

Rcc Infraventures Ltd & Ors vs Kotak Mahindra Bank Ltd on 11 December, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
FAO (COMM) 141/2023 & CM APPL. 35181/2023 (Stay)
RCC INFRAVENTURES LTD & ORS.

Through:

versus

KOTAK MAHINDRA BANK LTD

Through:

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

% 11.12.2023

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ["Act"] impugns the order dated 26 April 2023 passed by the District Judge, Commercial Court-02, Shahdara, Karkardooma Courts, Delhi dismissing O.M.P. (COMM) 21 of 2022 as preferred by the appellants / petitioners.

2. As would be manifest from a reading of the impugned order, one of the principal grounds of challenge which came to be mounted was of the respondent having admittedly constituted the Arbitral Tribunal ["AT"] unilaterally. Although the appellants / petitioners had drawn the attention of the District Judge to various decisions which had deprecated such a practice and, in fact, consistently taken the position that such an appointment procedure would not be countenanced in law, the District Judge in terms of the impugned order has observed thus: -

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/12/2023 at 21:22:34 "38. Thus, the judgments of Hon'ble Apex Court relied upon by counsel for petitioner are not applicable to the facts of instant case as CMD is ineligible to be appointed as the sole arbitrator under Seven Schedule and thus, he cannot appoint any other person to act as an arbitrator.

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45. From the material on record, it is revealed that petitioners had knowledge about the unilateral appointment of arbitrator by the respondent however, they opted not to participate in the arbitration proceedings and challenge the unilateral appointment of arbitrator.

As in the case of Mcleod Russel(Supra), the sole arbitrator in this case is a retired Additional District & Sessions Judge, Delhi and as such did not fall in the list provided in 7th Schedule.

46. Reliance is placed on judgment of Hon'ble Delhi High Court in Kanodia Infratech Vs Dalmia Cement(Bharat) Ltd pronounced on 08.11.21 in OMP(Comm): 297/21 and IAs 12902/21 and 12904/21.

47. In the cited case also, the award passed by unilaterally appointed arbitrator was challenged on the ground that arbitrator lacked inherent jurisdiction to entertain and try the disputes. Reliance was placed by the petitioner on the judgment in Perkins Eastmen case and TRF Ltd case. It was held:-

"35. Now, even if at this belated stage this court tests the case of petitioner applying the ratio of the law laid down in Perkins Eastman(Supra) and TRF Ltd(Supra), it finds that in those cases Hon'ble High Court had dealt with petition filed under the provisions of Section 11(6) of the Act, where as the present petition has been filed u/s 34 of the Act, provisions whereof prescribe ground on which the arbitral award can be challenged and set aside and not the mandate of appointment of arbitral tribunal. Hence, the reliance placed upon the decision of Perkins Eastman(Supra) is of no help to the case of petitioner".

"36. The petitioner has also placed reliance on Proddatur Cable TV Digi Services(Supra), which deals with a case where the mandate of arbitrator was challenged during the pendency of arbitral proceedings in a petition filed u/s 12(5) of the Act, whereas, in the present case the petitioner has not claimed disqualification under any of the grounds enumerated u/s 12(5) of the Act r/w 7th Schedule of A& C Act".

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"37. Similarly, reliance is placed by petitioner's counsel on decision in Bharat Broadband Ltd (Supra), in the said case, after dismissal of unilateral appointment of arbitrator by arbitral tribunal itself, petition u/s 14 & 15 of the Act was filed before the court and applicability of Section 12(5) of the Act was considered, whereas, in the instant case, the arbitral award is challenged u/s 34 of the Act". It was held:-

"40. In view of aforesaid narration, this court is of the opinion that appointment of Ld Arbitrator by respondent was never objected to by the petitioner, who had actively participated in arbitration proceedings which is evident from the fact that as many as 45 orders were passed by Ld Arbitrator during the pendency of arbitral proceedings. Moreover, the Ld Arbitrator himself is retired judge of Punjab & Haryana High Court and his integrity cannot be doubted. Accordingly, the case of petitioner challenging the mandate of arbitral tribunal is hereby rejected".

Reliance was also placed on judgment of Hon'ble Apex Court on Delhi Airport Metro Express Pvt Ltd Vs Delhi Metro Rail Corporation (2021) SCC Online SC 695 and it was held:

"46. Applying the ratio of law laid down by Hon'ble Supreme Court in the cases mentioned hereinabove to the present case, this court finds that under the provisions of Section 34 of the Act, scope of interference in the arbitral award is quite limited and can be gone into only when arbitral tribunal has gone beyond the scope of the contract/agreement and exceeded its jurisdiction.....".

48. In the instant case, apart from the unilateral appointment of the arbitrator and the subject matter being not arbitrable, no perversity in the award has been pointed out by counsel for petitioners. Hence, in view of provisions of Section 34 of the Act and law laid down by Hon'ble Delhi High Court in Kanodia Infratech (Supra) as well as in view of above discussion, I am of the considered opinion that unilateral appointment of arbitrator by the petitioner cannot be challenged at this juncture especially when the petitioner had the opportunity to participate in the arbitration proceedings and could have challenged the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/12/2023 at 21:22:35 appointment of arbitrator u/s 13 of the Act. Hence, the second limb of arguments advanced by counsel for petitioners is not tenable."

