HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Case No.	**M.P. No.2586/2020**
Parties Name	Cobra-CIPL JV vs. Chief Project Manager
Date of Judgment	**07/04/2021**
Bench Constituted	**Division Bench:** **Justice Prakash Shrivastava** **Justice Virender Singh**
Judgment delivered by	**Justice Prakash Shrivastava**
Whether approved for reporting	No
Name of counsels for parties	Shri Kapil Arora, Shri Shashank Verma and Ms. Aditi Tambi, Advocates for the petitioner. Shri N.S. Ruprah, Advocate for the respondent.
Law laid down	-
Significant paragraph numbers	-

O R D E R
07.04.2021

Per: Prakash Shrivastava, J.

This miscellaneous petition under Article 227 of the Constitution, is directed against the order of the Commercial Judge, Jabalpur dated 10th of September, 2020 passed in MJC(AV)36/2020 whereby the petitioner's application under Section 14 of the Arbitration and Conciliation Act, 1996 (for short **'the Act'**) has been dismissed.

2. The case of the petitioner is that it had entered into a contract with the respondent for Composite Electrical Work for

Design, Supply, Erection, Testing and Commissioning of 25 KV, 50 Hz, AC Single Phase Electrification Works of Jabalpur Division of West Central Railway. In 2015, major setback in the progress of work was suffered and thereafter the termination notice dated 12.02.2019 was issued by the respondent and steps were taken for invoking the bank guarantee for which separate proceedings under Section 9 of the Act were initiated. Since the dispute had arisen between the parties, therefore, the petitioner had given the legal notice dated 06.08.2019 invoking the arbitration clause and making a request to the respondent to appoint Mr. Justice (Retd.) D.M. Dharmadhikari, Former Judge, Supreme Court of India as sole Arbitrator and; in the alternatively to appoint Justice (Retd.) Usha Mehra, Former Judge, Delhi High Court in terms of Arbitration clause 1.2.54 (d)(ii) of the agreement. Thereafter, the email dated 23.08.2019 was sent by the Chief Project Director to the petitioner's Advocate intimating that the notice was addressed to wrong officer. The petitioner on 26.08.2019 had given the reply and had separately sent the notice addressed to General Manager, CORE, Allahabad. On 16.09.2019, the respondent wrote to the petitioner asking for consent to waive off applicability of Section 12(5) of the Act. On 25.09.2019, respondent wrote a letter to the petitioner asking the petitioner to appoint any two out of the panel of four names forwarded by it as petitioner's Arbitrator. Thereafter, on 05.10.2019, the petitioner filed an application under Section 11(4) of the Act as the respondent had failed to appoint the Arbitrator inspite of petitioner's notice for appointment. The respondent appeared before the High Court on 01.11.2019 in AC No.96/2019 filed under Section 11 of the Act. On 19.11.2019, the General Manager of the Central Organisation for Railway Electrification appoint the Arbitral

Tribunal consisting of the retired employees belonging to the Ministry of Railways and Arbitral Tribunal so constituted had passed the order dated 28.11.2019 directing the parties to file their pleadings. The petitioner objected to the constitution of the Arbitral Tribunal and; thereafter, he had filed an application under Section 14 of the Act before the trial Court on 22.07.2020 seeking to terminate the mandate of the Arbitrator. The Tribunal by the impugned order has dismissed the said application.

3. Submission of learned counsel for the petitioner is that in terms of Section 12(5) r/w Section 14 of the Act, the retired employees of the Railways appointed as Arbitrator have *de jure* become ineligible to conduct the arbitration, hence their mandate ought to have been terminated by the Tribunal. In support of his submission, he has placed reliance upon the judgment of the Supreme Court in the matter of ***Perkins Eastman Architects DPC and another vs. HSCC (India) Ltd.***, ***2019 SCC OnLine SC 1517*** and in the matter of ***Bharat Broadband Network Limited vs. United Telecoms Limited, 2019 (5) SCC 755***.

4. Opposing the prayer, learned counsel for the respondent has submitted that the respondent is competent to appoint its retired employees as Arbitrator in terms of the arbitration clause and in support of his submission he has placed reliance upon the judgment of the Supreme Court in the matter of ***Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, 2020 (14) SCC 712***.

5. Having heard the learned counsel for the parties and on perusal of the record, it is noticed that the trial court has duly

taken note of the pendency of the application under Section 11 of the Act before this Court and has refused to go on the issue of termination of the mandate of the Arbitrator for this reason.

6. The Supreme Court in the matter of ***Dakshin Shelters Private Limited vs. Geeta S. Johari, 2012 (5) SCC 152*** has held that a party's right to appoint Arbitrator in terms of the Arbitration clause extinguishes once it fails to appoint the Arbitrator on receipt of the notice in this regard from the other side. In such circumstances, the other party becomes eligible for appointment of Arbitrator under Section 11(5) of the Act. Section 11(5) of the Act also in clear terms provides that if the parties fail to agree on the Arbitrator within 30 days from the receipt of a request by one party from the other party to so agree for the appointment then appointment is made by the Chief Justice or any person or institution designated by him upon request of a party.

