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IN THE HIGH COURT OF DELHI AT NEW DELHI
VIBHU BAKHRU, J.
O.M.P. (T) (COMM) 34/2022; *29th March, 2022*
SACHEEROME ADVANCED TECHNOLOGIES (SAT) *versus* **NEC TECHNOLOGIES PVT. LTD. (NECI)**

Arbitration and Conciliation Act, 1996 - A party can challenge the appointment of an arbitrator only according to the procedure set out in Section 13 of the Act and that a petition under Section 14(1) could not be filed to challenge the appointment of an Arbitral Tribunal on the grounds mentioned under Section 12(3) of the Act, i.e., on the ground of justifiable doubts as to the independence or impartiality of the Arbitrator.

Petitioner Through Ms Geeta Luthra, Senior Advocate with Ms Kamakshi Gupta, Ms Manas Agrawal, Advocates.

Respondent Through Mr Ramesh Singh, Senior Advocate with Mr Arjun Pall, Ms Satya Jha, Advocates.

1. The petitioner has filed the present petition under Section 14 (2) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, praying that the mandate of the learned Sole Arbitrator be terminated.

2. The disputes between the parties have arisen in the context of an agreement dated 11.06.2019 (the Agreement). On 08.10.2020, the petitioner had issued a notice under Section 21 of the A&C Act, invoking the Arbitration Agreement and called upon the respondent to concur on appointment of an arbitrator. The respondent rejected the said request. Consequently, the petitioner filed a petition under Section 11 of the A&C Act [being ARB. P. 702/2020] seeking appointment of an Arbitrator.

3. The said petition was allowed by an order dated 04.12.2020 and Sh Rajiv Bansal, Senior Advocate (since deceased) was appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

4. The learned Arbitrator expired on 17.05.2021. In the circumstances, the petitioner filed a petition before this Court under Section 14(1)(a) read with Section 15 of the A& C Act being OMP (T) (COMM) 74/2021. This Court disposed of the said petition by an order dated 09.08.2021 and appointed Ms Radhika Biswajit Dubey, Advocate as the Sole Arbitrator to adjudicate the disputes between the parties.

5. The petitioner is aggrieved by the manner in which the Arbitral Tribunal has conducted the arbitral proceedings. It is also averred in the present petition that the learned Arbitrator did not make the complete disclosure as required under Section 12(1) of the A&C Act at the time of accepting her appointment. She had, however, subsequently disclosed that she had worked as a junior to one of the senior counsels appearing for the petitioner. She had also worked with a law firm, which had subsequently split. After the split she thereafter, was associated with one of the resultant firms as a partner (not the firm representing the respondent). The other resultant firm is representing the respondent.

6. Ms Luthra, learned senior counsel appearing for the petitioner states that the petitioner

had not challenged the appointment of the learned Arbitrator and had participated in the arbitral proceedings; however, the learned Arbitrator's inclinations were revealed subsequently.

7. It is important to note that the learned Arbitrator had made full disclosure at the first preliminary hearing held on 26.08.2021. This was prior to the learned Arbitrator receiving the Arbitral record. She had also recorded that none of the circumstances as disclosed fall foul of the Fifth or the Seventh Schedule to the A&C Act. Nonetheless she had made the disclosure for the comfort of the parties. Admittedly, the petitioner did not express any reservations and participated in the arbitral proceedings. However, in the present petition it is averred that the learned Arbitrator's "*direct and indirect*" contact and connection with the Law firms. have created a reasonable apprehension as to the independence and impartiality of the learned Arbitrator.

8. There is no dispute that the circumstances as disclosed by the learned Arbitrator do not fall within the scope of the Fifth Schedule of the A&C Act. Concededly, the petitioner had accepted the disclosure and had unreservedly participated in the arbitral proceedings.

9. Although Ms Luthra, learned Senior Counsel appearing for the petitioner had referred to the disclosure made by the learned Arbitrator to suggest an apprehension of bias, she did not press the same. She has confined the challenge to the appointment of the Arbitral Tribunal on two grounds. First, she submitted that the conduct of the Arbitral Tribunal does not inspire confidence. She stated that the Arbitral Tribunal had also found the petitioner (Claimant before the Arbitral Tribunal) guilty of inordinate delays and had also imposed costs, even though the alleged delays had occurred prior to the appointment of the learned Arbitrator. She submits that the learned Arbitrator could not have imputed any delay on the petitioner in conducting the arbitral proceedings or approaching this Court for appointment of the Arbitrator, in respect of a period prior to her appointment.

