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(2023-2)210 PLRIJ 001 (Del.)

Delhi High Court

Before: Justice Vibhu Bakhru, Justice Amit Mahajan.

KOTAK MAHINDRA BANK LTD. v. NARENDRA KUMAR PRAJAPAT

EFA(COMM)-3/2023

(i) Arbitration and Conciliation Act, 1996, Section 12(5) proviso - Arbitrator - Ineligibility of - Waiver - The proviso to Section 12(5) is unambiguous - A party can waive its right to object to the ineligibility of an arbitrator under Section 12(5), but the same is subject to two conditions - First, that the waiver is required to be by and done by an express agreement in writing; and second, that such agreement is entered into after the disputes have arisen - Unless both the aforesaid conditions are satisfied, there can be no waiver of the ineligibility of an arbitrator - Waiver of a right to object to ineligibility of an arbitrator under Section 12(5) of the A&C Act cannot be inferred by conduct of a party. [Para 7, 8]

(ii) Arbitration and Conciliation Act, 1996, Section 12(5) - Arbitrator - Ineligibility of - Unilateral appointment of an arbitrator without the consent of the other party(ies) - A person who is ineligible to act an Arbitrator, lacks the inherent jurisdiction to render an Arbitral Award under the Act - A decision, by any authority, which lacks inherent jurisdiction to make such a decision, cannot be considered as valid - Such an impugned award cannot be enforced. [Para 14]

(iii) Limitation Act, S. 5- Delay - Condonation of delay - 68 days - Explanation provided "*due to delay in obtaining necessary required documents from the bank (petitioner)* - No material to show that the appellant was impeded in any manner in retrieving the documents available with it - Any delay or procrastination in taking necessary steps for recovering the documents from its own office cannot be a ground for condoning the delay unless certain extenuating circumstances exist - Also the necessary documents based on which the appeal was filed were readily available with the appellant - Dismissed. [Para 15-18]

Judgment

Vibhu Bakhru, J. (Oral)- (17.05.2023) - The appellant has filed the present appeal impugning an order dated 23.11.2022, passed by the learned Commercial Court whereby the appellant's application for enforcement of an *ex- parte* arbitral award dated 21.07.2021, passed by Shri C. Prasanna Venkatesh, Sole Arbitrator in favour of D.H. Finance Company, was rejected.

2. The appellant claims that it is an assignee of D.H. Finance Company and is, therefore, entitled to enforce the Arbitral Award rendered in favour of the said entity.

3. In terms of the Arbitral Award, the sum of Rs. 4,66,103.3/- alongwith interest @ 18% per annum was awarded in favour of the D.H. Finance Company which was a claimant before the Arbitral Tribunal. The learned Commercial Court had found that the Arbitral Award was rendered *ex-parte* by an Arbitrator who was unilaterally appointed by D.H. Finance Company without any recourse or consent of the respondent. The Court had also found that the learned Arbitrator was ineligible for being appointed as an Arbitrator in terms of Section 12(5) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**').

4. In *Trf Limited v. Energo Engineering Projects Limited* .: (2017) 8 SCC 377, the Supreme Court held that once the Arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. In *Perkins Eastman Architects Dpc v. Hscc (India) Ltd.*: (2020) 20 SCC 760, the Supreme Court, following the earlier decision in *TRF Ltd. (supra)*, held that the Chairman-cum-Managing Director of a party was ineligible to appoint an arbitrator. Following the aforesaid decisions, this court in *Proddatur Cable TV Digi Services v. Siti Cable Network Limited*: (2020) 267 DLT 51 held that it is not permissible for a party to unilaterally appoint an arbitrator without the consent of the other party(ies). It is important to note that the aforesaid decisions were rendered in the context of Section 12(5) of the A&C Act.

5. In the present case, the learned Commercial Court had found that the arbitrator appointed by the claimant (DH Finance Company) was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the A&C Act as interpreted by the Supreme Court in the aforementioned decisions.

6. The learned counsel appearing for the appellant does not seriously dispute that the arbitrator unilaterally appointed by the claimant was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Act. He has largely focused his contentions on assailing the decision of the learned Commercial Court to award costs. It was also contended that the respondent was aware of the appointment of the arbitrator and had not raised any objection to such appointment; therefore the respondent is now precluded from challenging the impugned award.

7. We find little merit in the aforesaid contentions. The proviso to Section 12(5) of the A&C Act is unambiguous. A party can waive its right to object to the ineligibility of an arbitrator under Section 12(5) of the A&C Act but the same is subject to two conditions. First, that the waiver is required to be by and done by an express agreement in writing; and second, that such agreement is entered into after the disputes have arisen. Unless both the aforesaid conditions are satisfied, there can be no waiver of the ineligibility of an arbitrator.

8. In *Bharat Broadband Network Limited v. United Telecoms Limited*: (2019) 5 SCC 755, the Supreme Court had authoritatively held that waiver of a right to object to ineligibility of an arbitrator under Section 12(5) of the A&C Act cannot be inferred by conduct of a party. Such waiver can only be by an express agreement in writing. The Court had also clarified that “*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*”.

9. In view of the above, the failure, if any, on the part of the respondent to object to the unilateral appointment of the sole arbitrator, cannot be construed as waiver of his right under Section 12(5) of the A&C Act.

10. The award rendered by an arbitrator who is ineligible to be appointed as such cannot be enforced.

11. In *HRD Corporation v. GAIL (India) Ltd.*: (2018) 12 SCC 471, the Supreme Court held as under:

“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.” [emphasis added]

12. In *Govind Singh v. M/S Satya Group Pvt Ltd & Anr.*, 2023/DHC/000081 this court held as under:

“In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person who is ineligible to act as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person

who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction."

13. The Learned Commercial Court has held that an award rendered by a person who is ineligible to act as an Arbitrator by virtue of the provisions of Section 12(5) of the A & C Act is a nullity and, therefore, cannot be enforced. It has accordingly dismissed the enforcement petition under Section 36 of the A&C Act with the cost quantified as Rs. 25,000/-.

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.

15. We also find that the present appeal has been filed belatedly, i.e., after the delay of 68 days. The only explanation provided by the appellant for seeking condonation of delay reads as under:

"3. That the Petitioner craves leave of this Hon'ble court for delay in filling of the petition as due to delay in obtaining necessary required documents from the bank, There has been a delay of 68 days in filing of this petition."

16. We are unable to accept that the delay in filing the appeal ought to be condoned in view of the aforesaid explanation. Firstly, there is no material to show that the appellant was impeded in any manner in retrieving the documents available with it. Secondly, any delay or procrastination in taking necessary steps for recovering the documents from its own office cannot be a ground for condoning the delay unless certain extenuating circumstances exist.

17. The appeal indicates that apart from a copy of the impugned award, the impugned order, an internet copy of an order passed by the learned Single Judge of this Court in another matter, and the written submissions filed on behalf of the petitioner, no other documents have been filed. It is obvious that the necessary documents were readily available with the appellant.

18. We are, thus, at a loss to understand as to which further documents were required to be retrieved by the appellant that took additional sixty-eight days, over and above the time available to file the present appeal, to retrieve. In addition, there is also a 20 days delay in refiling the appeal.

19. The appeal is, accordingly, dismissed both on the grounds of delay as well as on merits.

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