BHARAT BROADBAND NETWORK LTD. V. UNITED TELECOMS LTD. (2019) 5 SCC 755

Supreme Court of India; 2-judge bench, **R.F. Nariman** and Vineet Saran JJ; decided on 16 April 2019

The argument of de jure inability can be brought up for one's own nominee arbitrator too. Waiving automatic disqualification of the Seventh Schedule requires an express agreement in writing with reference to the arbitrator in question.

(A) APPOINTMENT OF THE ARBITRATOR BY BHARAT'S CHAIRMAN

Bharat had floated a tender for a project in which United was the successful bidder. Under the arbitration clause of their agreement's general conditions ("GCC"), the Chairman and Managing Director ("CMD") or his nominee was to be the sole arbitrator. Certain disputes arose, and United invoked arbitration. In January 2017, Bharat's CMD appointed one Mr. K.H. Khan as the sole arbitrator.

(B) THE JUDGMENT IN *TRF*

On 03 July 2017, the Supreme Court's judgment in *TRF Ltd.* v. *Energo Engineering Projects Ltd.,* (2017) 8 SCC 377 was delivered in which a 3-judge bench concluded that since the Managing Director of one of the parties was ineligible to act as an arbitrator, he was ineligible even to nominate one.

(C) BHARAT REQUESTS MR. KHAN'S WITHDRAWAL. HE REFUSES. BHARAT GOES TO THE HIGH COURT

Based on *TRF*, Bharat now applied before the arbitrator seeking his withdrawal. Mr. Khan rejected the application. Bharat then filed a petition under Sections 14 and 15 ACA in the High Court of Delhi for the appointment of a substitute arbitrator on the ground that Mr. Khan had become *de jure* incapable of performing his functions.

(D) NAVIN CHAWLA J REJECTS THE PETITION—APPLIES ESTOPPEL, WAIVER, SPEEDY RESOLUTION CONCEPT

Navin Chawla J, sitting singly, rejected the petition. He held that the objection had been waived by both parties (by participating in the proceedings and exchanging pleadings) and that to "allow [Bharat] to raise issue of eligi-

bility of the arbitrator, having itself appointed him, would clearly run counter to the object of the Act and, hence, cannot be allowed." He also noted that *TRF* merely applied Section 12 (5) ACA and Bharat could not claim ignorance of that provision "when it had proceeded to appoint the arbitrator and then turn around to challenge the appointment once it finds that the arbitration proceedings are not taking the direction it would like."

(E) THE SUPREME COURT'S DECISION[18]

Firstly, the court started by referring to: -

(i) Sections 4; 11 (8); 12 (1), (2) to (5); 13; 14 ACA *post*-2015 Amendments.

(ii) Three Supreme Court judgments which earlier dealt with Section 12 (5), *viz.*, *Voestalpine Schienen GmbH* v. *DMRC Ltd.*, (2017) 4 SCC 665; *HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471; and *TRF*.

1. Disclosure and Challenge Procedure

Secondly, the disclosure and challenge procedure was summarised which the court said was clear "from a conspectus of the above decisions" (that is, the arbitrator was required to make a disclosure, the appointment may be challenged before him, arbitrator was required first to decide the challenge, which if rejected could be a ground taken only at the set-aside stage).

2. All Prior Agreements Hit by Seventh Schedule Wiped Out Except if Waived Under Section 12 (5) ACA

Thirdly, the court referred to Section 12 (5) ACA and the scheme of ineligibility set out in that section and explained the way it could be waived. It said: -

(i) Any prior agreement to the contrary is wiped out by the *non-obstante* clause in Section 12 (5) the moment any person whose relationship

[18] The court issued notice in January 2018 but did not stay the arbitration proceedings which resulted in two awards against Bharat. They were challenged in Section 34 ACA proceedings in the High Court and were pending at the time of this decision. Since the court decided that the mandate of the arbitrator terminated, the awards were set aside.

with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. That person becomes ineligible.

(ii) The ineligibility can be removed only under the proviso, after disputes having arisen, by waiving applicability of Section 12(5) by an express agreement in writing. "Express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but notwithstanding that who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith.

Fourthly, the court then referred to the discussion in the Law Commission's Report on waiver of ineligibility under the proviso of Section 12 (5) ACA: -

(i) The court said the report "makes it clear that that there are certain minimum levels of independence and impartiality that should be required of the arbitral process, regardless of the parties' agreement."

(ii) It extracted two passages where the Commission had reported that "genuine party autonomy must be respected" but in certain situations, "parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule." This, the Commission had reported, "could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute." The court emphasized on this passage.

3. Scheme of Sections 12, 13, and 14. The Manner of Waiver Under Section 12 (5) Contrasted with Section 4 ACA.

Fifthly, then, the court summarised the "scheme of Sections 12, 13 and 14" and contrasted the concept of waiver by conduct in Section 4 ACA with a waiver by express agreement in writing in the proviso to Section 12 (5): -

(i) Where an arbitrator makes a disclosure in writing, which is likely to give justifiable doubts as to his independence or impartiality, the appointment may be challenged under Sections 12(1) to 12(4) read with Section 13.

(ii) However, where such a person becomes "ineligible," there is no question of challenge before such arbitrator. In such a case, that is, a case which falls under Section 12(5), Section 14(1)(a) ACA gets attracted as the arbitrator becomes unable to perform his functions as a matter of law (i.e., *de jure*) and ineligible.

(iii) This being so, his mandate automatically terminates, and another arbitrator shall then substitute him under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become *de jure* unable, that a party must apply to the court to decide on the termination of the mandate unless otherwise agreed by the parties.

(iv) A question as to waiver under the proviso to Section 12(5) ACA may arise. Section 12(5) must be contrasted with Section 4, which deals with cases of deemed waiver by conduct, whereas the proviso to Section 12(5) deals with a waiver by express agreement in writing between the parties only if made after disputes having arisen between them.

Sixthly, the court then turned to the *TRF* case and its impact on this case, and held that the after *TRF* the appointment of Mr. Khan was void since inception: -

(i) After *TRF,* which held that an appointment made by an ineligible person is itself void *ab initio*, it became clear beyond doubt that the appointment of Mr. Khan would be void ab initio since such appointment goes to "eligibility," i.e., to the root of the matter.

(ii) *TRF* nowhere states it will apply only prospectively.

Seventhly, the court rejected the argument that Section 12 (4) ACA barred Bharat's application. The court held. Section 12 (4) applies only when a challenge is made to an arbitrator and has no applicability to an application made to the court under Section 14 (2) to determine whether the mandate of an arbitrator has terminated on *de jure* inability.

4. The meaning of Express Agreement in Writing Under Section 12 (5)

Lastly, the court discussed the "applicability of the proviso to Section 12(5) on the facts of this case" and explained the meaning of "express agreement in writing": -

(i) (Rejecting the High Court's reliance on Section 7 ACA) Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing." 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.

(ii) Here, Section 9 of the Contract Act, 1872, becomes important. It states:

"9. Promises, express and implied. —Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

(iii) It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such.

(iv) The facts of the present case disclose no such express agreement. The appointment letter is pre-*TRF*. Mr. Khan's invalid appointment became clear after *TRF* on 03 July 2017. Filing statement of claim would not mean there is an express agreement in words.