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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 28th OF OCTOBER, 2022

ARBITRATION APPEAL NO.33 OF 2022

Between:-

M/s DHARAMDAS TIRATHDAS CONSTRUCTIONS
PVT.THROUGH ITS DIRECTOR SHRI DHARAMDAS
HASSANANDANI S/O LATE SHRI TIRATHDAS
HASSANANDANI AGED ABOUT 77 YEARS,
OCCUPATION: BUSINESS HAVING ITSREGISTERED
OFFICE AT R/O 111-112, RAJARAM MOHAN RAI
COMPLEX, OPP. PALIKA PLAZA, MTH
COMPUND, INDORE.

.....APPELLANT

(BY SHRI VIJAY ASSUDANI, ADVOCATE)

AND

1. UNION OF INDIA THROUGH EXECUTIVE
ENGINEER ,INDORE.
2. SHRI K.K. VAREMA, SOLE ARBITRATOR,
R/O EA-290, DDA SFS FLATS, MAYA ENCLAVE,
NEW DELHI – 110064.

..... RESPONDENTS

(BY SHRI HIMANSHU JOSHI, ADVOCATE)

.....
Reserved on : 22.08.2022

Delivered on : 28.10.2022
.....

This appeal coming on for judgment this day, the court

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passed the following:

JUDGMENT

01. This appeal has been preferred under Section 37 of the Arbitration Conciliation Act, 1996 (hereinafter referred as the Act of 1996) by the claimant-appellant against the order dated 15.3.2022, passed by the Additional District Judge, Commercial Court, Indore in MJC AV No.1300059/2016 whereby the application filed by the appellant under Section 34 of the Act of 1996 has been rejected holding that no case for interference is made out.

02. In brief, the facts of the case are that the respondent No.1 had invited a tender in respect of construction of Neemuch Administrative Block and Dormitory and wherein the appellant's tender was accepted and an agreement was also executed between the parties in this regard on 10.08.2001. It is an admitted fact that the aforesaid agreement also contained an arbitration clause for settlement of the dispute between the parties and as a dispute arose regarding the claim of the appellant to the tune of Rs. 63,74,637/- to which the respondent No.1 did not claim and The Arbitrator who has partly awarded the claim to the tune of Rs.5,85,551/- along with interest.

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03. Shri Vijay Assudani, learned counsel appearing for the appellant, at the outset, has submitted that the appellant is assailing the order dated 15.3.2022 only on the ground available under Section 12(5) of the Act of 1996, as there was a unilateral appointment of the Arbitrator, since the Arbitrator was appointed by the respondent's Chief Engineer, Central Public Works Department in-Charge of the work and, thus, the same is barred by the decision rendered by the Supreme Court in the case of *Perkins Eastman Architects DPC and Others vs. HSCC (India) Limited*: reported as **(2019) SCC OnLine SC 1517**.

04. Counsel for the appellant has also relied upon the decision rendered by the Supreme Court in the case of *Bharat Broadband Network Limited vs. United Telecoms Limited* reported as **(2019) 5 SCC 755** as also a decision rendered by the Delhi High Court in the case of *A.K. Builders vs. Delhi State Industrial Infrastructure Development Corporation Ltd.* {O.M.P.(T) (COMM.) 12/2022 and I.A.No.1395/2022}.

Thus, it is submitted that the appointment of Arbitrator in the present case, Shri K.K.Varma, a retired Additional Director General of Central Public Works Department, was contrary to the provisions of Section 12(5) of the Act of 1996 as it was void

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ab-initio and as such the impugned Award is liable to be set aside and the parties may be allowed to initiate a fresh arbitration proceedings.

05. Shri Himanshu Joshi, learned counsel appearing for the respondent, on the other hand, has opposed the prayer and it is submitted that no case for interference is made out, as the Arbitrator was appointed at the request of the appellant itself and at this juncture, when the Award was passed by the Arbitrator way back on 28.1.2009, and the aforesaid ground which was not even raised by the appellant in their application filed under Section 34 of the Act of 1996 before the lower court, cannot be allowed to be agitated for the first time before this Court in the appeal under Section 37 of the Act of 1996.

06. Heard the learned counsel for the parties and also perused the record, as also the documents filed by the appellant.

07. From perusal of the record, this Court finds that as per the general conditions of the contract of the Central Public Works Department Works, Clause 25 of the same provides for settlement of disputes and arbitration, it provides that the Arbitrator can be appointed by the Chief Engineer, CPWD in charge of the work or where there is no Chief Engineer, the

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administrative head of the said PCWD. It is also found that the Arbitrator was appointed at the request of the appellant vide its application dated 08.3.2006, and subsequently, the Arbitrator was appointed on 03.1.2007. Shri K.K. Verma was appointed as the Arbitrator to adjudicate upon the dispute between the parties, who has passed his final Award on 28.1.2009. The aforesaid Award was challenged by the appellant herein, under Section 34 of the Act of 1996 vide its application dated 24.4.2009, and has been decided only on 15.3.2022, i.e., after a period of around 13 years.

