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

% *Date of Decision: 20.03.2025*

\+ **EFA(COMM) 12/2024 CM APPL. 66669/2024**

MUNICIPAL CORPORATION OF DELHI .....Appellant
Through: Ms Jagrati Singh, SC, Ms Rajpal, Mr Surender Kumar and Mr Praveen Kumar and Ms Vani Sharma, Advocates for MCD.

versus

M/S ALMASS INDIA .....Respondent
Through: Mr G C Pandey, Advocate for M/s.Almass India.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J. (*ORAL*)

1. The appellant [**MCD**] has filed the present appeal, *inter alia*, impugning an order dated 23.04.2024 passed by the learned Commercial Court whereby the Commercial Court had declined the appellant's prayer for enforcement of an arbitral award dated 20.01.2020 [**impugned award**] on the ground that it was rendered by an arbitrator, who was appointed unilaterally by the MCD without concurrence or consultation of the respondent.

2. The learned Commercial Court following the decision of this court in ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat: Neutral Citation No.: 2023:DHC:3705-DB*** had rejected MCD's application [being 13EX439/20] captioned *North Delhi Municipal Corporation v. M/s Almass*

India Thr. Its Partner Jatin Chopra for execution of the arbitral award dated 20.01.2020.

3. On 07.11.2014, the North Delhi Municipal Corporation, which has since merged with the Municipal Corporation of Delhi [**MCD**] had invited tenders from Advertising Contractors for awarding the contract for display of advertisements of a size of 20 feet x 08 feet on a Unipole at a site described as "S. No.60, Opposite Kali Mandir, Deen Dayal Upadhyay Marg, FTC Minto Road to ITO (New Site)" [**subject site**].

4. The respondent (Almass) – a partnership firm – had submitted its bid for allotment of the said site and its bid was found highest. Accordingly, MCD issued a letter dated 23.12.2014 allotting the said subject site for displaying advertisement for a period of two years from the date of the allotment, subject to deposit of requisite security amount equivalent to three months license fee; one month's advance license fee; and advertisement tax payable in terms of Section 142 of the Delhi Municipal Corporation Act, 1957.

5. Almass was called upon to pay a sum of ₹4,08,586/-: a sum of ₹3,03,021/- on account of security deposit equivalent to three months' License fee; ₹4,063/- on account of caution money; ₹1,01,007/- on account of one month's advance license fee; and ₹495/- on account of advertisement tax for the current financial year by the said letter dated 23.12.2014. Almass furnished the said amounts under the cover of its letter dated 02.02.2015. Thereafter, MCD issued an allotment letter dated 04.02.2015. Certain disputes have arisen in regard to the said contract. Almass sent a letter dated 15.05.2015 claiming that it was not handed over the possession of the

Unipole's site and sought to surrender the allotment of said advertisement site claiming that it was contrary to the Outdoor Advertisement Policy of 2017 (OAP – 2017), which was applicable at the material time. MCD rejected the said request.

6. MCD further claims that on an inspection conducted subsequently it was found that Almass had installed a Unipole at another location (near Minto Bridge) instead of at the allotted site. And, on 13.05.2015, MCD removed the Unipole installed by Almass.

7. It is not necessary to examine the communications exchanged between the parties. Suffice it to state that the dispute had arisen between the parties in the aforesaid context.

8. Almass filed a writ petition before this court [being *W.P.(C) 7280/2015* captioned *M/s Almass India v. North Delhi Municipal Corporation*] impugning certain letters, whereby MCD had rejected its request for surrendering the site. The said petition was dismissed by this court by an order dated 31.07.2015. However, Almass was granted the liberty to raise all pleas in appropriate proceedings.

9. Thereafter, MCD issued a letter dated 14.02.2017 calling upon Almass to deposit a sum of ₹11,78,693/-, which according to MCD was outstanding and payable by Almass. The dispute relating to the said claim was not resolved.

10. In the aforesaid backdrop, the Commissioner of MCD (at the material time Commissioner, North Delhi Municipal Corporation) issued a notification dated 05.05.2017 appointing a former officer of the Indian Administrative Services as the sole arbitrator. Thereafter, MCD filed a

statement of claim before the Arbitral Tribunal on 25.10.2018, which was more than one and a half year after the Commissioner, MCD had appointed the arbitrator. The Arbitral Tribunal made the impugned award on 20.01.2020. Perusal of the impugned award does not indicate that the learned Arbitrator had made any disclosure as required under Section 12 of the Arbitration and Conciliation Act, 1996 [**A&C Act**]. However, the impugned award does indicate that MCD had reported that it had served a copy of the statement of claim to Almass. However, Almass did not join the arbitral proceedings on the date fixed, that is, on 25.10.2018. The Arbitral Tribunal decided to proceed *ex parte* and rendered the impugned award, whereby it awarded part of the claim to the extent of ₹8,96,030/- in favour of MCD along with simple interest at the rate of 9% per annum from 07.03.2016 (the date of termination of the contract) till the date of the award. However, the Arbitral Tribunal further directed that if the awarded amount was not paid within ninety days of the issuance of the award, the interest would be payable till the actual realisation of the amount. The Arbitral Tribunal also awarded arbitration costs quantified at ₹1,11,000/- and directed that the same would also be paid with interest at the rate of 9% per annum if the payment was not made within the period of three months.

