 103 Crores [hereinafter referred to as 'the Scheme'].

ii. As part of the Scheme, the Respondent entered into an Agreement to Sell dated 10th October, 2012 for purchase of 29 school buses from the Petitioner for a consideration of Rs. 2,70,00,000/- (INR Two Crore Seventy Lakhs Only), of which, an initial deposit of Rs. 2,50,00,000/- (INR Two Crore Fifty Lakhs Only) was to be paid at the time of the execution of the agreement and the remaining amount of Rs. 20,00,000/- (INR Twenty Lakhs Only) was to be paid at the closing date of the transaction [The Agreement dated 10th October, 2012 is hereinafter referred to as 'Bus ATS'].

iii. Respondent paid the initial deposit of Rs. 2,50,00,000/- through an account transfer. This amount was to be a part of the total consideration of Rs. 103 Crores under the Scheme. As per the Petitioner, the Bus ATS is not an independent contract, but an indivisible offshoot of the Scheme contemplated in the Term Sheet.

iv. On the same date (i.e. 10th October, 2012), an Addendum to the Term Sheet was executed between the Petitioner, GIH and the Respondent, whereby, the Respondent was added as a party to the Term Sheet and Clause 3(iii) of the Term Sheet was amended.

v. The Petitioner fulfilled the conditions precedent set out in Clause 2.1 of the Bus ATS, and contends that the Respondent was obligated to purchase the 29 school buses by executing a binding sale deed under Clause 2.2 of the Bus ATS. However, the Respondent vide letter dated 19th November, 2013 terminated the Bus ATS, without assigning any reason, and demanded refund of the initial deposit of Rs. 2,50,00,000/- paid by it to the Petitioner. Thereafter, the Respondent presented the security cheques which were received from the Petitioner to their bankers, but the same was returned unpaid. vi. The Respondent issued a Demand Notice dated 17th July, 2014, calling upon the Petitioner to refund Rs. 2,50,00,000/-, followed by a notice invoking arbitration dated 8th August, 2014. This invocation led to the constitution of the Arbitral Tribunal comprising of a Sole Arbitrator. Before the Arbitral Tribunal, the Petitioner vide letter dated 6th September, 2014, objected to the unilateral appointment and called upon the Respondent to withdraw the appointment as the same was in contravention to the provisions of the Act. However, ignoring the Petitioner's objections to the appointment, the Respondent vide letter dated 24th October, 2014 reiterated the appointment of the Sole Arbitrator.

vii. The proceedings before the Arbitrator then culminated into an arbitral award dated 19th November, 2019, which is the subject matter of the challenge before this Court.

3. Mr. Darpan Wadhwa, learned Senior Counsel for the Petitioner who argued the matter on 3rd March, 2021, submitted that without going into the merits of the case, the impugned award is ex facie contrary to the Act and is liable to be set aside on the sole ground that the Arbitration Clause, as phrased, did not permit the Respondent to make a unilateral appointment of the Sole Arbitrator. Referring to the Arbitration Clause, Mr. Wadhwa submitted that it clearly stipulates that all disputes arising out of or in relation to the agreement have to be referred to Arbitration and the procedure for

the appointment has certainly not been prescribed. Thus, as per the provisions of the Act, the Arbitrator had to be appointed by the consent of both the parties, either by themselves, or failing which, by applying to the concerned High Court. The unilateral appointment by the Respondent was illegal and untenable in law. However, since the Ld. Sole Arbitrator entered into reference despite his wrongful appointment, the Petitioner was constrained to file an Interlocutory Application under Section 13(2) r/w Section 16 of the Act challenging the jurisdiction of the Arbitral Tribunal. In reply to the said application, the Respondent accepted the challenge made by the Petitioner. But inexplicably, despite such stand of the Respondent, the learned Arbitrator continued with the arbitration proceedings in contravention to the Act and rendered the impugned award. Mr. Wadhwa, further highlighted the recent developments in law relating to unilateral appointment of the Arbitral appointment by referring to the latest caselaws and stressed that in the instant case, the Arbitration Clause does not confer a right on any one party to make an appointment of an Arbitral Tribunal, and therefore the impugned award rendered is a nullity. That apart, the law as crystallised by the Supreme Court in Perkins Eastman Architects DPC Vs. HSCC (India), Dharma Pratishtanam Vs. Madhok Constructions Pvt Ltd, 2 and H.S. Bedi & Others Vs. STCI Finance Ltd,³ would strike down the unilateral appointment done by the Respondent, as now, there cannot be any quarrel as to the proposition that unilateral appointment is contrary to the agreement as well as the law.

