

M/S Siddhartha Construction Co. vs India Tourism Development Corporation ... on 2 April, 2025

Author: Prathiba M. Singh

Bench: Prathiba M. Singh

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision:

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FAO(OS) (COMM) 127/2022 & CM APPL. 23593/2022

M/S SIDDHARTHA CONSTRUCTION CO.

....

Through: Mr. Meenal Garg, Mr. Ri
and Ms. Mehak Kanwar, A

versus

INDIA TOURISM DEVELOPMENT CORPORATION

&ANR.

.....Responden

Through: Mr. Anish Chawla, Adv.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE RAJNEESH KUMAR GUPTA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

2. The present appeal has been filed by the Appellant- M/s. Siddhartha Construction Co. under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act"), against the order dated 14th September, 2021, passed by the Id. Single Judge in OMP (Comm.) 184 of 2021 titled M/s Siddharth Constructions Co. v. India Tourism Development Corporation Ltd (hereinafter "Impugned Order").

3. Vide the Impugned Order, the Id. Single Judge dismissed the Appellant's application under Section 34 of the Act inter alia seeking to set aside of the arbitral award dated 09th May, 2020 passed by the Sole Arbitrator (hereinafter "the award").

4. The brief background of the case is that the India Tourism Development Corporation (hereinafter, 'ITDC') had awarded the work of building a memorial named "Memorial Of Smt. Vidyavati Ji Mother Of Great Martyr Shaheed Bhagat Singh Ji" to the Appellant vide agreement dated 2nd July, 2012 (hereinafter, 'the agreement'). The value of the work was approximately Rs. 3.67 crores and the same was to be completed within twelve months.

5. Disputes arose between the parties in respect of the delays which occurred in completion of the work. The project was finally completed only after a period of five years. Pursuant to the disputes between the parties, the Appellant invoked the arbitration clause in the agreement which reads as under:

"48. Except where otherwise provided for in the Contract all questions and disputes relating to the meaning of the specification, design drawings and instructions herein before mentioned and as to the quality of workmanship or materials, used on this work or as to any other question, claim, right, matter, or thing whatsoever in any way arising out or relating to the Contract, design, drawing, specifications, estimates instructions, orders or these conditions or otherwise concerning the Works, or execution or failure to exercise the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the Managing Director/ Chief engineer of the India Tourism Development Corporation or any other person appointed by him. There will be no objection if the arbitrator so appointed is an employee of India Tourism Development Corporation and that he had to deal with the matters to which the Contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the ** Managing Director/ Chief Engineer shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this Contract that no person other than a person appointed by the Managing Director/ Chief Engineer, as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50000/- (Rupees Fifty thousand) and above, the arbitrator shall give reasons for the award."

6. On 14th March, 2019, the Appellant sent a notice and requested for appointment of an arbitrator with mutual consent. It asserted that the appointment procedure mentioned in the above stated clause of the agreement was contrary to Section 12(5) of the Act and proposed the name of Sh. Amarjit Singh, (Retd.) Chief Engineer, Mohali for being appointed as the Sole Arbitrator with mutual consent.

7. However, ITDC unilaterally appointed Justice (Retired) S.P. Garg, a former judge of this Court as the Sole Arbitrator. Thereafter, the said Sole Arbitrator entered reference and the parties accordingly filed their claims and counter claims.

8. The claims of the Appellant were partly allowed by the Sole Arbitrator vide the award dated 9th May, 2020.

9. The said award was challenged before the Id. Single Judge under Section 34 of the Act and the petition was dismissed on 14th September, 2021. The said impugned order is challenged in appeal

before this Court under Section 37 of the Act.

10. Mr. Garg, Id. Counsel appearing for the Appellant submits that the only ground on which the challenge to the impugned order is raised is that the Sole Arbitrator was ineligible under Section 12(5) of the Act as he was appointed unilaterally by ITDC. It is his submission that the law on unilateral appointment of arbitrator is now well settled by both, the High Courts and the Supreme Court, in the following decisions:

i. Perkins Eastman Architects DPC and Anr. v. HSCC (India) Ltd. 2019 SCC OnLine SC 1517 ii. Bharat Broadband Network Ltd. v. United Telecoms Ltd.

