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

FAO 145/2021, CM APPL. 17340/2021, CM APPL. 5406/2022, CM APPL. 5407/2022.

Reserved on : 26/07/2022
Date of Decision : 28/10/2022

IN THE MATTER OF:

BHARAT FOUNDRY AND ENGINEERING WORKS & ORS. ..... Appellants

Through: Ms. Aakanksha Kaul, Mr. Manek Singh and Mr. Aman Sahani, Advocates.

versus

INTEC CAPITAL LIMTED & ANR. ..... Respondents

Through: Ms. Mallika Ahluwalia and Mr. Saransh Garg, Advocates for respondent No.1.

AND

FAO 146/2021, CM APPL. 17344/2021, CM APPL. 5408/2022, CM APPL. 5409/2022

BHARAT FOUNDRY AND ENGINEERING WORKS & ORS. ..... Appellants

Through: Ms. Aakanksha Kaul, Mr. Manek Singh and Mr. Aman Sahani, Advocates.

versus

INTEC CAPITAL LIMTED & ANR. ..... Respondents

Through: Ms. Mallika Ahluwalia and Mr.Saransh Garg, Advocates for respondent No.1.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of the present appeals filed under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter, referred to as *'the Act'*), the appellants have assailed the common order dated 18.08.2020 passed by learned ADJ-03, South-East, Saket Courts, New Delhi in Arbitration Petition Nos. 78/2018 and 79/2018, whereby appellant's objections under Section 34 to the two Arbitral awards dated 23.06.2016 were dismissed.

2. Facts necessary for the disposal of the present appeals are as following. Respondent No.1/claimant, a non-banking financial company, made a claim against the appellants in respect of two loans of Rs.75,00,000/- and Rs.1,07,14,000/- granted to them, principal borrower/guarantor. A sole arbitrator was appointed at the behest of respondent No.1 vide nomination letter dated 23.02.2016 and the arbitral proceedings were pursued before the sole arbitrator.

3. In the Arbitral proceedings, though the appellants were served, they remained unrepresented and were proceeded *ex-parte* on 06.05.2016. Eventually, both claims were allowed *ex-parte* vide two separate arbitral awards dated 23.06.2016.

4. Besides the above two claims, respondent No.1 had filed two more claims against the appellants, with respect to two other loan accounts. In these proceedings too, *ex-parte* arbitral Awards were passed by the sole arbitrator on 16.12.2016.

5. The appellants' case is that they became aware of the Arbitrators' appointment in all the four cases only at the time when execution proceedings were initiated by respondent No.1 to enforce the *ex-parte* arbitral Awards. According to the appellants, the objection to the Arbitrator's appointment was taken by them at the earliest in Section 34 proceedings and one of the grounds to challenge the Awards was that the same were passed *ex-parte* against the appellants.

6. In all the four arbitral proceedings, the sole arbitrator was the same, which fact, according to the appellants, renders the Award in question legally vulnerable, due to lack of proper disclosure by the sole arbitrator under Section 12 of the Act, as discussed below.

7. The appellants filed objections under Section 34 of the Act against all the four Awards, vide separate Arbitration Petition Nos. 76, 77, 78 and 79 of 2018, which came to be disposed of vide the common impugned order.

8. In all the four petitions, a common objection was raised about want of mandatory disclosure by the sole arbitrator in terms of Section 12 read with Schedule VI, disclosing his appointment in four arbitral proceedings, thereby raising doubts over his eligibility to continue as an arbitrator in all the four proceedings. The Arbitrator made a declaration in all the four arbitral proceedings that he was exempted from making a disclosure in terms

of Schedule VI, as his appointment was from a pool of arbitrators, covered by Explanation 3 of Schedule VII. The appellants denied the applicability of Explanation 3 and submitted that the Arbitrator's appointment in all the four proceedings was hit by Entries 22 and 24 of Schedule V.

9. Before this Court, it was contended by the appellants that the Court below rejected plea of respondent No.1 being covered by Explanation 3 of Schedule VII, and held that the disclosure under Section 12 of the Act was mandatory. However, the Court erred in holding that the disclosure was required to be made only in the later proceedings, namely Arbitration Petition Nos. 76 and 77 of 2018, disclosing his earlier appointment in Arbitration Petition Nos. 78 and 79 of 2018. The Court held that there was no requirement of making disclosure in Arbitration Petition Nos. 78 and 79 of 2018 since on the day of his appointment in these petitions, the Sole Arbitrator had not been acting as an arbitrator in any other proceedings between the parties, so as to attract Entries 22 and 24 of Schedule V.

10. According to Ms. Aakanksha Kaul, learned counsel for the appellants, the Court below fell in error by failing to appreciate that the disclosure was as much mandatory in the earlier proceedings in Arbitration Petition Nos. 78 and 79 of 2018 as it was in Arbitration Petition Nos. 76 and 77 of 2018 since, under Section 12(2) of the Act, a duty has been cast to disclose existence of circumstances that may give rise to doubts about impartiality of the arbitrator as soon as they arise. She argued that this duty is a continuing obligation.

