$~5(2022)

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

% *Date of Decision: 25th February 2022*

\+ **O.M.P. (T) (COMM.) 12/2022 and IA No. 1395/2022**

A K BUILDERS ..... Petitioner

Through: Mr Rajeev Kumar, Advocate.

versus

DELHI STATE INDUSTRIAL INFRASTRUCTURE DEVELOPMENT CORPORATION LTD ..... Respondents

Through: Mr Nishant Datta, Mr Pradeep Bhardwaj and Mr Chirag, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. ***(ORAL)***

[Hearing held through videoconferencing]

1. The petitioner has filed the present petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') praying that the mandate of the learned Arbitrator be terminated and another Arbitrator be appointed in his place.

2. The respondent (hereafter '**DSIIDC**') had issued a Notice Inviting Tender (NIT) for executing the work of "*Construction of Halfway/Long Stay Home for Social Welfare Department at Sector 22,*

Rohini, Delhi".

3. The Contract value of the said work was fixed at ₹4,70,35,632/- and, it was stipulated that the work would be completed within a period of sixteen months. The petitioner submitted its bid for the said work and was awarded the Contract for executing the work in question by a Letter of Award (hereafter "**LoA**") dated 07.08.2012. It was stipulated that the work would be executed on or before 15.12.2013. It is stated that the execution of the work was inordinately delayed. The petitioner claims that the work was completed on 30.03.2015. The petitioner had raised a Final Bill and, it is stated that the same was cleared on 14.05.2019. Certain disputes have arisen between the parties in connection with the Contract in question and the petitioner invoked the Arbitration Clause by a notice dated 17.01.2020.

4. On 19.02.2020, the Chief Engineer, DSIIDC appointed Sh. D.S. Pandit, IAS (Retired) as a Sole Arbitrator to adjudicate the disputes between the parties. The Arbitral Tribunal held its first hearing on 13.03.2020. It is stated that several hearings have been held before the Arbitral Tribunal thereafter. DSIIDC states that the petitioner had participated in the arbitral proceedings without any reservation. However, the petitioner has now filed the present petition on 21.01.2022 seeking termination of the mandate of the learned Arbitrator on the ground that he is ineligible to act as an Arbitrator in view of the decisions of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377*** and ***Perkins Eastman Architects DPC and Ors. v. HSCC (India) Limited: AIR 2020 SC 59***

and, a decision of this Court in ***Proddatur Cable TV Digi Services v. Citi Cable Network Limited: (2020) 267 DLT 51***.

5. Mr Datta, learned counsel appearing for DSIIDC drew the attention of this Court to the petitioner's notice dated 17.01.2020 under Section 21 of the A&C Act. He pointed out that the petitioner had called upon the Chief Engineer of DSIIDC to appoint an Arbitrator in terms of Clause 25 of the General Conditions of Contract (GCC). He contended that the Arbitrator was appointed by the Chief Engineer, DSIIDC at the instance of the petitioner and it is not open for the petitioner to now question the same because the petitioner had participated in the arbitral proceedings for almost two years.

6. Mr Datta submitted that the decision of the Supreme Court in ***Bharat Broadband Network Limited v. United Telecoms Limited: (2019) 5 SCC 755*** would not be applicable to the facts of the present case. He sought to distinguish the said decision on the ground that in that case the appellant had sought removal of the Arbitrator immediately after a decision was rendered in the case of ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*). He submitted that in contrast to the same, the petitioner in this case had participated in the arbitral proceedings for a considerable period of time.

7. I have heard the learned counsel for the parties.

8. This Court is of the view that the decisions of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*) and ***Bharat Broadband Network Limited v. United Telecoms Limited***

(*supra*) squarely cover the controversy involved in this case.

9. The contention that the learned Arbitrator was appointed at the instance and consent of the petitioner, is not persuasive. A plain reading of the letter dated 19.02.2020, whereby the Chief Engineer, DSIIDC had appointed the learned Arbitrator, indicates that he had done so in exercise of hispowers conferred under Clause 25 of the GCC and not by consent, as is contended by the learned counsel on behalf of DSIIDC. However, it is not disputed that the petitioner had requested the concerned authority to act in terms of the said Clause.

