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

Reserved on: 10.05.2023
Date of decision: 01.06.2023

\+ **O.M.P. (COMM) 252/2018 & I.A. 13103/2022**
MAN INDUSTRIES (INDIA) LIMITED

..... Petitioner

Through: Mr.Jayant Mehta, Sr. Adv. with Ms.Amrita Singh & Mr.Raghav Bhatia, Advs.

versus

INDIAN OIL CORPORATION LIMITED

..... Respondent

Through: Mr.Dhruv Malik, Ms.Sharmistha Ghosh, Ms.Aditi Sinha & Ms.Palak Nenwani, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 03.02.2018 passed by the learned Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the Purchase Order dated 08.08.2013 placed by the respondent on the petitioner for line pipes for de-bottlenecking Salya-Mathura Pipeline.

2. The present petition was filed by the petitioner around 01.05.2018. During the pendency of the present petition, the petitioner filed an application, being I.A. No. 13103/2022, praying for leave to

amend the petition by adding ground 'DD' as an additional ground of challenge to the Impugned Award. Ground 'DD' challenges the Impugned Award on the ground that the learned Sole Arbitrator was *de jure* ineligible to adjudicate the disputes between the parties in terms of Section 12(5) of the Act and the judgments of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited,*** (2017) 8 SCC 377; ***Bharat Broadband Network Limited v. United Telecoms Limited***, (2019) 5 SCC 755; and ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.***, (2020) 20 SCC 760, as he had been appointed by the respondent.

3. The parties have been heard on the above application as also on the merit of the original challenge to the Arbitral Award.

4. Mr. Jayant Mehta, the learned senior counsel and Ms. Amrita Singh, the learned advocate for the petitioner, placing reliance on the judgments of ***TRF Limited*** (supra) and ***Perkins Eastman Architects DPC*** (supra), submit that the learned Sole Arbitrator having been appointed by the respondent, albeit in terms of the Arbitration Agreement between the parties, was *de jure* ineligible to act as an Arbitrator in view of Section 12(5) of the Act. Placing reliance on the judgment of the Supreme Court in ***Bharat Broadband Network Limited*** (supra), they submit that the applicability of Section 12(5) of the Act can be waived only by an express agreement of the petitioner. They submit that there was no express waiver of the ineligibility of the learned Arbitrator by the petitioner.

5. They further submit that though the learned Arbitrator was appointed at the request of the petitioner, and during the course of the arbitration proceedings, the petitioner had not challenged the authority

of the learned Arbitrator, on the other hand, the petitioner had, in fact, filed applications under Section 29A of the Act seeking extension of the mandate of the learned Arbitrator, the same would not satisfy the condition of the Proviso to Section 12(5) of the Act and, therefore, the Award passed by the learned Arbitrator is a nullity. In support, they place reliance on the judgment of the Division Bench of this Court in ***Govind Singh v. Satya Group Pvt. Ltd. and Another***, 2023 SCC OnLine Del 37; and of the learned Single Judge(s) of this Court in ***JMC Projects (India) Ltd. v. Indure Private Limited***, 2020 SCC OnLine Del 1950; and ***MS Bridge Building Construction Co. Pvt. Ltd. v. Bharat Heavy Electricals Ltd.***, 2023 SCC OnLine Del 242.

6. On the issue of whether this objection can at all now be allowed to be raised, and the period of limitation for filing petition under Section 34 of the Act having passed, they place reliance on the judgments of the Supreme Court in ***Hindustan Zinc Limited (HZL) v. Ajmer Vidyut Vitran Nigam Limited***, (2019) 17 SCC 82 and ***Lion Engineering Consultants v. State of Madhya Pradesh and Others***, (2018) 16 SCC 758, to submit that a plea of lack of jurisdiction of the Arbitrator can be raised at any stage of the proceedings, including before the Supreme Court. They further submit that the incorporation of additional grounds by way of an amendment can be allowed depending on the facts and circumstances of each case. They submit that in the present case, as the amendment raises an issue of lack of jurisdiction of the learned Arbitrator, the same should be allowed to be raised before this Court.