11. At this stage, it would be relevant to refer to the arbitration clause as set out in terms and conditions applicable to the contract in question. The said Clause is set out below:

> "Arbitration 32.(A)Any Controversy or dispute arising out of the permission granted to the advertiser, for display site, advertisement through. Unipole on the NDMC area shall be referred to the sole arbitration of … Commissioner, NDMC or any other officer nominated by him in this behalf either by

himself or on party the request. There shall be no bar to the reference of dispute to the arbitrator or such officer as nominated by the Commissioner even if the said officer might have dealt with the matter earlier and expressed his opinion thereon. In case the arbitrator to whom the matter is originally referred is transferred or vacates his office or is unable to act for any reason, the Commissioner, NDMC shall be competent to appoint another person to act as an arbitrator, who shall be entitled to proceed with the reference from the stage at which it was left by the predecessor. No person other than the one nominated by the commissioner NDMC shall act as arbitrator. The decision of the Commissioner or the arbitrator nominated by him, shall be final and binding on the party(ies). The limitation for filling claims for arbitration is 90 days from the expiry of the contract period and in case no claim is filed within this period. It shall be presumed that there is no claim/dispute.

(B) Subject to above, the provisions of the Arbitrator Act in force, or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force, shall apply to the arbitration proceedings under this clause.

(C) The party invoking the arbitration clause shall specify the dispute or disputes, to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each dispute.

(D) The arbitrator may from time to time, without the consent of the party, enlarge the time for mailing and publishing the award."

12. Concededly, the Arbitral Tribunal was appointed unilaterally by the Commissioner, MCD in terms of the aforesaid Clause. It is also not disputed that the Commissioner being an Officer of the MCD was ineligible to act as an arbitrator by virtue of the Seventh Schedule to the A&C Act. The

question whether a person, who is ineligible to act as an arbitrator can appoint an arbitrator, is no longer *res integra*. In ***TRF Limited v. Energo Engineering Projects Limited.: (2017) 8 SCC 377***, the Supreme Court had held as under:

> **"50.** First, we shall deal with Clause (*d*). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench

decision in *State of Orissa* v. *Commr. of Land Records & Settlement* [*State of Orissa* v. *Commr. of Land Records & Settlement*, (1998) 7 SCC 162] . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held : (SCC p. 173, para 25)

> "*25.* We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand* v. *State of Punjab* [*Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503] . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the *State Government* itself and "not an order passed by any *officer* under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer *in his own right* and *not as a delegate* of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate."
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> (emphasis in original)

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying

on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

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."

13. In ***Perkins Eastman Architects DPC &. Anr. v. HSCC (India) Ltd.: (2020) 20 SCC 760,*** the Supreme Court has, following the decision in the case of ***TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377*** (*supra*), held as under:

"21. But, in our view that has to be the logical deduction from *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator

but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]

28. In *TRF Ltd.* [*TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72], the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of the aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the applicants."

14. Since in the present case, the Commissioner MCD was ineligible to act as an arbitrator in terms of Section 12(5) of the A&C Act, he was also ineligible to appoint an arbitrator in his place.

15. In ***Govind Singh v. M/s Satya Group Pvt. Ltd. and Anr.: 2023 SCC OnLine Del 37***, this court had held that the ineligibility of an arbitrator strikes at the root of its jurisdiction and an arbitral award rendered by an arbitral tribunal lacking inherent jurisdiction is liable to be set aside as being wholly without jurisdiction.

16. In ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat: 2023:DHC:3705-DB***, this court had held that a person, who is ineligible to act as an arbitrator, would lack the jurisdiction to render an award. Any decision by an authority that lacks the inherent jurisdiction cannot be considered as valid. Accordingly, this court had held that the arbitral award by an arbitral tribunal, that is, admittedly ineligible to act as an arbitrator, cannot be enforced.

17. It is material to note that the Special Leave Petition [being SLP(C) Diary No. 47322/2023] preferred against the decision of this court in ***Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat: 2023:DHC:3705-DB*** (*supra*) was also dismissed by an order dated 12.12.2023, which is reproduced below:

> "Delay condoned.
> From paragraph 6 of the impugned order, it appears to be an admitted position that the Arbitrator unilaterally appointed by the petitioner was ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Arbitration and Conciliation Act, 1996. Hence, in view of this particular factual position, no case for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution of India. The Special Leave Petition is accordingly dismissed.
> Pending application also stands disposed of."

18. In the present case, the learned counsel for MCD does not dispute that

the learned Arbitrator was ineligible to act as an arbitrator by virtue of Section 12(5) of the A&C Act and the authoritative decisions rendered by the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377*** (*supra*) and ***Perkins Eastman Architects DPC &. Anr. v. HSCC (India) Ltd.: (2020) 20 SCC 760*** (*supra*).

19. This court may also note that in ***Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company: Civil Appeal Nos.9486-9487/2019***, the Constitution Bench of the Supreme Court has held that the unilateral appointment clauses in public private contracts are violative of Article 14 of the Constitution of India.

20. In view of the above, we find no infirmity with the impugned order.

21. The appeal is, accordingly, dismissed. The pending applications are also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

MARCH 20, 2025
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Click here to check corrigendum, if any