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

Judgment pronounced on: 29.10.2024

\+ **O.M.P. (COMM) 208/2022**

N.S. ASSOCIATES PVT. LTD. .....Petitioner

Through: Mr. M. Tarique Siddiqui, Mr. Sunil Verma, Mr. Rakshan Ahmed, Mr. Abhishek K. Tanwar, Mr. Mohd. Bilal and Mr. Fajulla, Advocates.

versus

THE LIFE INSURANCE CORPORATION OF INDIA .....Respondent

Through: Mr. Mohinder Singh, Mr. Ankur Goel and Ms. Diksha Ahuja, Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition assails an arbitral award dated 10.01.2022 (hereinafter *'the Award'*) passed in arbitral proceedings between the parties.

2. As noticed in order dated 21.10.2024, two preliminary/ jurisdictional objections had been raised by the learned counsel for the respondent. Firstly, it is contended on behalf of the respondent that the present proceedings are without jurisdiction, inasmuch as, the seat of arbitration is at Kanpur. This submission is made on the basis of Clause 4 of the contract agreement between the parties which is in the following terms -

> *"4. All disputes arising out of or in any way concerned with this Agreement shall be deemed to have arisen in Kanpur and only the Courts in Kanpur shall have jurisdiction to determine the same."*

3. Secondly, it was contended on behalf of the respondent that the present case is a case of unilateral appointment of the Arbitrator and in terms

of various judgments rendered by Co-ordinate Benches of this Court, and also by Division Bench of this Court in ***Govind Singh v. M/s Satya Group Pvt. Ltd. And Anr.*** 2023/DHC/000081, the arbitral proceedings are nullity and/or *non est* and, therefore, the resultant award is liable to be set aside on this score.

4. In so far as the first objection raised by learned counsel for the respondent is concerned, the same is without merit. It can be seen from a perusal of Clause 4 of the Contract Agreement relied upon by the respondent that the same does not control, or have any bearing on the seat of arbitration.

5. In the present case, the appointment letter dated 14.11.2019 whereby the concerned Executive Director (Engineering) appointed the learned Sole Arbitrator, it was specifically mentioned that "the arbitration proceedings shall be held at New Delhi only". Admittedly, the entire arbitral proceedings have been held at New Delhi and the award has also been rendered at New Delhi.

6. In ***Reliance Infrastructure Limited v. Madhyanchal Vidyut Vitran Nigam Limited***, 2023 SCC OnLine Del 4894, this Court was expressly concerned with somewhat similar situation where the General Conditions of Contract prescribed that "the venue of arbitration shall be at New Delhi" whereas, Clause 21.0 of the letter of award prescribed that a different Court shall have exclusive jurisdiction in all matters arising out of the contract. In the said background, this Court, after considering the legal position set out in a catena of judgments concluded as under:-

> *"32. On a conspectus of the aforesaid judgments, the position of law that emerges is that when the contract contains an arbitration clause that specifies a "venue", thereby anchoring the arbitral proceedings thereto, then the said "venue" is really the "seat" of arbitration. In*

such a situation the courts having supervisory jurisdiction over the said "seat" shall exercise supervisory jurisdiction over the arbitral process, notwithstanding that the contract contains a clause seeking to confer "exclusive jurisdiction" on a different court.

33. In the present case, the relevant clause in the LOA purporting to confer "exclusive jurisdiction" is a generic clause, and does not specifically refer to arbitration proceedings. For this reason, the same also does not serve as a "contrary indicia" to suggest that that Delhi is merely the "venue" and not the "seat" of Arbitration. As such, the same cannot be construed or applied so as to denude the jurisdiction of the Courts having jurisdiction over the "seat" of Arbitration,

34. The present petition is thus maintainable."

7. The Division Bench of this Court in '***Yash Deep Builders LLP v. Sushil Kumar Singh and Ors'***, MANU/DE/1688/2024, while relying upon the judgment rendered in ***Reliance*** (supra) has observed as under –

"42. In Reliance Infrastructure Limited v. Madhyanchal Vidyut Vitran Nigam Limited MANU/DE/5224/2023, another learned single judge of this court referring to several judgments held that the choice of Delhi as the venue of arbitration was demonstrative of the fact that the arbitral proceedings were intended to be anchored to Delhi, and in the absence of any contrary indicia, the inexorable conclusion was that Delhi is the seat of Arbitration. It was further held that when the contract contains an arbitration clause that specifies a "venue", thereby anchoring the arbitral proceedings thereto, then the said "venue" is really the "seat" of arbitration. In such a situation the courts having supervisory jurisdiction over the said "seat" shall exercise supervisory jurisdiction over the arbitral process, notwithstanding that the contract contains a clause seeking to confer "exclusive jurisdiction" on a different court. Further, that a generic clause, not specifically referring to arbitration proceedings would not serve as a "contrary indicia" so as to denude the jurisdiction of the Courts having jurisdiction over the "seat" of Arbitration.