11. Ms. Kaul further argued that there need not be an actual cause for impeaching the neutrality of the arbitrator since Section 12 provides for

mere existence of circumstances listed in Schedule V to be sufficient to doubt the neutrality of the arbitrator. According to her, the arbitrator's act of remaining discreet about the subsequent appointment actually casts an aspersion on his impartiality.

12. In support of her contentions, learned counsel for the appellants placed reliance on the following decisions:

i) M/s. Lanco-Rani (JV) *v.* National Highways Authority of India Limited reported as **2016 SCC OnLine Del 6267**;

ii) Mohan Govind Chitale *v.* Nirmala Anand Deodhar. reported as **2008 SCC OnLine Bom 1712**;

iii) Union of India *v.* Tolani Bulk Carriers Limited reported as **2001 SCC OnLine Bom 1027**.

iv) Halliburton Company *v.* Chubb Bermuda Insurance Ltd. reported as **[2020] UKSC 48.**

13. Opposing the appeals, learned counsel for respondent No.1 contended that disclosure under Section 12 of the Act is not mandatory and is only directory in nature. She further sought to justify the appointment of the same arbitrator in four proceedings by referring to the exception in Explanation 3 of Schedule VII and claimed that the arbitrator was chosen from a specialized pool.

Learned counsel relied upon the following judgments in support of her contentions:-

i) Union of India *v.* Pam Development Private Limited reported as **(2014) 11 SCC 366**;

ii) Sudesh Prabhakar *v.* Emaar MGF Constructions Pvt. Ltd. reported as **2018 SCC OnLine Del 6847;**

iii) Manish Anand and Others *v.* Fiitjee Ltd. reported as **2018 SCC OnLine Del 7587**;

iv) Gauri Shankar Educational Trust and Others *v.* Religare Finvest Ltd. reported as **2019 SCC OnLine Del 6987**;

v) Bhasin Infotech & Infrastructure Pvt. Ltd. *v.* Ahmad Main and Another reported as **2019 SCC OnLine Del 7764**;

vi) Amardeep Builders *v.* G.N.C.T. of Delhi reported as **2021 SCC OnLine Del 3994**.

14. The short question involved in the present case is the competence and eligibility of the Sole Arbitrator appointed in respect of four arbitral proceedings between the parties, in view of Entries 22 and 24 of Schedule V. There is no challenge to the eligibility of the arbitrator under Schedule VII and the challenge raised is limited to suspicions arising under Schedule V.

15. Independence and impartiality of the Arbitrator ensure the sanctity of arbitral proceedings and as such, Section 12 of the Act read with Schedule VI underlines the importance and necessity of a disclosure. A challenge to an incomplete or improper disclosure needs to be seen in the facts and circumstances of each case. In present case, the record shows that the Arbitrator made the following disclosure:

> *"In accordance with the statutory mandate of section 12 of the Arbitration and Conciliation Act 1996 (As amended by Act NO.3 of 2016) read with relevant Schedules, it is hereby disclosed that Arbitrator has a vast experience of Conducting*

Arbitration proceedings and has no direct or indirect relationship with the parties to the disputes or Counsels thereof, neither arbitrator is having any interest in the subject matter of the Dispute, even remotely compromising his neutrality in deciding the present dispute. It is made clear that present Arbitration proceeding involves a subject matter which needs to be dealt with by specialized pool of Arbitrators and as such disclosure on that count is dispensed with in terms of Explanation 3 of Seventh Schedule."

16. In HRD Corporation (Marcus Oil and Chemical Division) *v.* GAIL (India) Limited reported as **(2018) 12 SCC 471**, it has been held by the Supreme Court that unlike Schedule VII, circumstances listed in Schedule V would not themselves make the arbitrator ineligible to act, unless it is established by attending facts that the arbitrator's neutrality was indeed compromised. Relevant excerpt from the decision is reproduced hereunder:

*"**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.

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20. *However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein - that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or*

her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.

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23. *Coming to Justice Doabia's appointment, it has been vehemently argued that since Justice Doabia has previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period, he is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement "in the case". From the italicized words, it was sought to be argued that "the case" is an ongoing one, and a previous arbitration award delivered by Justice Doabia between the same parties and arising out of the same agreement would incapacitate his appointment in the present case. We are afraid we are unable to agree with this contention. In this context, it is important to refer to the IBA Guidelines, which are the genesis of the items contained in the Seventh Schedule. Under the waivable Red List of the IBA Guidelines, para 2.1.2 states:*

*"**2.1.2.** The arbitrator had a prior involvement in the dispute."*

(emphasis supplied)

24. *On reading the aforesaid guideline and reading the heading which appears with Item 16, namely, "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and*

> *impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression "the arbitrator" in Item 16 cannot possibly mean "the arbitrator" acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as "the arbitrator" refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served "as arbitrator" before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a "business relationship" with the respondent under Item 1. Nor is the delivery of an award providing an expert "opinion" i.e. advice to a party covered by Item 15."*

17. In view of the above, the contention raised in the present case with respect to appointment of the Sole Arbitrator being hit by Entries 22 and 24 of Schedule V does not *per se* deprive him of eligibility to have acted as Arbitrator between the parties. The appellants have neither pleaded nor proved any action of the Arbitrator that otherwise taints his neutrality making him unfit to act as an arbitrator. The appellants' sole reliance on Entries 22 and 24 of Schedule V, to presume bias against the arbitrator, is not in the spirit of what has been held in HRD Corporation (Supra).

