

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 04TH DAY OF JUNE, 2024

BEFORE

THE HON' BLE MR.JUSTICE R. DEVDAS

CIVIL MISCELLENEOUS PETITION NO.96 OF 2024

BETWEEN

MR. SHYAMAL MUKHERJEE,
S/O LATE MR DWIJENDRA NATH MUKHERJEE
AGED ABOUT 65 YEARS,
A-24, NEETI BAGH, NEW DELHI-110049.

...PETITIONER

(BY SRI PRADEEP NAYAK, ADVOCATE)

AND

PRICEWATERHOUSECOOPERS SERVICES LLP
A LIMITED LIABILITY PARTNERSHIP
INCORPORATED UNDER THE LIMITED
LIABILITY PARTNERSHIP ACT, 2008
HAVING ITS REGISTERED OFFICE AT
1ST FLOOR, SUCHETA BHAWAN, 11-A,
VISHNU DIGAMBAR MARG, NEW DELHI-110002
HAVING ITS BRANCH OFFICE AT
252, SAVARKAR SMARAK,
VEER SAVARKAR MARG SHIVAJI PARK
DADAR WEST MUMBAI
MAHARASHTRA-400028

....RESPONDENT

(BY SRI.C.K.NANDAKUMAR SENIOR COUNSEL FOR
SMT.ANANDI KAMANI & SRI. KAMAL SHANKAR, ADVOCATES)

THIS CIVIL MISCELLANEOUS PETITION IS FILED UNDER SEC.11(5) OF THE ARBITRATION AND CONCILIATION ACT, 1996, PRAYING TO APPOINT MR.JUSTICE M.S.SANKLECHA (RETIRED JUDGE, BOMBAY HIGH COURT), AS THE SOLE ARBITRATOR TO RESOLVE THE DISPUTES AND DIFFERENCES THAT HAVE ARISEN BETWEEN THE PETITIONER AND RESPONDENT AS PER THE ARBITRATION AGREEMENT CONTAINED IN CLAUSE 18.7 OF THE LLP AGREEMENT, AS HE HAS BEEN APPOINTED AS THE SOLE ARBITRATOR IN CONNECTED DISPUTES WITH PRICEWATERHOUSECOOPERS PVT. LTD., (THE COMPANY) BY THE HONBLE BOMBAY HIGH COURT IN ARBITRATION APPLICATION (L) NO. 7663/2023, WITH THE DIRECTION TO THE PARTIES TO SHARE THE ARBITRATORS FEE EQUALLY AND PASS SUCH OTHER APPROPRIATE ORDER AS THIS HONBLE COURT DEEMS FIT AND ETC.

THIS CIVIL MISCELLEANEOUS PETITION HAVING BEEN HEARD AND RESERVED ON 30.05.2024 AND COMING ON FOR PRONOUNCEMENT OF ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

This Civil Miscellaneous Petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the Act, 1996', for short) seeking appointment of a sole Arbitrator in terms of the arbitration clause contained in the LLP Agreement dated 21.03.2017.

2. Having regard to the prayer made in the petition seeking appointment of Hon'ble Mr.Justice M.S.Sanklecha

(Retired Judge, Bombay High Court) as the sole Arbitrator to resolve the disputes and differences that have arisen between the petitioner and the respondent, learned Senior Counsel Sri.C.K.Nandakumar, appearing for the respondent submitted that except Hon'ble Mr.Justice M.S.Sanklecha, any other Former Judge of any High Court may be appointed as a sole Arbitrator and not Hon'ble Mr.Justice M.S.Sanklecha. The learned Senior Counsel has very fairly submitted that the respondent is not making any allegation of bias against the learned Judge, but the respondent insists on appointment of any other person as sole Arbitrator having regard to the express provisions contained in sub-section (3) of Section 12 of the Arbitration and Conciliation Act, 1996 read with Entry 24 of the Fifth Schedule of the Act, 1996.