7. On the challenge on merits of the Impugned Arbitral Award, they submit that the learned Arbitrator has awarded damages in favour

of the respondent, in spite of the respondent having failed to prove any loss being suffered by the respondent on account of delay in supply of the pipes by the petitioner. They submit that it was the case of the petitioner before the learned Arbitrator that the respondent did not suffer any damages due to the delay in supply of the pipes by the petitioner, and this was evident from the fact that the respondent did not lift the stock of the pipes even on being offered as its project was getting delayed for reasons such as delay in wildlife clearances, local farmers issues, etc. Placing reliance on the judgment of the Supreme Court in ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49, they submit that in absence of any proof of loss being suffered by the respondent, award of damages by the learned Arbitrator cannot be sustained.

8. On the other hand, the learned counsel for the respondent, placing reliance on the judgment dated 12.07.2022 of the High Court of Bombay in Writ Petition No. 6501/2022 titled ***Friends and Friends Shipping Pvt. Ltd. v. Central Warehousing Corporation,*** submits that while a new ground can be allowed to be raised in challenge to the Arbitral Award at a later stage, in the garb of an amendment application, an absolutely new ground of challenge which has no foundation in the original petition filed under Section 34 of the Act cannot be allowed to be raised. He submits that the above judgment has been affirmed by the Supreme Court by its order dated 14.10.2022 passed in SLP(C) no.17522/2022, observing as under:

> *" Having heard learned counsel appearing on behalf of the petitioner and the reasoning given by the High Court, while passing the impugned judgment and order, in*

> *para 8, we see no reason to interfere with the same. The application to amend Section 34 application is rightly rejected by the learned District Court which has been rightly confirmed by the High Court.*
>
> *The Special Leave Petition stands dismissed.*
>
> *Pending application stands disposed of."*

9. He also places reliance on the judgment of the Supreme Court in ***State of Maharashtra v. Hindustan Construction Company Limited,*** (2010) 4 SCC, 518 in support of the above proposition of law.

10. He submits that Section 34(3) of the Act prescribes the period within which a challenge to the Award can be made. It also prescribes the period by which the Court can condone the delay in filing of the challenge to the Award. Any delay beyond the said period cannot be condoned by the Court. He submits that the petitioner, therefore, cannot lay a new challenge to the Arbitral Award at this belated stage in the garb of filing of an application seeking amendment to the original petition.

11. He submits that in the present case, the petitioner has never challenged the eligibility of the learned Sole Arbitrator to adjudicate on the disputes between the parties. He submits that, in fact, the learned Arbitrator was appointed at the request of the petitioner. The learned Arbitrator before entering upon the reference submitted his disclosure as required under Section 12 of the Act. The petitioner never raised any objection to the eligibility of the learned Sole Arbitrator. Thereafter, the petitioner, in fact, twice filed applications under Section 29A of the Act seeking extension of the mandate of the

learned Arbitrator. He submits that the filing of the application under Section 29A of the Act by the petitioner would, in fact, satisfy the Proviso to Section 12(5) of the Act and the ineligibility, if at all, attached to the learned Sole Arbitrator would be waived.

12. On the merits of the Arbitral Award, he submits that the agreement between the parties provides for a 'Delay Delivery Discount' of a maximum of 10% of the total contract value. In the present case, the learned Arbitrator has found the petitioner guilty of delay in making supply of the pipes. Thereafter, in terms of the judgment of the Supreme Court in ***M/s Construction & Design Services v. Delhi Development Authority***, (2015) 14 SCC 263, the learned Arbitrator has observed that the contract in question, being of public interest, there can be a presumption of the delay having resulted in damages to the respondent on account of such delay. He submits that the view taken by the learned Arbitrator is a plausible view and this Court in exercise of its limited jurisdiction under Section 34 of the Act would not be entitled to interfere in the same.

