IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L) NO. 24705 OF 2022
WITH
INTERIM APPLICATION (L) NO. 25653 of 2022
IN
ARBITRATION PETITION (L) NO. 24705 OF 2022

Quess Corp .. Petitioner

Versus

Netcore Cloud Pvt.Ltd .. Respondent

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Mr.Vishal Nautiyal with Ms.Vidhi N. Sharda, Mr.Smit Shah i/b Mr.Aviral Dhirendra for the Petitioner.
Mr.Prakhar Tandon for the Respondent.

CORAM: BHARATI DANGRE, J.
DATED : 17th JANUARY, 2023.

JUDGMENT:-

1 By the present petition, the petitioner seek relief of terminating the mandate of sole Arbitrator, Shri Amrut Joshi appointed as a Arbitrator to adjudicate the disputes that had arisen between the parties out of the 'Masters Service Agreement' dated 24/5/2017.

The petitioner, a limited Company incorporated under the Companies Act, claim to be a leading business

service provider, whereas the respondent is involved in the business of providing mobility and e-mail services to distinct cliental in India.

Since it was desirous of availing transmission Bulk SMS services from the respondent, the petitioner entered into a Master Service Agreement on 24/5/2017, under which the respondent was to provide application based platform to host and disseminate bulk SMS to end users of the petitioner.

2 As per the petitioner, the parties started performing their respective obligations under the agreement. However, certain disputes arose with respect to multiple invoices raised by the respondent, and this resulted in the respondent invoking arbitration clause and proposed the name of Mr.Amrut Joshi as Sole Arbitrator in the notice dated 16/1/2020.

The petitioner did not agree to the appointment of the named arbitrator, and this resulted in the respondent approaching this Court under sub-section (6) of Section 11 of the Arbitration and Conciliation Act. By order dated 23/11/2022, Mr.Amrut Joshi was appointed as Sole Arbitrator to decide the disputes and differences, subject to the terms and conditions stipulated in the order.

3 The proceedings commenced before the learned Arbitrator after a date was fixed for preliminary hearing, and he made disclosure in the form mentioned in Vth Schedule of the Arbitration and Conciliation Act, 1996, inter alia, stating that he had no direct or indirect, past or present interest in relation to the subject matter in dispute, whether financial, business, professional or other kind which would give rise to justifiable doubt as to the independence or impartiality.

Issues came to be framed by the learned Arbitrator and the matter was fixed for the claimant's evidence on 4/7/2022.

4 The petitioner contend, that while the proceedings were ongoing before the Arbitral Tribunal, it came to its notice that the Arbitrator was representing the counsel for the respondent (Mr.Prabhakar Tandon and Ms.Sudha Dwivedi) in an interlocutory application No.443 of 2021 filed in Company Petition (IB) No.1399/NB/2017, captioned as Bank of India vs. Mandhana Industries Ltd.

5 The aforesaid information took the petitioner by surprise, and according to him, this was not disclosed by the Arbitrator, during the preliminary hearing held by him or any time thereafter. On gathering further information, it was revealed that the Arbitrator has been representing counsel for the respondent in several other matters before various

forums, including the High Court of Mumbai and the NCLAT and certain orders to that effect are placed on record by the petitioner.

6 It is in this background I have heard the counsel for the petitioner, who would vehemently argue that the sole arbitrator, in the wake of the aforesaid, has become ineligible to continue as an arbitrator, as per Section 12(5) r/w Schedule VII of the Act. The submission is, he is *de jure* and *de facto* unable to perform his functions, and since the issue of ineligibility goes to the root of the appointment, he would lack inherent jurisdiction to proceed further, which would enable a party to file an application u/s.14(2) to the Court to decide on termination of his/her mandate.

The submission is, the appointment of Mr.Amrut Joshi as sole Arbitrator is against the ethos and spirit of the Act and the continuation of the proceedings by him is bad-in-law and therefore, this Court shall terminate his mandate and stay the ongoing arbitration proceedings.

Per contra, the learned counsel Mr.Khandeparkar assertively deny the said argument and he would raise a question about the maintainability of the petition filed u/s.14(2) of the Arbitration and Conciliation Act, as he would submit that Section 13 which prescribe the challenge procedure operate only against Schedule V, whereas, as per

the scheme of the enactment, Section 14 is applicable as regards the disqualification or ineligible circumstances enumerated in Schedule VII of the Act.