3. The undisputed facts which are germane are that the petitioner was an employee of Pricewaterhouse Coopers Pvt. Limited, a registered Company (herein after referred to as 'Company') and was also an equity partner of Pricewaterhouse

Cooper Services LLP, which is the respondent herein. It is however contended by the petitioner that he was not given a copy of the LLP Agreement and he did not have knowledge of the clauses contained therein. After his retirement and upon disputes arising between the petitioner and the respondent, the petitioner issued two separate arbitration notices, calling for appointment of Arbitrator to resolve the disputes between the parties. Thereafter, the petitioner filed two separate petitions before the Bombay High Court invoking Section 11 of the Act, 1996, and sought appointment of Arbitrators. When the matters were heard by the Bombay High Court, objections were raised at the hands of the respondent herein stating that in terms of the LLP Agreement the seat of arbitration is Bengaluru and therefore, a petition could not have been filed before the Bombay High Court. The petitioner sought to withdraw the petition insofar as the LLP Agreement is concerned while seeking liberty to file appropriate application/petition before the competent court. Accordingly,

the Bombay High Court, by order dated 06.02.2024 not only disposed of the application as regards the LLP Agreement as withdrawn, but also proceeded to appoint Hon'ble Mr.Justice M.S.Sanklecha, as the sole Arbitrator to decide the disputes between the petitioner and the Company. Subsequently, this Civil Miscellaneous Petition was filed by the petitioner seeking appointment of Hon'ble Mr.Justice M.S.Sanklecha, as the sole Arbitrator.

4. Learned Senior Counsel Sri.C.K.Nandakumar, while drawing the attention of this Court to paragraph No.16 of the petition submits that the petitioner does not dispute the fact that in the reply to the arbitration notice, the respondent proposed the names of two Former Judges of this Court, having regard to the fact that the seat of arbitration is Bengaluru. It is also pointed out that the petitioner has proposed the names of two Former Judges of the Bombay High Court and not Hon'ble Mr.Justice M.S.Sanklecha. Moreover, it is vehemently contended that in terms of Entry

24 of the Fifth Schedule, since Hon'ble Mr. Justice M.S. Sanklecha is already serving as an Arbitrator in a related issue, he is barred from being appointed as an Arbitrator in the present matter.

5. Learned Counsel for the petitioner has however placed reliance on a judgment of the Hon'ble Supreme Court in the case of ***Panipat Jalandar NH-1 Tollway Private Limited Vs. National Highways Authority of India***, in Special Leave Petition (C) No.4115 of 2022, dated 21.03.2022, and submitted that appointment of an Arbitrator who has earlier decided a dispute between the same parties or of one of the parties is not a total bar for appointment as Arbitrator in another dispute. It was held that Entry 22 would not apply as a rule for the appointment of the same arbitral tribunal to adjudicate multiple disputes between the same parties arising out of the same contract, to avoid duplication of arguments and save time. Moreover, the appointment of Hon'ble Mr. Justice M.S. Sanklecha was by the court and not nominated

by the petitioner. It is submitted that the petitioner has been insisting for consolidated arbitration proceedings since the claim of the petitioner, although arising out of his relationship with the Company on one hand and the LLP Agreement on the other, nevertheless, the issues are closely related to each other. The learned Counsel would hasten to add that the petitioner is not insisting on a consolidated arbitration, however, having regard to the nature of the claim made by the petitioner, it would be in the interest of justice and to avoid conflicting decisions, that the arbitration should be conducted by the same person who has been appointed by the court to consider the other disputes between the petitioner and the Company.

6. However, learned Senior Counsel Sri.C.K.Nandakumar seeks to place reliance on another judgment of the Hon'ble Supreme Court in the case of ***HRD Corporation(Marcus Oil And Chemical Division) Vs. Gail (India) Limited (Formerly Gas Authority of India Limited), (2018) 12 SCC 471*** and

submits that in the decision relied by the learned Counsel for the petitioner Entry 24 of the Fifth Schedule had not fallen for consideration. On the other hand, in the case of HRD Corporation (supra) it has been held that if a person is currently serving or has served within the past three years as Arbitrator in another arbitration on a related issue, he may be disqualified under Entry 24. The learned Senior Counsel would further submit that even the Bombay High Court has accepted the contention of the respondent that the disputes arising out of the LLP Agreement is independent of the employment of the petitioner by the Company and therefore, the two issues cannot be tried in a consolidated arbitration proceedings. Such findings have been accepted by the petitioner and therefore, the petitioner cannot insist on appointment of the same Arbitrator.

7. The issue therefore is, whether an Arbitrator who is considering another dispute between the same or one of the

parties is barred from trying a dispute in the light of Entry 24 of the Fifth Schedule of the Act, 1996?

8. In the considered opinion of this Court, the issue stand answered at the hands of the Apex Court in the case of ***Panipat Jalandar*** (supra). In the Fifth Schedule, under the heading "**Previous services for one of the parties or other involvement in the case**" Entry 22 and 24 are enlisted. For easy reference provision in both the Entries are culled out hereunder:

"22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

23. -----

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties."