3. We note that insofar as this Court is concerned, the issue of a "unilateral appointment" and its resultant impact on awards that may be rendered by such an AT is no longer res integra and stands settled in light of the judgment rendered by the Division Bench of this Court in Kotak Mahindra Bank Ltd. vs. Narendra Kumar Prajapat [2023 SCC OnLine Del 3148].

4. We note that the Court while dealing with this aspect had observed as follows:-

"4. In TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377, the Supreme Court held that once the Arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. In Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760, the Supreme Court, following the earlier decision in TRF Ltd. (supra), held that the Chairman-cum- Managing Director of a party was ineligible to appoint an arbitrator. Following the aforesaid decisions, this court in Proddatur Cable TV Digi Services v. Siti Cable Network Limited, (2020) 267

DLT 51 held that it is not permissible for a party to unilaterally appoint an arbitrator without the consent of the other party(ies). It is important to note that the aforesaid decisions were rendered in the context of Section 12(5) of the A&C Act.

5. In the present case, the learned Commercial Court had found that the arbitrator appointed by the claimant (DH Finance Company) was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the A&C Act as interpreted by the Supreme Court in the aforementioned decisions.

6. The learned counsel appearing for the appellant does not seriously dispute that the arbitrator unilaterally appointed by the claimant was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Act. He has largely focused his contentions on assailing the decision of the learned Commercial Court to award costs. It was also contended that the respondent was aware of the appointment of the arbitrator and had not raised any objection to such appointment; therefore the respondent is now precluded from challenging the impugned award.

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7. We find little merit in the aforesaid contentions. The proviso to Section 12(5) of the A&C Act is unambiguous. A party can waive its right to object to the ineligibility of an arbitrator under Section 12(5) of the A&C Act but the same is subject to two conditions. First, that the waiver is required to be by and done by an express agreement in writing; and second, that such agreement is entered into after the disputes have arisen. Unless both the aforesaid conditions are satisfied, there can be no waiver of the ineligibility of an arbitrator.

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13. The Learned Commercial Court has held that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of the provisions of Section 12(5) of the A & C Act is a nullity and, therefore, cannot be enforced. It has accordingly dismissed the enforcement petition under Section 36 of the A&C Act with the cost quantified as Rs. 25,000/-.

14. This Court finds no infirmity with the aforesaid view. A person who is ineligible to act an Arbitrator, lacks the inherent jurisdiction to render an Arbitral Award under the A&C Act. It is trite law that a decision, by any authority, which lacks inherent jurisdiction to make such a decision, cannot be considered as valid. Thus, clearly, such an impugned award cannot be enforced."

5. In view of the aforesaid, we find ourselves unable to sustain the view to the contrary as taken in the impugned order. We are further constrained to observe that the view expressed by the District Judge on Sections 12 and 13 of the Act are also rendered untenable for the following additional reasons. Undisputedly, in terms of the arbitration clause the appointment was to be made by the Bank. Notwithstanding the judgments of the Supreme Court in Perkins Eastman Architects DPC & Another vs HSCC (India) Limited [(2020) 20 SCC 760] and TRF Limited vs. Energo Engineering projects Limited [(2017) 8 SCC 377] having been cited for the consideration of the District Judge, those were distinguished on the ground that they were dealing with clauses where the appointment was to be made by the CMD. In our considered opinion the reasoning so assigned is wholly skewed. This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/12/2023 at 21:22:37 and untenable since undisputedly the Bank would have to necessarily act through a competent authority. The result would thus be the same and the District Judge has clearly taken an erroneous view in this respect.

6. Equally unsustainable was the understanding of the District Judge assuming that a failure to raise a challenge to an arbitrator in accordance with Section 13 would result in the appellant / petitioner being estopped from raising that issue at a later stage. The aforesaid view fails to bear in consideration that in terms of Section 13 (5) of the Act, the challenger stands enabled to raise that issue even in a petition under Section 34. Of equal significance is Section 34 (2) (a)

(v) of the Act and which countenances such a challenge being raised. In any case and since the respondents have conceded to the setting aside of the impugned order, we do not deem it appropriate to enter any further observations.

7. We also take note of the admitted fact that although in respect of certain other connected petitions preferred under Section 34 of the Act, an issue of non-arbitrability was also raised, bearing in mind the remedy constructed by the Recovery of Debts and Bankruptcy Act, 1993 ["RDB Act, 1993"], that aspect would have no relevance insofar as O.M.P. (COMM) 21 of 2022 is concerned and where the subject matter of the dispute fell below the threshold limit of Rs.20 lakhs as applicable.

8. Accordingly, and for all the aforesaid reasons, we allow the instant appeal and set aside the impugned order insofar as it rules upon O.M.P. (COMM) 21 of 2022. We accord liberty to the respondents to adopt such other remedies as may be otherwise permissible in law.

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9. Consequently, the appeal along with pending application shall stand disposed of on the aforesaid terms.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

DECEMBER 11, 2023RW/VP This is a digitally signed order.

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