By inviting my attention to several circumstances enlisted in Schedule V, which give rise to justifiable doubts as to the independence and impartiality of Arbitrator, he would submit that by no stretch of imagination, it would be applicable to a counsel, who appear for distinct Attorneys in distinct proceedings, and it is not necessary to make a disclosure about such an appearance as a counsel, and that is the precise reason the Arbitrator has never made a disclosure statement.

Mr.Khandeparkar has placed reliance on the decision of this Court in case of *Sheetal Maruti Kurundwade Vs. Metal Power Analytical (I) Pvt. Ltd, 2017(6) Mh.L.J 642*, and according to him, the observations made in the said decision would cover the case of the sole arbitrator like him, making it apparently clear that he has not incurred any disqualification. Further, Mr.Khandeparkar has placed on record a letter addressed by the applicant to the Arbitrator, where has asked for his recusal. He has also placed on record an order passed by the Arbitrator on 14/11/2022, on the communication received by him and while ruling upon his jurisdiction.

7 It is no doubt true that impartiality and independence of an arbitrator is a quintessential feature of the arbitration process. In order to strengthen this feature, the Arbitration and Conciliation Act, 1996 came to be amended in the year 2016 by providing grounds for challenging the appointment of the possible arbitrator, and by making it imperative for the proposed arbitrator to disclose in writing any circumstances such as;

> (a) such as the existence, either direct or indirect, of any past or present relationship with, or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
>
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation (1) and (2) appended to the said section read thus:

> "Explanation 1 –The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
>
> Explanation 2 – The disclosure shall be made by such person in the form specified in the Sixth Schedule".

The appointment of an Arbitrator can be challenged only if circumstances exist that give rise to justifiable doubt as to his independence or impartiality or he does not possess the qualifications agreed to, by the parties.

8 The challenge procedure is set out in Section 13 and is postulated in sub-section (2) of Section 13 which read thus :-

> *"13(2) Failing any agreement referred to in sub-section (1), a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal."*

9 Section 14 provide for termination of the mandate of an arbitrator and contemplate his substitution by another arbitrator in two contingencies (a) and (b) as under :-

> ***"14. Failure or impossibility to act.*** *- (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-*
>
> *(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and*
>
> *(b) he withdraws from his office or the parties agree to the termination of his mandate."*

10 Sub-section (2) of Section 14 prescribe that if a controversy remains, concerning to any of the grounds referred to in clause (a) of sub-section (1), party may apply to the Court to decide on the termination of mandate. It has therefore to be seen whether the petitioner has followed the aforesaid procedure when he wanted to challenge the appointment of the arbitrator on the ground that there was an incorrect disclosure and therefore, the Arbitrator has become *de jure* incompetent to continue with arbitration.

For the first time, on 17/10/2022, the petitioner addressed a communication, intimating that they have gained knowledge that the Arbitrator was representing the counsel for the claimant Mr.Prabhakar Tandon and Ms.Sudha Dwivedi in an Interlocutory Application before the NCLT. Subsequently, it was revealed that the Arbitrator has been representing counsel for the claimant in several other matters, and therefore, a petition is filed u/s.14(2) of the Act before the High Court, seeking termination of his mandate. Admittedly, the e-mail addressed to the Arbitrator was not marked to the claimant or their Advocates, but the arbitrator deemed it fit to forward the same to the Advocate of the claimant.

11 The learned Arbitrator, by invoking the principle of kompetenz-kompetenz, ruled upon the said objection and dealt with the e-mail received by him on 17/10/2022 in form

of a request since it was not filed as an application. Mr.Dhirendra, the Advocate for the respondent informed the Tribunal that the communication dated 17/10/2022 is not an application u/s.12 read with Section 13 of the Arbitration and Conciliation Act, and when specifically asked what is the ground for recusal, he substituted his request of termination of mandate with the one of keeping the proceedings in abeyance as he has already filed petition u/s.14(2) before the High Court.