(2019) 5 SCC 755 iii. Govind Singh v. Satya Group Pvt. Ltd. and Anr. 2023 SCC OnLine Del 37 iv. Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat 2023 SCC OnLine Del 3148

11. Id. Counsel for Appellant also relies upon Smaaash Leisure Ltd. v. Ambience Commercial Developers Pvt. Ltd. 2023 SCC OnLine Del 8322 to argue that even an express consent which may be given by a party would not constitute a waiver of right to challenge the appointment of arbitrator, unless the same is given in writing. The relevant part of the said judgment is extracted hereinbelow:

"37. Therefore, the import of all the aforesaid judgments is unequivocally and unambiguously that an express agreement in writing, waiving the applicability of Section 12(5) is the statutory sine qua non to exit from the rigours of Section 12(5) and nothing less would suffice. As held in the aforesaid judgments, no conduct, howsoever extensive or suggestive or even a statement before the Arbitrator can substitute an 'express written agreement' and sans a written agreement envisaged under Section 12(5), operation of law will invalidate a unilateral appointment. Therefore, this Court cannot subscribe to the argument of the Respondent that the statement made by the counsel for the Petitioner giving up its objection to the Arbitrator's appointment would constitute a waiver. This would also require to be seen in light of the fact that as soon as the Petitioner received the communication suggesting a panel of three names, it had responded in writing, stating unequivocally that the proposed panel was not acceptable and this was followed by a similar communication to the Arbitrator."

12. Mr. Chawla, Id. Counsel for the Respondent, relies upon the decision of the Calcutta High Court in McLeod Russel India Limited and Ors. v. Aditya Birla Finance Limited and Ors. (MANU/WB/0262/2023) to argue that the award would not be rendered void or hit by Section 12(5) of the Act as the Appellant has clearly given a letter dated 15 th May, 2019 acceding to the appointment of the Sole Arbitrator. In addition, the Sole Arbitrator had also given the certificate of not having any conflict of interest.

13. He further submits that in fact, an interim award dated 11th November, 2019 was also passed in favour of the Appellant which was also accepted by the Appellant and the said interim award is also

made part of the final award. Reliance is also placed upon Anuj Kumar v. Franchise India Brands Ltd. (2023 SCC OnLine Del 2560) to argue that whenever there is consent to the appointment of the Sole Arbitrator the same would not be liable to be set aside.

14. In rebuttal, Mr. Garg, Id. Counsel for Appellant submits that the judgment in McLeod Russel India Limited and Ors. (supra) has been distinguished and not followed by the Id. Single Judge of this Court in Union of India v. M/s Omni Projects (India) Ltd bearing O.M.P. (Comm.) No. 355/2023. Reliance has been placed upon the following paragraphs:

"13. The reliance of Mr. Pathak on the judgment of McLeod Russel India Ltd. (supra) is misconceived as the Hon'ble Calcutta High Court relying on Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760 holds that the Arbitrator being a designated person with the power to appoint another person, the person so appointed would be ineligible.

14. With respect to the judgment of the Hon'ble Calcutta High Court, the Court therein fails to appreciate that no amount of conduct can regularise the absence of an agreement in writing, reference is made to paragraph 15 of Bharat Broadband Network Ltd. (supra).

15. For the said reasons, I am of the view that the appointment of the Sole Arbitrator by the petitioner falls under entry 12 of Seventh Schedule and is hit by Section 12(5) of the Arbitration and Conciliation Act, 1996. Hence the said appointment cannot sustain."

15. The Court has heard Id. Counsels for the parties.

16. Section 12(5) of the Act reads as under:

"12. Grounds for challenge.-- (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

17. The said provision has been inserted with effect from 23 rd October, 2015. The proviso to the said provision clearly makes it clear that any Arbitrator who falls in the category set out in the Seventh Schedule to the Act would be ineligible. Entry 1 of the Seventh Schedule of the Act reads as under:

"Arbitrator's relationship with the parties or counsel:

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."

18. The judgment of the Supreme Court in Perkins Eastman (supra) has clearly laid down the law on the issue:

"21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

19. In the above stated decision, the Supreme Court holds clearly that if a particular person is ineligible in terms of Seventh Schedule of the Act, such person would not be entitled to even appoint an Arbitrator.