13. I have considered the submissions made by the learned counsels for the parties.

14. At the outset, it is important to emphasize that the respondent has not disputed that, though in terms of the Arbitration Agreement and on the request of the petitioner, the learned Arbitrator was appointed by the respondent alone. The Arbitration Agreement between the parties was contained in Clause 4.26.1 of the Special Conditions of Contract attached to the Purchase Order and is reproduced hereinbelow :-

> *"4.26.1 Any dispute or difference of any kind at any time(s) between the Purchaser and the vendor arising out of in connection with or incidental to the contract (including any dispute or difference regarding the interpretation of the contract or the termination thereof, or resulting from a termination thereof), shall be referred to arbitration by a Sole Arbitrator appointed by the General Manager. The provisions of the Arbitration & Conciliation Act, 1996 and all statutory re-enactments and modifications thereof and the Rules made thereunder shall apply to all such arbitrations. The venue of the arbitration shall be New Delhi (India)."*

(*Emphasis Supplied*)

15. The petitioner invoked the Arbitration Agreement vide its notice dated 15.01.2016, requesting as under:-

> *"We, therefore, in terms of Arbitration Clause request you to nominate a person to act as an Arbitrator. Please ensure that names being proposed meet the requirement of independence and impartiality as envisaged in the Arbitration and Conciliation (Amendment) Ordinance, 2015."*

16. On the above request, the respondent appointed the learned Arbitrator vide letter dated 15.02.2016.

17. Relying upon its earlier judgment in ***TRF Limited*** (supra), the Supreme Court in ***Perkins Eastman Architects DPC*** (supra) has held that the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a Sole Arbitrator. A party to the Agreement, therefore, would be disentitled to make any appointment of an Arbitrator.

18. In ***Bharat Broadband Network Limited*** (supra), the Supreme

Court held that Section 12(5) of the Act provides for *de jure* inability of an Arbitrator to Act as such. The only way in which this ineligibility can be removed is by fulfilling the conditions in the Proviso to Section 12(5) of the Act, 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. The '*express agreement in writing*' has reference to a person who is interdicted by the Seventh Schedule, but who is stated by the 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. It was held that where the Arbitrator is unable to perform his function, being ineligible under Section 12(5) of the Act, the appointment of the Arbitrator itself was void.

19. In ***Govind Singh*** (supra), a Division Bench of this Court considering the above judgments held that even if the party does not raise an objection to the appointment of the Arbitrator and participates in the arbitral proceedings without raising any objection to the appointment of the Arbitrator, it is not a waiver of such party's right under Section 12(5) of the Act. It was further held that an Arbitral Award passed by an Arbitrator who is ineligible to act as an Arbitrator cannot be considered as an Arbitral Award at all. The ineligibility of an Arbitrator goes to the root of his jurisdiction and the Arbitral Award cannot be considered as valid.

20. In ***MS Bridge Building Construction Co. Pvt. Ltd.*** (supra), a learned Single Judge of this Court, relying upon the above judgments, rejected the plea of the respondent therein that the petitioner therein having filed applications for extension of the mandate of the

Arbitrator is deemed to have waived the applicability of Section 12(5) of the Act and cannot assail the Award on that ground.

21. In ***JMC Projects (India) Ltd.*** (supra), another learned Single Judge of this Court again rejected the plea of the respondent observing that the filing of applications for extension of time for continuance and completion of the arbitral proceedings, or applications to the Arbitrator for extension of time to file the affidavit of evidence etc., cannot constitute an "*agreement in writing*" within the manner of the Proviso to Section 12(5) of the Act.

22. In view of the above authorities, there can be no doubt that the learned Arbitrator appointed by the respondent was *de jure* ineligible to act as such. The petitioner by its participation in the arbitration proceedings or by its filing of applications under Section 29A of the Act seeking extension of the mandate of the learned Arbitrator, cannot be said to have waived the ineligibility of the learned Arbitrator under Section 12(5) of the Act, and, therefore, the Arbitral Award passed by the learned Arbitrator is invalid.