43. Coming back to the facts of the present case, reference has been made by the parties to two different clauses of the collaboration agreement. One is Clause 19 (jurisdiction) which stipulates that all matters concerning the agreement and the development of the scheduled property shall be subject to the jurisdiction of courts at Gurugram, Haryana alone. The other being Clause 23 (arbitration) stipulating that "in the event any dispute or difference arises out of or

> *in connection with the interpretation or implementation of this agreement, or out of or in connection with the breach, or alleged breach of this agreement, such dispute shall be referred to arbitration under the Arbitration and Conciliation Act, 1996 to be decided by a sole arbitrator appointed mutually by the parties hereto. In case of any difference between the parties on appointment of a sole arbitrator, the Arbitration Tribunal shall consist of three arbitrators. The second party shall appoint one arbitrator and the first party shall appoint the second arbitrator. The third arbitrator shall be appointed by the two selected arbitrators failing which such appointment shall be done by the Arbitration Council of India, New Delhi. The decision taken by the majority of arbitrators shall be final and binding on the parties hereto. The venue of the arbitration shall be at Delhi, India.*
>
> *44. Clause 23 is the arbitration clause and it is distinct from Clause 19. The arbitration contract is contained in Clause 23 and it is a complete contract between the parties relating to arbitration. When Clause 23 is read, it clearly establishes that the parties agreed that the venue of the entire arbitration proceedings would be Delhi, India. Even in case of a disagreement between the two selected arbitrators, the appointment of the third arbitrator is to be done by the Arbitration Council of India, New Delhi, Clause 23.1.5, which is under the main Clause 23 pertaining to arbitration stipulates that the provisions of the clause shall survive the termination of the agreement. This clearly shows that Clause 23 pertaining to arbitration is distinct from the collaboration agreement and is to survive even the termination of the agreement."*

8. As such, no merit is found in the objection raised by learned counsel for the respondent as regards territorial jurisdiction of this Court to entertain the present petition.

9. The second aspect that has been urged by learned counsel for the respondent is that the entire arbitral proceedings and the resultant award are *non est* inasmuch as, the present case is the case of unilateral appointment of arbitrator which is impermissible in terms of the judgments of the Supreme Court in ***'Perkins Eastman Architects DPC & Ors. v. HSCC Ltd.'***, (2020) 20 SCC 760, '***TRF Ltd. v. Energo Engineering Projects Ltd.***', 2017 8 SCC 377, and '***Bharat Broadband Network Limited v. United Telecoms***

Limited', (2019) 5 SCC 755, and the judgments of this Court in ***'Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat',*** 2023 SSC OnLine Del 3148 and ***Govind Singh*** (supra).

10. There can be no cavil with the proposition that unilateral appointment of arbitrator renders the entire arbitral proceedings *non est* in view of the inherent lack of jurisdiction and *de jure* inability of a unilaterally appointed arbitrator. This position has been expressly noticed by this Court in catena of judgments.

11. In ***Kotak Mahindra*** (Supra), the Division Bench of this Court has observed as under –

> ***"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."*

12. In the case of ***'Naveen Kandhari and Another v. Jai Mahal Hotels Pvt. Ltd***.' 2018 SCC OnLine Del 9180, a Coordinate Bench of this Court has observed as under :-

> *"18. A plain reading of the arbitration clause as set out above indicates that an arbitrator was required to be appointed by the parties. Thus, the unilateral appointment of Mr. A.P. Dhamija as an arbitrator is contrary to the arbitration clause and without authority. It is also relevant to note that the respondent had invoked the arbitration clause by its letter dated 06.06.2016 and unilaterally declared that it had appointed Mr. A.P. Dhamija, Advocate as an arbitrator.*
>
> *19. The said appointment, being contrary to the terms of the arbitration agreement, cannot be considered as an appointment at all. It is for all intents and purposes non est. Mr. A.P. Dhamija has no authority to act as an arbitrator; his actions are plainly of no consequence."*