10. She also referred to certain correspondence (e-mails) exchanged for fixing the dates of examination and the manner of conducting the cross-examination (virtual or physical). She submits that the Arbitrator's conduct gives rise to apprehension of real likelihood of bias on her part and the said Arbitrator is thus, *de jure* incapable of performing her functions.

11. Second, Ms Luthra, submits that there has been an inordinate delay on the part of the learned Arbitrator in conducting the arbitral proceedings and therefore, she has failed to act with due dispatch.

12. It is seen that the petitioner had filed an application before the learned Arbitrator under Section 15 read with Section 14(1)(a) of the A&C Act seeking termination of her mandate, which was rejected.

13. The contention that the mandate of the learned Arbitrator stands terminated under Section 14(1) of the A&C Act is unmerited. The present petition is not maintainable.

14. It is well settled that a petition under Section 14(1) of the A&C Act cannot be filed to challenge appointment of the Arbitral Tribunal on grounds as set out under Section 12(3) of the A&C Act. Any party seeking to challenge the appointment of the arbitrator is

required to do so in accordance with the procedure set out in Section 13 of the A&C Act. In the first instance, the said challenge is required to be considered by the Arbitral Tribunal. In terms of Sub-section (3) of Section 13 of the A&C Act, the learned Arbitrator could either withdraw from the office failing which the Arbitral Tribunal is required to decide the said challenge. In terms of Sub-section (4) of Section 13 of the A&C Act, if the challenge is not successful, the Arbitral Tribunal is required to continue with the arbitral proceedings and make an award. In such circumstances, the only recourse available to a party challenging the appointment of an Arbitrator under Section 13 of the A&C Act, is to await for the arbitral award and if aggrieved, take recourse to the provisions as set out under Section 34 of the A&C Act.

15. In the present case, the petitioner did not make any application challenging the appointment of learned Arbitrator under Section 13 of the A&C Act; it filed an application styled as under Section 16 read with Section 14(1)(a) of the A&C Act. Nonetheless, in substance, the petitioner had challenged the appointment of the learned Arbitrator. The learned Arbitrator considered the said application and has since decided the same. In the circumstances, the only recourse now available to the petitioner is to proceed with the arbitral proceedings and challenge the arbitral award under Section 34 of the A&C Act, if it so desires.

16. The contention that Section 14 of the A&C Act provides a separate remedy available to parties to challenge appointment of an arbitrator, notwithstanding, the provisions under Section 13 of the A&C Act, is unmerited. In ***Progressive Career Academy Pvt. Ltd. v. FIITJEE Ltd.: 180 (2011) DLT 714,*** the Court had examined the UNCITRAL Model Law and noted that the Parliament had not adopted the Model Law in its entirety on the subject of impartiality of the Arbitral Tribunal. The Court had further noted that a departure from the said Model Law, indicated that the Indian Parliament did not want any curial interference at an interlocutory stage of the arbitral proceedings on the perceived ground of bias. The Court held that such a challenge would be permissible only under Section 34 of the A&C Act after the award had been rendered. The relevant extract of the said decision is set out below:

"**20.** A comparison of the provisions dealing with the challenge to the arbitrator's authority in the A&C Act and the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Arbitral Tribunal. However, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further Appeal. It seems to us, therefore, that there is no room for debate that the Indian Parliament did not want curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13(5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral Tribunal, a challenge on this score is possible in the form of Objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is palpably different also to the English, Australia and Canadian Arbitration Law. This difference makes the words of Lord Halsbury in *Eastman Photographic Materials Co.* all the more pithy and poignant.

21. In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in *Interstate Constructions* is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in *Pinaki Das Gupta, Neeru Walia, Ahluwalia Contracts (India) Ltd.* and *Newton Engineering and Chemicals Ltd.*. We are of the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings."