08. Coming to the merits of this case, Shri Assudani, learned counsel appearing for the appellant has laid much emphasis on the decision rendered by the Delhi High Court in the case of *A.K. Builders* (supra) wherein also in similar circumstances, the Delhi High Court has relied upon the decision rendered by the Supreme Court in the case of *Perkins Eastman Architects DPC and others* (supra) as also in the case of *Bharat Broadband Network Limited* (supra).

09. On perusal of the said decision, it is found that counsel appearing for the respondent/Delhi State Industrial Infrastructure Development Corporation (DSIIDC) had also relied upon a decision rendered by the Delhi High Court itself

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in the case of ***Kanodia Infratech Limited vs. Dalmia Cement (Bharat) Limited*** reported as **284 (2021) DLT 722** in which the Delhi High Court has declined to interfere with the arbitral award on the ground that the Award was already passed under Section 34 of the Act of 1996. The relevant paras 12, 13, 14, 15 & 16 in the case of ***A.K. Builders (supra)*** read as under :-

"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.

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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 Signature Not Verified Digitally Signed By:Dushyant Rawal 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

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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."

(emphasis supplied)

10. A bare perusal of the aforesaid decision reveals that even the learned Judge of the Delhi High Court has expressed his reservation in respect of the decision passed by the co-ordinate Bench of the Delhi High Court in the case of ***Kanodia***

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Infratech Limited (supra).

11. On close scrutiny of the decision rendered by the Delhi High Court in the case of **A.K. Builders** (supra) as also the decision rendered by the Supreme Court in the case of **Bharat Broadband Network Limited** (supra), this Court **begs** to defer from the finding recorded by the Delhi High Court in the case of **A.K. Builders** (supra) and its disagreement with the decision rendered by the Co-ordinate Bench of the Delhi High Court in the case of **Kanodia Infratech Limited** (supra) for the reasons assigned henceforth.

12. The only question which falls for consideration before this Court is that whether an arbitration award can be set at nullity on the ground that the appointment of the Arbitrator itself was in violation of the provisions of Section 12(5) of the Act of 1996, even though the appointment was made prior to 23.10.2015 when the Arbitration and Conciliation(Amendment) Act of 2015 (hereinafter, the Amendment Act, 2015) came into force. In the considered opinion of this Court, the answer to this issue has already been given by the Supreme Court in the case of **Bharat Broadband Network Limited** (supra). Relevant para 18 of which, reads as under:-

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“18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

“Arbitrator’s relationship with the parties or counsel

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5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration” Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court’s judgment in TRF Ltd. (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void *ab initio*. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void *ab initio*. Since such appointment goes to “eligibility”, i.e., to the root of the matter, it is obvious that Shri Khan’s appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated

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10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

(emphasis supplied)

13. A bare perusal of the aforesaid observations made by the Supreme Court leaves no manner of doubt that provisions of S.12(5) would be applicable prospectively by the reason of s.26 of the Amendment Act, 2015 which provides that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Admittedly, in the case in hand, the arbitrator was appointed on_03.1.2007, whereas the award itself was passed on 28.01.2009 and the impugned order u/s.34 of the Act of 1996 was passed on 15.3.2022, and thus, given the aforesaid chronology, this court has no doubt to hold that the ground u/s.12(5) of the Act of 1996 is not available to the appellant by virtue of s.26 of the Amendment Act, 2015. And since no other ground was urged before this court, no case for interference is made out in the

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impugned order dated 15.03.2022. Resultantly, the present petition being devoid of merits **stands dismissed**.

14. Before closing this order, it is also necessary to address the issue of delay in deciding the s.34 Application by the lower court. This Court expresses its strong displeasure for keeping an application filed under Section 34 of the Act of 1996 pending for a period of around 13 years in the court of first instance itself, which delay is attributable to the predecessors of the present presiding officer. Such delay in disposing of an application filed under Section 34 of the Act of 1996, in the considered opinion of this Court, literally amounts to defeating the very purpose of initiation of arbitration proceedings, which is, to expedite the final disposal of an arbitration matter. Such delay also mocks at and frustrates the very object for which the Arbitration and Conciliation Act, 1996 was promulgated.

15. And thus, to avoid any such further delays in such other Application already filed or to be filed under Section 34 of the Act of 1996 before the concerned court in every District in the entire State of Madhya Pradesh, it is directed that all such applications filed under Section 34 of the Act, 1996 pending before the concerned Court shall be strictly decided as expeditiously as possible, in accordance with s.34(6) of the Act

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of 1996.

16. It is also directed that in any case where the pendency of such application spills over more than one year, the concerned Judge shall inform the Registry of this Court regarding the reasons for delay in disposing of the said case.

17. With the aforesaid observations, this appeal stands **disposed of.**

(Subodh Abhyankar)
JUDGE

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