7. In the present case, the petitioner had given the notice for appointment of Arbitrator on 06.08.2019 and when the Arbitrator was not appointed within 30 days, he had filed AC No.96/2019 under Section 11 of the Act before this Court on 05.10.2019 and during the pendency of the application under Section 11 of the Act, he had moved an application under Section 14 before the trial court on 22.07.2020. In the application under Section 11 of the Act, the prayer of the petitioner before this Court is to appoint an independent Arbitrator and in the application under Section 14 of the Act which is subsequently filed by the petitioner before the trial court again the prayer is to appoint a substitute independent Arbitrator. The petitioner is not justified in initiating the

parallel proceedings before the trial court under Section 14 after already approaching this Court under Section 11 of the Act. Undisputedly, while deciding the application under Section 11 of the Act, the petitioner will have the opportunity to raise the issue of ineligibility, incompetency or invalidity of the arbitral panel of retired railway employees appointed by allegedly violating of Section 12(5) of the Act and after loosing the jurisdiction for such appointment on expiry of 30 days period from the date of notice of appointment of Arbitrator by the petitioner. In this background, the Tribunal had not committed any error in refusing to go into the main issue on account of the pendency of AC No.96/2019 before this Court.

8. The Supreme Court also in the matter of ***TRF Limited vs. Energo Engineering Projects Limited, 2017 (8) SCC 377*** has held that the Court in proceedings under Section 11 of the Act can exercise the jurisdiction to nullify the appointment made by the authorities when there has been failure of procedure or *ex facie* contravention of the inherent facets of the arbitration clause and in those proceedings the plea pertaining to statutory disqualification of the nominated arbitrator can be raised. In that case, the Hon'ble Supreme Court had found that the Managing Director, the nominated Arbitrator, was ineligible, hence, has sent the matter back to the High Court by holding as under:

> *"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator*

> *becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.*
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> *55. Another facet needs to be addressed. The Designated Judge in a cryptic manner has ruled after noting that the petitioner therein had no reservation for nomination of the nominated arbitrator and further taking note of the fact that there has been a disclosure, that he has exercised the power under Section 11(6) of the Act. We are impelled to think that that is not the right procedure to be adopted and, therefore, we are unable to agree with the High Court on that score also and, accordingly, we set aside the order appointing the arbitrator. However, as Clause (c) is independent of Clause (d), the arbitration clause survives and hence, the Court can appoint an arbitrator taking into consideration all the aspects. Therefore, we remand the matter to the High Court for fresh consideration of the prayer relating to appointment of an arbitrator."*

9. Learned counsel for the petitioner has placed reliance upon the judgment of the Supreme Court in the matter of ***Perkins Eastman Architects DPC and another***(supra). But in that case also, the question of ineligibility of the Arbitrator was gone into while deciding the application under Section 11(6) of the Act. As against this, learned counsel for the respondents has placed reliance upon the judgment of the Supreme Court in the matter of ***Central Organisation for Railway Electrification, 2020 (14) SCC 712*** wherein the appointment of the arbitral panel consisting of the retired railway officers in terms of the arbitration clause has been upheld. These issues can very well be raised by the concerned party in the pending proceedings under Section 11 of the Act.

10. The Supreme Court in the matter of ***Bharat Broadband***

Network Limited vs. United Telecoms Limited, 2019 (5) SCC 755 has held that if a person *de jure* ineligible to be appointed as Arbitrator vide Section 12(5) read with Schedule VII of the Act then an Arbitrator appointed by him is *de jure* ineligible and appointment of such Arbitrator is void *ab initio* and the proceedings conducted by him are also void. There is no dispute to the aforesaid position but having approached this Court by way of AC No.96/2019 prior in point of time, the petitioner has opportunity to raise it in the said AC.

11. It is worth noting that at this stage this Court is exercising limited supervisory jurisdiction under Article 227 of the Constitution and such a power is required to be exercised very sparingly, on equitable principle. The Supreme Court in the matter of ***Shalini Shyam Shetty and another vs. Rajendra Shankar Patil, 2010 (8) SCC 329*** while defining the limits of exercise of the power has held that -

> *"**49.** On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:*
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> *(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.*
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> *(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.*
>
> *(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would*

also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, `within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L.Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

> *(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.*
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> *(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.*
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> *(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.*
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> (o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

12. Even otherwise, the Supreme Court in the matter of ***Jai Singh and others Vs. Municipal Corporation of Delhi and Another*** reported in ***2010(9) SCC 385*** while considering the scope of interference under Article 227 of the Constitution, has held that the jurisdiction under Article 227 cannot be exercised to correct all errors of judgment of a court, or tribunal acting within the limits of its jurisdiction. Correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.

13. Having regard to the fact that this Court is exercising limited supervisory jurisdiction and the present case does not fall within the parameter of interference in exercise of such a jurisdiction and also considering the fact that the issue which the petitioner is raising can very well be adjudicated in the pending AC No.96/2019, I am of the opinion that no case for interference in the impugned order is made out. The petition is accordingly **dismissed**.

(Prakash Shrivastava)
Judge

(Virender Singh)
Judge

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