17. This Court in ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.: 2017 SCC OnLine Del 8034*** held that insofar as a challenge to the Arbitral Tribunal in the circumstances referred is Section 12(3) of the A&C Act is concerned, recourse to Section 14 of the A&C Act would not be available. However, in a case where a person is ineligible to act as an arbitrator in terms of Section 12(5) of the A&C Act, a petition under Section 14 may be maintainable. The said view was upheld by the Supreme Court in ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.: (2018) 12 SCC 471***. The Supreme Court has authoritatively explained the said scheme of the A&C Act as under:

"12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(*a*), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

18. The contention that the Arbitral Tribunal has not acted with due dispatch is bereft of any merit. It is seen that the learned Arbitrator was appointed on 09.08.2021. It is seen that a number of hearings have been held by the Arbitral Tribunal despite the mitigating circumstances resulting from the outbreak of Covid-19. The matter is at the stage of recording of evidence.

19. Ms Luthra, spent considerable time in advancing arguments that the appointment of the learned Arbitrator was completely unjustified in changing the manner of hearings scheduled on 28.01.2022 to 30.01.2022 from physical to virtual by her communication dated 05.01.2022, ostensibly on account of surge in covid cases. She submitted that the learned Arbitrator could under no possible circumstance have any reason to know the status of covid cases on 28.01.2022.

20. A virtual hearing was held before the Arbitral Tribunal on 29.11.2021. The procedural order no.7 issued thereafter (on 03.12.2021) indicates that the Arbitral Tribunal had, with the consent of the parties, scheduled sittings for three days – from 28.01.2022 to 30.01.2022 in physical board with two sessions per day. Apparently, the same was fixed as the respondent's witness (who had located to Singapore) had expressed his inability to be physically present prior to 28.01.2022. The petitioner states that the respondent was willing for cross-examination of his witness by the virtual mode for three days – 17.12.2021 to 19.12.2021.

21. After the hearing was concluded before the Arbitral Tribunal on 29.11.2021, the petitioner sent an email dated 30.11.2021 requesting that the cross-examination of witness be fixed for 17.12.2021 to 19.12.2021. However, the same was not acceptable to the respondent and this was communicated by the learned counsel for the respondent by its email dated 02.12.2021. Since the respondent did not accede to the petitioner's request for change in the schedule of hearings which were fixed on 28.01.2022 to 30.01.2022, the same were retained by the Arbitral Tribunal. Thereafter, on 05.01.2022, the Arbitral Tribunal issued an email changing the mode of hearing fixed on 28.01.2022 to 30.01.2022 from physical to virtual on account of surge in Covid-19 cases. The learned counsel for the petitioner had objected to the same by its email dated 19.01.2022 and requested that the mode of hearing as fixed earlier be retained as there was a decrease in the number of Covid-19 cases. There was an exchange of correspondence between the parties.

22. It is in this context that Ms Luthra contends that the Arbitral Tribunal ought to have retained the mode of hearing as physical and if there was a surge in Covid-19 cases, she could have taken a decision on a date closer to the dates of hearing.

23. The said contention is clearly without substance. It is common knowledge that the number of Covid-19 cases had increased. It is material to note that the petitioner did not immediately object to the communication dated 05.01.2022. It did so after two weeks, that is, by an email dated 19.01.2022. Interestingly, the reason provided by the petitioner for a delayed response is that the counsels on record were "*down with COVID-19 in the first two weeks of January and were in quarantine, and hence, they were unable to access their emails in due course of time*".

24. This is sufficient to demonstrate that the Arbitral Tribunal's decision to change the

mode of hearing was not unjustified. The contentions advanced on behalf of the petitioner in this regard are unsubstantial.

25. It is also relevant to note that in view of the pandemic, the Supreme Court has also passed various orders in ***Re: Cognizance for Extension of Limitation: Suo Motu Writ Petition (Civil) No.3/2020***, extending the period of limitation in all cases including the time for an Arbitral Tribunal to make an award as contemplated under Section 29A of the A&C Act. The question whether the Arbitral Tribunal has acted with due dispatch is required to be considered bearing the mitigating circumstances resulting from the outbreak of Covid 19, in mind.

26. In the present case, this Court is unable to accept that the Arbitral Tribunal has not acted with due dispatch or there has been any delay on its part.

27. In view of the above, the present petition is dismissed with costs quantified at ₹25,000/-. The costs shall be deposited with the Delhi High Court Legal Services Committee within a period of two weeks from date.

28. It is clarified that nothing stated in this order shall preclude the parties from raising such contentions, as advised, either before the Arbitral Tribunal or before this Court under Section 34 of the A&C Act, after the Arbitral Award has been rendered.