10. In view of the decision of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*), a person who is ineligible to act as an arbitrator would also be ineligible to appoint an arbitrator. Thus, clearly, the Chief Engineer, DSIIDC was not empowered to appoint an Arbitrator in terms of Clause 25 of the GCC. The contention that the petitioner is precluded from raising any objections on this ground as the petitioner had participated in the arbitral proceedings, is also unmerited. Section 12(5) of the A&C Act clearly provides that waiver of any right under Section 12(5) of the A&C Act is required to be by an Agreement in writing, entered into after the disputes had arisen. In ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*), the Supreme Court had held as under:

> "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 writing". 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 the proposal or acceptance of any promise is made in words, the promise is said 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..."

11. In view of the authoritative pronouncement of the Supreme Court regarding the proviso to Section 12(5) of the A&C Act, there is no scope for entertaining the submission that the petitioner had, by his conduct, impliedly waived its right under Section 12(5) of the A&C Act. The waiver under Section 12(5) of the A&C Act has to be by an express agreement in writing. The contention that the Arbitrator was appointed by the Chief Engineer, DSIIDC pursuant to the request of

the petitioner to appoint an arbitrator is of little relevance when one considers the case of ***Bharat Broadband Network Limited v. United Telecoms Limited*** (*supra*). In that case the arbitrator was, in fact, appointed by the appellant who had then sought to challenge the same as being in violation of Section 12(5) of the A&C Act.

12. Mr Datta also referred to the decision of a Coordinate Bench of this Court in ***Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited***: ***284 (2021) DLT 722*** where this Court had declined to interfere with an arbitral award on the ground that the arbitrator was ineligible and the parties had participated in the arbitral proceedings.

13. The said decision is clearly inapplicable to the facts of this case as is apparent from paragraph 37 of the said decision, which reads as under:

> "**37.** Similarly, reliance is placed by petitioner's counsel upon decision in Bharat Broadband Network Limited (Supra). In the said case, after dismissal of unilateral appointment of Arbitrator by the Arbitral Tribunal itself, petition under Sections 14 and 15 of the Act was filed before the Court and applicability of Section 12(5) of the Act was considered, whereas in the instant case the arbitral Award is challenged under Section 34 of the Act."

14. In the aforesaid case, the Court had sought to distinguish the decision of ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.*** (*supra*) on the ground that the same was a petition under Sections 14 and 15 of the A&C Act and, not a petition under Section 34 of the A&C Act. Thus, clearly, the respondent can draw no support from the

said decision.

15. A petition under Section 14 of the A&C Act, on the ground that an Arbitrator is ineligible under Section 12(5) of the A&C Act to act as an arbitrator, is maintainable. This issue is also no longer *res integra* in view of the decision of the Supreme Court in ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited: (2018) 12 SCC 471***. In that case, the Supreme Court had expressly held that a petition under Section 14 of the A&C Act would be maintainable if the arbitrator was ineligible to act in terms of Section 12(5) of the A&C Act. The relevant extract of the said decision is set out below:

> "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."

16. This Court also has reservations regarding the decision in ***Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited*** (*supra*) in respect of the reasons stated to distinguish the decision of ***Bharat Broadband Network Ltd. v. United Telecoms Ltd***. (*supra*). However, it is not necessary to dilate on the same as the said decision is indisputably not applicable to a petition under Section 14 of the A&C Act.

17. In view of the above, the present petition is allowed. The

mandate of Mr D.S. Pandit, IAS (Retired) who is unilaterally appointed, is terminated.

18. Justice (Retired) V K Jain, a former Judge of this Court (Mobile No. +91 9650116555) is appointed to act as a Sole Arbitrator. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act. The parties are at liberty to approach the learned Arbitrator for further proceedings.

19. It is clarified that the proceedings would be commence from the same stage as obtaining before the learned Arbitrator.

20. The pending application also stands disposed of.

VIBHU BAKHRU, J

FEBRUARY 25, 2022
RK/v