23. The only question, therefore, left to be considered by this Court is whether the petitioner can now be allowed to agitate the above ground by way of an amendment application, which admittedly has been filed much beyond the period prescribed in Section 34(3) of the Act.

24. In ***Hindustan Construction Company Limited*** (supra), the Supreme Court has held that the effect of Section 34(3) of the Act is not to completely rule out any amendment being allowed to be made in the application for seeking setting aside of the Award howsoever material or relevant it may be. The Court held as under:-

> ***"29.*** *There is no doubt that the application for setting aside an arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) i.e. within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of the legislature while enacting Section 34.*
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> ***30.*** *More so, Section 34(2)(b) enables the court to set aside the arbitral award if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in clause (b) "the court finds that" do enable the court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice."*

25. In ***Lion Engineering Consultants*** (supra), the Supreme Court

held that even without an amendment in the petition, a plea of lack of jurisdiction of the Arbitrator can be raised even though no such objection was raised under Section 16 of the Act.

26. In ***Hindustan Zinc Limited (HZL)*** (supra), the Court held that if there is an inherent lack of jurisdiction of the Arbitrator, the plea can be taken up any stage and also in collateral proceedings. Such plea can be taken even where the party has consented to the appointment of the Arbitrator.

27. Applying the above principles to the facts of the present case, the plea of the Arbitrator being *de jure* ineligible to act as such is a plea of lack of jurisdiction. This plea can be allowed to be raised by way of an amendment and even without the same.

28. In ***Friends and Friends Shipping Pvt. Ltd.*** (supra), relied upon by the learned counsel for the respondent, the grounds that were sought to be added by way of an amendment were on the challenge to the neutrality of the Arbitrator. A ground to demonstrate fraud was also sought to be inserted. The Court, in fact, distinguished the judgment of the Supreme Court in ***Ellora Paper Mills Limited v. State of Madhya Pradesh***, (2022) 3 SCC 1, by observing as under:-

> *"8. At the outset it is necessary to bear in mind that by way of the proposed amendment the grounds which are now being sought to be inserted have absolutely no foundation in the petitioner's application preferred under Section 34 of the Arbitration Act. As has been rightly noticed by the learned District Judge at no point of time any objection about neutrality of the Arbitrator was raised by resorting to Section 12, 13 or 15 of the Arbitration Act.*

> *This needs to be emphasized for the sole reason to ascertain as to if, the proposed amendment merely intends to add some facts to the pending challenge to the award or is it that it is intended to put forth absolutely new challenge*
>
> *xxxxx*
>
> *10. True it is that in the matter of Ellora Paper Mills Limited (supra), the Section 12(5) which is inserted in the year 2015 has been held to govern a pending arbitration proceeding. However, it is to be borne in mind that it was a proceeding which was initiated under Sections 11, 14 and 15 and although the Arbitral Tribunal was constituted many years ago it had never commenced its proceeding. This is not the fact situation in the matter in hand. In this matter, without raising any objection at any earlier point of time on account of neutrality of the arbitrator by resorting to Sections 12, 13 and 14, an award has been passed and even it has been put to execution. Therefore, the petitioner is not entitled to derive any benefit from the decision in the matter of Ellora Paper Mills Limited (supra) as well."*

29. The above judgment would, therefore, not come to the aid of the respondent, as in the present case, the objection on the learned Arbitrator is under Section 12(5) of the Act and of him being *de jure* ineligible to act as an Arbitrator.

30. In view of the above, it has to be held that the learned Arbitrator was *de jure* ineligible to act as such and the Award passed by the learned Arbitrator is void and unenforceable. The same is, therefore, set aside.

31. I have not rendered an opinion on the other challenge to the Arbitral Award as I do not deem it necessary to do so, having held that the Award is a nullity.

32. The application and the petition are allowed. There shall be no order as to costs.

NAVIN CHAWLA, J

JUNE 01, 2023*/rv/KP/SS*