12 The Arbitrator, in his order dated 14/11/2022, succinctly recorded the objection in the following words :

> "5. Mr.Dhirendra submits that I am de-jure and de-facto unable to perform my functions or act as an arbitrator in the present proceedings on account of the provisions of Section 12(5) r/w Schedule VII of the Act. Mr.Dhirendra submits that I am de-facto ineligible to act as an arbitrator and that my appointment itself is null and void. He relied upon certain orders passed by the National Company Law Tribunal ('NCLT') as well as the National Company Law Appellate Tribunal ('NCLAT') as well as the Hon'ble Bombay High Court to show that I have appeared as a counsel along with Mr.Prakhar Tandon and Mrs.Sudha Dwivedi in several matters Mr.Dhirendra pointed out that Mr.Tandon is the counsel for the Claimant in the present matter appearing on instructions of Mrs.Sudha Dwivedi who has filed her vakalatnama in the matter".

13 After extensively referring to the VII[th] Schedule, the learned Arbitrator rejected the plea of keeping the proceedings in abeyance indefinitely by recording as under :-

> "22 In view of the above, I must say that as the law stands today, the ingredients required to meet the conditions set out in entry no.3 of Schedule VII of the Act are an arbitrator's association either with the 'party' or with the 'subject matter/dispute" of the arbitration as mentioned in the said entry. As noted earlier, Mr.Dhirendra has failed in pointing out how I have been associated either with the Claimant (Netcore Cloud Pvt.Ltd) or with the subject matter of the present dispute which is pending before me in arbitration, in any other capacity or matter that I may have taken up as an advocate/counsel. I am therefore not inclined to accede to Mr.Dhirendra's request of keeping the arbitration proceedings in abeyance indefinitely".

14 The Arbitrator also permitted the respondent to file an application u/sec.12 r/w Section 13 of the Act and recorded as under :-

> "26 It is made clear that should the respondent file an application u/s.12 r/w Section 13 of the Act as stated in Mr.Dhirendra's email sent today, the same will be deal with in accordance with law. It is also made clear that the conduct of the parties is being noted by this Tribunal having regard to the provisions of Section 31-A of the Act for the purpose of determining costs that may eventually awarded to the concerned party in the final award".

15 The present petition is filed before this Court for termination of the mandate on the ground that the arbitrator stand disqualified, since he has represented the counsel for the respondents, and therefore, he has incurred disqualification de jure.

When one look at the scheme of the Arbitration and Conciliation Act, which contemplate the disclosure by the Arbitrator, it operates in two parts; where prior to his appointment, the Arbitrator will disclose whether he share any relationship, interest, past or present, either with the party or subject matter in dispute in any form, which would give rise to justifiable doubt as to independence or impartiality and the second situation is contemplated, when after his appointment and throughout the Arbitral proceedings, any circumstances come into existence, which were not informed by him, at an earlier point of time.

It is only in these circumstances, his appointment shall be red flagged and subjected to challenge.

There is a procedure prescribed for raising a challenge in both the situations and which is contemplated u/ s.13, specifically sub-section (2) and sub-section (3) and in this contingency, it is open to the Arbitrator to decide the challenge.

16 When I have perused the communication addressed by the respondent to the Arbitrator and from reading of the order passed by the Arbitral Tribunal, what is evident is, the petitioner never raised a challenge as contemplated u/s.13 of the Arbitration and Conciliation Act, but he requested the arbitrator to keep the proceedings in abeyance as he has already instituted the proceedings, seeking termination of his mandate u/s.14 of the Act.

The Arbitrator has rightly taken note of this disharmony and conferred a liberty upon the petitioner to file an application u/s.12 r/w Section 13, if at all he wanted to challenge his appointment.

17 The learned counsel for the petitioner has vehemently relied upon the decision of the Apex Court in case of *HRD Corporation (Marcus Oil and Chemical Division) Vs. GAIL (India) Limited (2018) 12 SCC 471*, which exhaustively deal with the procedure posing challenge to the appointment of arbitrator, where circumstances exist as enlisted in Schedule V.

When one looks at the Vth Schedule of the Act, where certain circumstances are flagged as waivable, one can find clause no.3 and 4 which read thus :-

> "3 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

> 4 The arbitrator is a lawyer in the same law firm which is representing one of the parties".

The Hon'ble Apex Court in paragraph no.12 has dealt with the issue of an arbitrator becoming ineligible in the following words :

> "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 exists 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".