9. Grounds for challenging appointment of an Arbitrator are provided in sub-section (3) of Section 12. Such

appointment can be challenged only if circumstances exist that give rise to justifiable doubt as to his independence or impartiality. If the relationship of the Arbitrator with the parties or Counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule of the Act, such person shall be ineligible to be appointed as an Arbitrator, in terms of sub-section (5) of Section 12. It is not the case of the respondent that the person sought to be appointed as Arbitrator incurs any of the disqualification under the Seventh Schedule.

10. The Hon'ble Apex Court in **HRD Corporation** (supra) and **Panipat Jalandar** (supra) has held that the disqualification contained in Entry 22 and 24 are not absolute, if he/she is able to show that he/she was independent and impartial on the earlier two occasions. In a case falling under Entry 24, where a person appointed as Arbitrator currently serves as Arbitrator in another arbitration on a related issue, the Hon'ble

Apex Court has clearly drawn a distinction in paragraph No.24 of **HRD Corporation** (supra), as follows:

"24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered

largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression "the arbitrator" in Item 16 cannot possibly mean "the arbitrator" acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as "the arbitrator" refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served "as arbitrator" before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a "business relationship" with the respondent under Item 1. Nor is the delivery of an award providing an expert "opinion" i.e. advice to a party covered by Item 15.

[Emphasis supplied]

11. It is therefore clear that as an Arbitrator, if a person has decided a dispute earlier or has been appointed as an Arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties, that by itself is not a bar for his appointment as an Arbitrator subsequently, if it is possible for such Arbitrator to show that he was independent and impartial on the earlier occasion. Therefore, it is too far fetched to contend that a person serving as an Arbitrator in a dispute involving the petitioner and affiliate of the respondent herein is barred from being appointed as an Arbitrator in the present case. The gravamen of the issue has been considered and answered in paragraph No.28 in ***Panipat Jalandar*** (supra) as follows:

"28. The issue of reasonable likelihood of bias must be dealt with objectively from the point of view of a neutral third person. The question to be posed is, whether a neutral third person would perceive the appointment of the Arbitrator as unfair. In other words, the Court has to address to itself the core question of whether the Arbitrator

has such interest in the Arbitration, or any of the parties thereto, that could colour his objectivity and sway his decision in any particular way, keeping in mind the grounds specified in the Fifth Schedule. However, a person whose relationship with the parties or counsel or the subject matter of the dispute falls in any of the categories specified in the Seventh Schedule, would outright be ineligible to be appointed as an Arbitrator.”

12. As in the case of **Panipat Jalandar** (supra), this is not a case where different arbitration references relating to different contracts are being made to the same Arbitrator. The appointment of the Arbitrator was made by the High Court of Bombay, in a related case. Therefore, this Court is of the considered opinion that Entry 24 will not apply as a rule for declining appointment of Hon'ble Mr. Justice M.S. Sanklecha to adjudicate the dispute between the petitioner and the respondent, which is admittedly an affiliate of M/s. Pricewaterhouse Coopers Pvt. Limited (Company) and on the other hand, it would be in the interest of justice and to avoid

duplication of arguments and to save time that Hon'ble Mr.Justice M.S.Sanklecha may be appointed as an Arbitrator in the present case.

13. The Civil Miscellaneous Petition is accordingly **allowed** on the following terms:

- (i) Hon'ble Mr.Justice M.S.Sanklecha (Retired Judge, Bombay High Court) is appointed as sole Arbitrator to adjudicate the disputes and differences that have arisen between the petitioner and the respondent under LLP Agreement dated 21.03.2017.
- (ii) The learned Counsel for the petitioner to inform Hon'ble Mr.Justice M.S.Sanklecha about his appointment.
- (iii) The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated under Section 11(8) read with Section 12 of the Arbitration and Conciliation Act, 1996, to the Registrar (Judicial) of this Court to be placed on record.

- (iv) The Arbitrator shall, after entering the reference fix the date of first hearing and issue further directions as are necessary.
- (v) The sole Arbitrator shall be entitled for the fees as per the Arbitration and Conciliation Centre Rules, 2012, governing the Arbitration and Conciliation Centre (Domestic and International), Bengaluru and the arbitral costs and fee of the Arbitrator shall be borne by the parties in equal proportion and shall be subject to the final Award that may be passed by the Arbitrator.
- (vi) All rights and contentions of the parties are kept open.

**Sd/-
JUDGE**

DL
CT: JL