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

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Date of Decision: 11.03.2022

+ **O.M.P. (T) (COMM.) 113/2021 & Crl. M.A. 4645/2022**

MOHD TARIQ USMANI

..... Petitioner

Through Mr Mohd Qayam-ud-din, Advocate with
Ms Smerity Rdni, Advocate.

Versus

JEETENDER PAL & ANR.

..... Respondents

Through Mr G.P. Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. (ORAL)

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 Arbitrator, one Mr Manoj Kumar Verma, be terminated as he was unilaterally appointed by the respondent. The petitioner further prays that another arbitrator be appointed in his place.

2. There is no dispute that the said Arbitrator was appointed unilaterally by the respondent to adjudicate the disputes that have arisen between the parties in connection with a Partnership Deed dated

01.05.2018 (hereafter ‘the Partnership Deed’). In terms of the Partnership Deed, the petitioner and respondent had agreed that the business of the firm shall be carried out under the name – M/s Ocean Exim India (respondent no.2).

3. On 14.01.2020, respondent no. 1 issued a legal notice to the petitioner and respondent no. 2 invoking the arbitration agreement (Clause 12 of the Partnership Deed) and further appointed Mr Manoj Kumar as the Sole Arbitrator. The petitioner responded to the said notice by a letter dated 03.03.2020/05.03.2020 sent by his advocate.

4. Respondent no.1 (hereafter ‘the respondent’) states the petitioner did not respond to the legal notice dated 14.01.2020 but has now, filed a forged and fabricated reply dated 03.03.2020. He further claims that the legal notice dated 14.01.2020 was followed by another notice dated 04.02.2020, which has been concealed by the petitioner.

5. Mr Manoj Kumar Verma sent a letter dated 05.06.2020 accepting his appointment as an Arbitrator. The reference to the arbitration agreement in his letter is not the Partnership Deed but another agreement. Admittedly, no hearings were held thereafter due to the lock down imposed by the concerned authorities in the wake of the outbreak of the Covid-19 pandemic.

6. Mr Verma issued another notice dated 11.09.2021 stating that the arbitration proceedings were stayed due to the pandemic but he had decided to commence with the proceedings. Further, he directed the parties to appear at his residence on 27.09.2021

7. It is also the respondent's case that the petitioner did not object to the appointment of the learned Arbitrator at the material time and therefore, is precluded from raising any objections at this stage.

8. The respondent further states that the present petition is not maintainable as the only recourse available to the petitioner is to make an application under Sections 12 or 13 of the A&C Act before the Arbitral Tribunal.

9. Next, the learned counsel for the respondent submits that once an Arbitral Tribunal is appointed, there is no scope for interference by this Court in such appointment. He referred to the decision of the Supreme Court in *SBP & Co. v. Patel Engineering Ltd & Anr.*: (2005) 8 SCC 618 and drew the attention of this Court to paragraph 47 of the said decision. In that case the Supreme Court had observed that once the matter reaches the Arbitral Tribunal, the High Court would not interfere with the orders passed by the Arbitral Tribunal save and except under Section 37 of the A&C Act or under Section 34 of the A&C Act. He also referred to the decision of this Court in *Priknit Retails Ltd. v. Aneja Agencies*: (2013) 198 DLT 763, in support of the aforesaid contentions.

10. Before proceeding further, it is relevant to refer to the Arbitration Clause as contained in Clause 12 of the Partnership Deed. The same reads as under:-

“12. ARBITRATION

Whenever there by any difference of opinion or
any dispute between the partners the partners shall

refer the same to an arbitration of one person. The decision of the arbitration so nominated shall be final and binding on all partners such arbitration proceedings shall be governed by Indian Arbitration Act, which is in force.”

11. It is clear from the Arbitration Agreement that it was not open for the respondent to unilaterally appoint any individual as an arbitrator.

12. There is some controversy whether the petitioner had responded to the notice sent by the respondent on 14.01.2020. Whereas the petitioner claims that he had replied to the aforesaid notice on 03.03.2020/05.03.2020, the respondent disputes the same. However, it is not disputed that the petitioner did not furnish his written consent for the appointment of Mr Manoj Kumar Verma, as an Arbitrator.

13. It is clear from the legal notice dated 14.01.2020 that the respondent had invoked the arbitration clause and simultaneously appointed Mr Manoj Kumar Verma as the Sole Arbitrator without the consent of the petitioner. The said notice does not indicate that the parties had earlier mentioned or discussed the appointment of the Sole Arbitrator.

14. It is relevant to set out the notice dated 11.09.2021 sent by the Sole Arbitrator, Mr Manoj Kumar Verma. The contents of the said notice are reproduced below:-

**“NOTICE FOR APPEARANCE IN
ARBITRATION PROCEEDING”**

Whereas, Mr Jeetender Pal vide reference letter dated 14.01.2020 has appointed the undersigned as Sole Arbitrator to adjudicate and settle the dispute between the parties mentioned above having arbitration clause 12 of the Partnership Agreement dated 01.05.2018.