4. Mr. Saurabh Kirpal, learned Senior Counsel, who is present today, submits that the although the arbitral proceedings have culminated into an award, but the position of the law as contended by Mr. Wadhwa, is clear and unambiguous. Therefore, the Court can take a view on the matter in accordance with law.

5. In the opinion of the Court, the manner in which the Arbitral Tribunal has proceeded is ex facie contrary to the Act. Under Clause 7 of the Bus ATS, the procedure for appointment of an Arbitrator is not prescribed. The said Clause reads as under:

"7. Jurisdiction and Governing Law:

This Agreement shall be interpreted under, and be governed by, the laws of India. All disputes arising out of or in relation to this Agreement shall be referred to arbitration in Delhi as per the Arbitration and Conciliation Act, 1996. The Courts in Delhi shall have the exclusive jurisdiction over any disputes that may arise out of this Agreement."

6. The Arbitration Agreement nowhere gives a carte blanche to the 2019 SCC Online 1517 (at paras 13-16).

AIR 2005 SC 214 (at paras 20,27,33 and 35).

OMP (Comm) 427/2018 (Paragraphs 14-17).

Respondent to appoint an Arbitrator. The Arbitrator could be appointed only with the concurrence and consent of both the parties under Section 11(5) of the Act, failing which, the appointment could only be made by the Chief Justice or his designate in terms of Section 11 of the Act. Under no circumstances could the Respondent have unilaterally appointed the Arbitrator. Therefore, Sole Arbitrator's appointment was thus void ab initio on the ground of being contrary to provisions of the Act. However, since the Arbitrator entered upon reference, the Petitioner was constrained to file an interlocutory Application/Written Statement under Section 13(2) R/w 16 of the Act inter alia challenging his jurisdiction. Despite the fact that the Respondent accepted the Petitioner's challenge, the Arbitrator proceeded to pass the Order dated 11th December, 2015, rejecting the Petitioner's application under Section 13(2) R/w 16 of the Act on the basis of a strange and flawed reasoning that once a disclosure is made in writing as to the independence and impartiality by the Arbitrator, his impartiality and independence is implied and his appointment can only be challenged on the grounds contemplated by Section 12 alone or any other provision viz. section 13 to 15 of the Act. The Petitioner was thus constrained to continue to participate in the arbitral proceedings, as the right to challenge the rejection of an application under Section 16 can only be made after final order is passed under Section 34 R/w Section 16(6) of the Act. Nonetheless, since the Arbitrator's appointment was clearly in conflict with the Act, the Award rendered by him is violative of Section 34 (2)(a)(v) of the Act and is ex-facie is untenable in law.

7. Since the Arbitrator's appointment was contrary to the provision of the arbitration agreement and Act, the unilateral reference of disputes and the proceedings before the Sole Arbitrator are void ab initio and the award so rendered is a nullity in law. Hence, the impugned award cannot be sustained and the Court has no hesitation in setting aside the award and it is ordered accordingly. The parties are free to take recourse to any legal remedy as may be available to them for adjudication of their disputes, in accordance with law.

8. Mr. Kirpal, learned Senior Counsel for the Respondent, submits that now the Respondents would have to file an application under Section 11 of the Act, and requests that as and when the said application is taken up for hearing, the Court may consider directing the Arbitral Tribunal to continue the proceedings from the stage where the parties left off prior to the pronouncement of the Award, in order to save cost and time that has been wasted in these present proceedings. Needless to say, the Court would obviously keep the aforesaid observations in mind as and when such a petition is taken up for consideration.

9. The petition is allowed and the pending application is disposed of in the above terms.

SANJEEV NARULA, J MARCH 23, 2021 nd