18 In the peculiar situation, where the objection raised by the petitioner deserve any consideration, is no more *res-integra* as it has been put to rest in case of Sheetal Maruti Kurundwade (supra), where the position for counsel is highlighted in the following words :-

> "24 The emphasized portions make it plain that the association of the arbitrator must be proximate, not remote. Schedule V contemplates various scenarios. Item 3 of this Schedule is exactly the same as Item 3 of the VIIth Schedule. Items 4 and 25 of the Vth Schedule disqualify partners of a law firm from acting as arbitrators where their law firm represents one of the parties in arbitration. The reason is so obvious it needs no great explanation. Item 29 is interesting, and it says that where a person is repeatedly appointed as an arbitrator, this is justifiable doubt. The point is that

Schedule V is linked to Section 12(1)(a), and this mandates a disclosure by the arbitrator. Whether or not falling afoul of the Vth Schedule is an automatic disqualification even if disclosed is not something I am called on to decide in this matter, though it does appear that the non-disclosure is fatal, but the disclosure, if accepted and waived, would not result in a disqualification. Section 12(5) speaks of ineligibility and it is linked to the VIIth Schedule; but the proviso to that sub-section again contemplates a possible waiver.

25. At the broadest level, no arbitrator should be involved in any manner with one of the parties to the dispute or a partner with a lawyer or law firm appearing in the arbitration, or representing the law firm or lawyer personally.

26. A law firm's briefing of counsel in other, unrelated matters is on a very different footing. In our profession it very often happens that on a given day a law firm will brief counsel for one client and on the very next day, or perhaps later that very day, will brief another counsel against the first. At no point in their regular practice do counsel appear 'for' the law firm that briefs them, leaving aside cases where the briefing lawyer or law firm is itself the litigant. In- house counsel or counsel who receive a fee-paid general retainer or salary from a law firm stand on a different footing. We are here concerned with independent counsel, those in the profession who in the course of their daily practice receive briefs from many attorneys, law firms or individual practitioners. This is a remnant of the 'dual system', now abolished, and a central feature of that system, one that continues to this day in practice, is the independence of counsel. They accept briefs from multiple attorneys (often on the same day at the same time in different courts). They are not always briefed at every stage of the case, nor is there any rule that they perform the same functions at every stage: a counsel may lead at one stage, and at another may take second chair to a senior. None of this is backed by statute, but hinges on traditions of long standing. This

> independence manifests itself in different ways. We have seen counsel withdrawing -- sometimes in court itself -- because their clients give them fresh instructions contrary to previous ones conveyed to court. In Mumbai at least, counsel from the same chambers often oppose each other in court and there is never a doubt raised about their professional independence. We have, too, in this city an acceptance of a junior counsel being briefed against the senior whose chamber he or she has joined. No one sees this as anything but the fiercest independence; indeed, seniors consider it a badge of honour to be opposed (the more vigorously the better) by their own juniors, for there is perhaps no better indicator of a briefing attorney's confidence in the capability, integrity and independence of a junior counsel than to field him against his own senior.

19 Referring to a situation where the counsel having accepted a brief from a particular attorney, Advocate on record or lawyer for some other client, has been held to be not amounting to per se disqualification or ineligibility because the disqualification connection must be between the Arbitrator's counsel and the litigant. This proposition is succinctly set out in para 28 as under :-

> 28 Therefore, counsel having accepted a brief from a particular attorney, advocate-on-record or lawyer for some other client is not per se a disqualification or ineligibility. The disqualification connection must be between the arbitrator-counsel and the litigant. That this is of the essence is obvious from Item 3 of the two schedules -- in a given case, where the law firm or lawyer is itself or himself the client, the arbitrator cannot function as such in an arbitration where that very law firm or lawyer is also engaged, though for some other

party; for the arbitrator in question would then have before him a party for whom he is engaged.

In the wake of the aforesaid observations, I do not think that there is any need to further deliberate upon the issue, as I find myself in complete agreement with the observations made in case of Sheetal Maruti Kurundwade (supra) as apparently, there is no clash of interest of the Arbitrator because as a counsel, he had represented the Advocate representing the opposite party.

Hence, the objection cannot survive and has been rightly turned down by the learned Arbitrator and I find no legal infirmity in the said order.

The present petition, seeking termination of the mandate of the arbitrator, therefore, cannot be entertained and is dismissed.

In view of the disposal of Arbitration Petition, Interim Application does not survive and is disposed off.

(SMT. BHARATI DANGRE, J.)

Tilak