And, further whereas I have accepted my appointment as Sole Arbitrator and have entered upon the matter and I am not aware of any circumstances nor have any interest that prevents me from arbitrating the present matter. As per the terms of the Agreement the venue of Arbitration is at Delhi.

Whereas I have sent a notice on 05.06.2020 to party to present arbitration, which was delivered to both of you, and I have not received any objection from both of you. Hence my appointment as arbitrator is final and binding on both the parties.

The present arbitration proceeding was stayed due to pandemic situation prevalent in the country but now the situation has improved hence I decided to start the proceeding of arbitration. Hence, I am directing both the parties to appear in my office: House No.-1339, Second Floor, Dr. Mukherjee Nagar, Delhi – 110009 (place of arbitration), on 27.09.2021 at 4.30 PM. The Petitioner is directed to file statement of

claim along with documents on the said day.

Issued under my hand on this 11th day of September, 2021.

(MANOJ KUMAR VERMA)”

15. It is clear from the aforesaid notice that Mr Manoj Kumar Verma was appointed as a Sole Arbitrator without any concurrence or discussions with the petitioner. Mr Manoj Kumar Verma had proceeded on the *ex-facie* erroneous assumption that his appointment had been accepted as he had not received any objection from the petitioner.

16. In the letter dated 04.02.2020 claimed to have been sent by the respondent, he states that he had not received any response from the petitioner to his legal notice dated 14.01.2020. It is thus apparent that the petitioner has not, at any stage, either participated in the arbitral proceedings or expressed his consent to the appointment of Mr Manoj Kumar Verma as an Arbitrator.

17. In ***Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited: 2019 SCC OnLine SC 1517***, it was held that unilateral appointment of an arbitrator by a person who is ineligible to act as an arbitrator is impermissible. The individual so appointed unilaterally would also be ineligible to act as an arbitrator by virtue of Section 12(5) of the A&C Act, as introduced by the Arbitration and Conciliation (Amendment) Act, 2015. The only exception carved out, which is provided under the proviso of Section 12(5) of the A&C Act, is where

parties by a written agreement waive their right under Section 12(5) of the A&C Act after the disputes have arisen.

18. Admittedly, in this case there is no written consent of the petitioner for the respondent to unilaterally appoint an arbitrator.

19. The contention that once an arbitrator is appointed, the court would have no jurisdiction to interfere with his mandate is without any merit.

20. The question, whether this Court can interfere when a challenge is raised on the ground of ineligibility of an arbitrator under Section 12(5) of the A&C Act, is no longer *res integra*. In ***HRD Corporation (Marcus Oil & Chemical Division) v. GAIL (India) Limited: 2017 SCC OnLine Del 8034***, this Court held that in respect of a challenge to the appointment of an arbitrator under Section 12(1) of the A&C Act, the party so challenging the arbitrator has to follow the discipline of Section 13 of the A&C Act. However, in respect of a challenge on the ground of ineligibility of an arbitrator under Section 12(5) of the A&C Act, a petition under Section 14 of the A&C Act is maintainable. This view was upheld by the Supreme Court in ***HRD Corporation (Marcus Oil & Chemical Division) v. GAIL (India Ltd.): (2018) 12 SCC 471***, wherein the Supreme Court observed 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.”

21. In addition to the above, this Court must also observe that in the present case, Clause 12 of the Partnership Deed (Arbitration Clause), does not permit unilateral appointment of the Arbitrator by any party. This Court is also unable to accept that the petitioner had concurred, whether tacitly or otherwise, for the appointment of Mr Manoj Kumar Verma as an Arbitrator.

22. In view of the above, the present petition is merited and is liable to be allowed.

23. Considerable judicial time has been consumed by the learned counsel appearing for the respondent, in canvassing propositions that are no longer *res integra* and have been settled by the authoritative decisions rendered by the Supreme Court. This Court is of the view that the attempt of the respondent to unilaterally appoint an arbitrator, where the Arbitration Agreement (Clause 12 of the Partnership Deed) does not permit so, is an attempt to subvert the arbitral process.

24. In view of the above, the present petition is allowed and the mandate of Mr Manoj Kumar Verma as an Arbitrator stands terminated.

25. Mr. Anil Kumar Airi, Senior Advocate (Mobile No. 9811087578) is appointed as an Arbitrator in place of Mr Manoj Kumar Verma. 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.

26. For the reasons stated above, this Court is also of the view that the respondent is liable to bear the costs of the proceedings, which are quantified at ₹50,000/-. The said costs will be deposited by the respondent with the Delhi High Court Legal Aid Services Committee within a period of two weeks from today. The receipt of the same be furnished with the Registry of this Court. The Registry is directed to place this matter before this Court if the orders passed above are not complied with.

27. The pending application is also disposed of.

VIBHU BAKHRU, J

MARCH 11, 2022

Pkv/v

[Click here to check corrigendum, if any](#)