20. The arbitration clause in the present case that has been extracted above would show that the appointment was to be made by the Managing Director of the ITDC. It is not in dispute that the Sole Arbitrator was, in fact, appointed by the Managing Director.

21. Since the Managing Director of ITDC would himself be an employee, in terms of the Seventh Schedule, he would be an ineligible person and hence, in terms of Perkins Eastman (supra), any appointment by the said Managing Director would also render the said appointment completely void.

22. The remaining decisions which are relied upon by the parties in fact reiterate this position. The relevant portions of the said judgments are set out below:

i. Govind Singh v. Satya Group Pvt. Ltd. and Anr.(Supra):

"20. Thus, it is not necessary to examine the question whether the appellant had raised an objection to the appointment of the learned Arbitrator. Even if it is assumed that the appellant had participated in the arbitral proceedings without raising any objection to the appointment of the learned Arbitrator, it is not open to hold that he had waived his right under Section 12(5) of the A&C Act. Although it is not material, the record does indicate that the appellant had objected to the appointment of respondent no. 2 as an arbitrator.

21. In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person who is ineligible to act as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction.

22. In *Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited* : (2021) 284 DLT 722 the learned Single Judge of this Court had declined to interfere with the arbitral award, which was challenged on the ground that the arbitrator was ineligible to act as an arbitrator, on the ground that the parties had participated in the arbitral proceedings. The learned Single Judge had observed that the decision of the Supreme Court in *Bharat Broadband Network Limited v. United Telecoms Limited* (supra) was not applicable as the said matter had travelled to the Supreme Court against the decision of this Court, rejecting the petition under Section 14 and 15 of the A&C Act.

23. We are unable to agree that the decision in *Bharat Broadband Network Limited v. United Telecoms Limited* (supra) can be distinguished on the aforesaid ground. The said decision had authoritatively held that in terms of the proviso of Section 12(5) of the A&C Act, the ineligibility of an arbitrator under Section 12(5) of the A&C Act could be waived only by an express agreement in writing and cannot be inferred by the conduct of the parties. Thus, the fact that the parties had participated before the arbitral tribunal cannot be construed as a waiver of their rights to object to the ineligibility of the arbitrator(s). We are unable to accept that while such a right could be exercised prior to the delivery of the award, it would cease thereafter. If the arbitrator is ineligible to act as an arbitrator, the arbitral award rendered by the arbitral tribunal would be without jurisdiction."

ii. *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* (supra) 2019 5 SCC 755 "15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which

this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub- section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule."

iii. Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat 2023 SCC OnLine Del 3148 "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.

8. In Bharat Broadband Network Limited v. United Telecoms Limited: (2019) 5 SCC 755, the Supreme Court had authoritatively held that waiver of a right to object to ineligibility of an arbitrator under Section 12(5) of the A&C Act cannot be inferred by conduct of a party. Such waiver can only be by an express agreement in writing. The Court had also clarified that "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".

9. In view of the above, the failure, if any, on the part of the respondent to object to the unilateral appointment of the sole arbitrator, cannot be construed as waiver of his right under Section 12(5) of the A&C Act.

10. The award rendered by an arbitrator who is ineligible to be appointed as such cannot be enforced."

23. As is evident from the above stated decisions that have already discussed the law, it is settled that any clause in an arbitration agreement that permits appointment of a person as an arbitrator who has a relationship with the parties concerned or even appointment by a person who has a relationship with the parties concerned, would be barred by the Seventh Schedule to the Act. The appointment so made would be rendered invalid in terms of Section 12(5) of the Act.

24. In view of the above legal position, the Arbitrator in the present case being ineligible in terms of Section 12(5) of the Act and there being no express waiver of right in writing to challenge the appointment of the Sole Arbitrator by the Appellant, the award dated 9th May, 2020 is set aside. The order dated 14th September, 2021 passed by the Id. Single Judge is also set aside.

25. Ld. Counsel for the Respondent submits that if the award is set aside and the appointment can no longer be made by the Managing Director, then the arbitration clause itself would no longer operate.

26. If that be so, then the parties are free to avail of their remedies in accordance with law.

27. The appeal is allowed in the above terms. All pending applications, if any, are also disposed of.

PRATHIBA M. SINGH JUDGE RAJNEESH KUMAR GUPTA JUDGE APRIL 2, 2025 dj/ss