13. In ***'M/s Upper India Trading Co. Pvt. Ltd v. M/s Hero Fincorp Ltd'*** 2024:DHC:1721, this Court observed as under :-

> *"13. Following the judgment of Perkins (supra) and TRF (supra), this court in Geeta Poddar (supra) has further held as under:-*
>
> > *"7. In view of the foregoing settled position of law, there exists no doubt in the mind of the Court that unilateral appointment of the second sole arbitrator by the Managing Director of the Respondent was non-est in law, being in conflict with Section 12(5) read with Seventh Schedule of the Act, and thus void ab initio."*
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> *14. The facts in the present case are similar. The Sole Arbitrator has been appointed by the respondent unilaterally. The same is clearly hit by the judgments of "Perkins Eastman Architects DPC" (supra) and "TRF Limited" (supra) As the appointment is barred u/s 12(5) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996, the whole arbitration proceedings are non-est in law."*

14. In ***Bharat Broadband*** (supra), the Supreme Court dealt with a situation where invalidity of the appointment of the arbitrator and the arbitral proceedings were pleaded by the party which appointed the arbitrator. The Supreme Court after taking note of the judgments in ***HRD Corp. V/s. GAIL (India) Ltd***, (2018) 12 SCC 471 and ***TRF Ltd.*** (supra) noticed that the only way the *de jure* inability can be overcome is if the parties, subsequent to the disputes having arisen between them, waive the applicability of Section 12(5) of the A&C Act by an express agreement in writing. It was observed in that case as under:

> *"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."*

15. Learned counsel for the petitioner contends that in the present case, there was an agreement in writing between the parties whereby the applicability of Section 12(5) of the A&C Act was waived. It is submitted that the same is implicit from a letter dated 04.12.2019 addressed by the petitioner/claimant to the learned Arbitrator after his appointment. The said letter reads as under: -

> *"This is to felicitate you profusely on your appointment as arbitrator in the matter of disputes between M/s N S Associates Pvt. Ltd. (NSAPL) and LIC of India vide letter No. 436 dated 14.11.2019 from LIC of India.*
>
> *As efforts have been underway since May June 2018 for settlement of disputes you are requested to set the ball of arbitration in to motion at your earliest convenience."*

16. Further, it is pointed out that in the proceedings dated 24.12.2019 before the learned Arbitrator it was expressly noticed by the Arbitrator that *'appointment of A.T. has been made by the ED, LIC, Mumbai & no party had any objection to this'*.

17. I am unable to agree that the aforesaid bring about an 'express agreement' between the parties, as required for the purpose of waiving applicability of Clause 12(5) of the A&C Act. In ***Bharat Broadband*** (supra)

the Supreme Court has clarified that an express agreement in writing refers to an agreement by which both the parties affirmed that despite full knowledge of the factum of ineligibility of the Arbitrator, they have full faith and confidence in the said arbitrator to continue to act as such.

18. The Supreme Court noticed that the proviso to Section 12(5) was in stark contrast with Section 4 of the A&C Act; Section 4 deals with cases of deemed waiver by conduct, whereas the proviso to Section 12(5) deals with waiver only by express agreement in writing by the parties made subsequent to the disputes having arisen between them.

19. In ***Bharat Broadband*** (supra) the Supreme Court expressly laid down that an express agreement in writing is quite distinct from an agreement which is to be inferred by the conduct. The relevant observations of the Supreme Court are as under:

> *"17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may*

typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with eases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

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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 writings. 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 of any promise is made in words, the promise is said the proposal or acceptance 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. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid

appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before- the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment i is not correct when it applies Section 4, Section 7, Section 12(4). Section 13(2) and Section 16(2) of the Act to the facts of the present case. and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

20. In the present case, the letter dated 04.12.2019 and the proceedings dated 24.12.2019 clearly do not qualify as an 'express agreement in writing'. The petitioner seeks to infer the existence of an agreement waiving Section 12(5) of the A&C Act, based on what is stated in letter dated 04.12.2019 and recorded in the proceedings dated 24.12.2019. This is clearly impermissible inasmuch as the statutory requirement for overcoming *de jure* inability is "an express agreement in writing" and not an agreement to be inferred from the conduct of the parties.

21. For the aforesaid reason, the impugned award is clearly unsustainable. Consequently, the prayer (a) of the petitioner is allowed; the impugned award is set aside in terms of the said prayer.

22. The present petition, alongwith pending applications, stand disposed

of in the above terms.

SACHIN DATTA, J

OCTOBER 29, 2024/*at,sv*