18. It is further pertinent to note that the appellants were *ex-parte* in the arbitral proceedings and their objections to the Award in question on the ground of denial of opportunity of hearing by the arbitrator, has been rejected by the Court below. The Arbitrator's decision to proceed *ex-parte* has been upheld by the Court below, relying upon the service reports. This Court, sitting in appeal, has found no reason to upset the said factual finding of the Court below.

Besides, it is a well-settled position of law that an *ex-parte* Award is just as binding as an Award passed in the presence of the respondents [Refer: Saroja *v.* Chinnusamy (Dead) by LRs and Another reported as **(2007) 8 SCC 329**].

19. An *ex-parte* Award by nature would mean that the appellant is precluded from setting up his defence of such nature for the first time by way of objections under Section 34 of the Act. If the appellants had not been proceeded *ex-parte*, they would have been required to pursue the challenge procedure laid down under Section 13 to challenge the appointment of the Arbitrator. This challenge is made before the arbitrator and not in objections under Section 34. As has been held above, circumstances provided for under Schedule V do not *per se* render the arbitrator ineligible, unlike Schedule VII. The appellants' contention that challenge to the appointment of Arbitrator could have only been made by way of objections under Section 34 for the first time is not correct.

20. Notably, a Co-ordinate Bench of this Court in Sudesh Prabhakar (Supra), while following ratio culled out in HRD Corporation (Supra), also

concluded that mere appointment in more than two arbitrations by the parties or their affiliates in past three years would not visit the Arbitrator with absolute disqualification. It was held:

> "***13.*** *In my opinion, prima facie the challenge of the petitioner(s) to the Arbitrator even on facts does not appear to be justified. It is not denied before me that all other cases in which the Arbitrator has been appointed relates to the same issue regarding the demand of VAT by the respondent. Learned counsel for the respondent makes a statement before the Court that the Arbitrator in question has not been appointed in any other matter by the respondent or has acted as an Arbitrator where the respondent is a party, except for the present batch of petitions. As a common issue of law and facts arises in batch of these petitions, it is even otherwise appropriate for one Arbitrator to decide the entire batch. These references in fact form a single reference and are technically different arbitration proceedings only for the reason that one of the party, i.e. the Petitioners in each case would be different as the Arbitration Agreements are different for each party. However, that does not mean that there are actually more than one arbitration proceedings so as to attract provisions of Item 22 or 24 of Fifth Schedule of the Act.*"

21. To similar extent are the observations of this Court in Narayan Chandra Bishal *v.* FIITJEE Ltd, **Arbitration Petition No.814/2017** and Gauri Shankar Educational Trust (Supra).

22. Recently, in Amardeep Builders (Supra), the petitioner had approached this Court under Section 11 of the Act seeking reference of disputes to arbitration. While appointing the same Arbitrator in respect of three separate arbitrations arising between the same parties and observing that the disputes involved were similar in nature, the Court held:

> *"**5.** Inasmuch as the disputes are between the same parties and are similar in nature, I deem it appropriate, in order to ensure an expeditious resolution thereof, that the disputes be referred to arbitration by the same arbitrator. This, in my view, would not infract, in any manner, the Fifth Schedule to the 1996 Act or Serial No. 24 thereof, as that applies to a situation in which, at the time of appointment of the arbitrator, he is already serving or has served in the past, as arbitrator for either of the parties in a similar case. No such infirmity applies in the present case."*

23. From above, it is evident that the law is well settled that merely because an Arbitrator has been appointed in more than two arbitral proceedings between the parties/their affiliates, the Award cannot be set aside, until a concrete foundation is laid down for doubting the independence and impartiality of the Arbitrator.

In the present case, as noted above, it has been categorically held that the appellants were duly served in all the four proceedings separately, however, deliberately chose not to appear in any of them. Consequently, no challenge to the appointment of the Arbitrator was made during the pendency of arbitral proceedings. Although a contention was raised in petition(s) filed under Section 34 of the Act as to the non-receipt of any notice of initiation of Arbitral proceedings, in the present appeal, no such challenge was raised. Even otherwise, the same being a question of fact does not come within the purview of challenge available under Section 37 of the Act.

24. Although learned counsel for the appellants placed reliance on the decisions passed by Courts in India, as rightly pointed out be learned counsel for respondent No.1, the same are of no consequence having been

rendered under the unamended provisions of the Act and at a time when Schedule V did not form part of the Act.

25. This Court is of the opinion that the appellants have failed to show any grounds doubting the impartiality and independence of the Sole Arbitrator and as such, reliance on the decision in Halliburton Company (Supra) is also of no avail.

26. Accordingly, the appeals are dismissed with no order as to cost. Miscellaneous applications are disposed of as infructuous.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 28, 2022
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