

GAHC010179472023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./24/2023

A.N.E. INDUSTRIES PVT. LTD.
A PRIVATE LIMITED COMPANY INCORPORATED UNDER THE COMPANIES
ACT, 1956 VIDE CIN U00000PB2003PTC026066,
AND HAVING ITS REGISTERED OFFICE AT CHANDIGARH ROAD,
NAWANSHAHR, PUNJAB 144514,
REPRESENTED BY ITS DIRECTOR MR. GAGANDEEP SINGH (DIN- 01655358)

2: GAGANDEEP SINGH
SON OF LATE SOHAN SINGH

RESIDENT OF PALM SPRINGS

VILLA GV 48 A
GOLF COURSE ROAD

OPPOSITE HOTEL IBIS
PIN- 122011

PS- SECTOR 54
DIST.- GURGAON

STATE- HARYANA

VERSUS

UNION OF INDIA AND 3 ORS.
MINISTRY OF COAL, SHASTRI BHAVAN, NEW DELHI- 110001,
REPRESENTED BY THE SECRETARY, COAL INDIA LIMITED,
SHASTRI BHAWAN, NEW DELHI-110001.

2:COAL INDIA LIMITED
A GOVERNMENT COMPANY INCORPORATED UNDER THE PROVISIONS
OF COMPANIES ACT
1956 VIDE CIN- L23109WB1973GOI028844

AND HAVING ITS REGISTERED OFFICE AT COAL BHAWAN
PREMISES NO. -04-MAR
PLOT-AF-III ACTION AREA-1A
NEW TOWN RAJARHAT

KOLKATA 700156.

3:NORTH EASTERN COAL FIELDS COAL INDIA LIMITED
P.O.- MARGHERITA
IN THE DISTRICT OF TINSUKIA
ASSAM
PIN- 786181.

A COMPANY REGISTERED UNDER THE COMPANIES ACT 1956 AND
HAVING ITS REGISTERED OFFICE AT COAL BHAWAN
PREMISES NO-04-MAR
PLOT-AF-III ACTION AREA-1A
NEW TOWN RAJARHAT
KOLKATA 700156

AND REPRESENTED BY THE GENERAL MANAGER
NORTH EAST COAL FIELDS COAL INDIA LIMITED MARGHERITA
ASSAM.

4:THE GENERAL MANAGER
NORTH EASTERN COALFIELDS
COAL INDIA LTD.
MARGHERITA
IN THE DISTRICT OF TINSUKIA

ASSAM PIN- 786181

Advocate for the Petitioner : MR. SHANTANU SARMA

Advocate for the Respondent : DY.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

30.01.2024

1. Heard Mr. C.P. Sarma, learned Senior Counsel assisted by Mr. A. Lal, learned counsel appearing for the petitioners. Also heard Mr. M.Z. Ahmed,

learned Senior Counsel assisted by Mr. A.M. Dutta, learned counsel appearing for the respondent Nos. 2 to 4. Mr. K. Gogoi, learned counsel appears on behalf of the respondent No. 1.

2. The petitioners herein have prayed for appointment of an Arbitrator in terms of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act'), keeping in view the amended Section 12 of the 1996 Act, as has been interpreted by the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.***, reported in ***(2020) 20 SCC 760***, i.e., an independent and disinterested Arbitrator would have to be appointed by the Court and not in terms of the procedure provided in the arbitration clause, wherein the Arbitrator is an interested person.

3. On the other hand, the counsel for the respondent Nos. 2 to 4 submits that the appointment of an Arbitrator would have to be done under Section 11 of the 1996 Act in terms of the decision of the Hon'ble Supreme Court in the case of ***Union of India Vs. Parmar Construction Company***, reported in ***(2019) 15 SCC 682*** and in the case of ***Union of India Vs. Pradeep Vinod Construction Company***, reported in ***(2020) 2 SCC 464***, whereby the Arbitrator would have to be appointed in terms of the procedure laid down in the arbitration clause of the agreement, even if the Arbitrator is an interested person or if not an interested person, appointed by an interested person.

4. The brief facts of the case is that the petitioners were allotted a work order by the respondent No.3 on 16.10.2019 for extraction of coal seams at Tikak OC, Tikak Colliery by open cast method for 5 years. The petitioners thereafter mobilized/deployed machinery and manpower on the site for

extraction of coal seams. However, the forest officials from the Government of Assam stopped all works at the site on 05.11.2019. The petitioners were directed not to resume any mining activity on the ground that no permission had been taken from or given by the Forest Department for the mining activity. Thereafter, an alternative site was provided to the petitioner for their mining activities, in which they are still working. The petitioners are now claiming compensation for the loss incurred in having their mining activities stopped in the original site, due to the respondent No. 3 not having taken the prior permission of the Forest Department, Government of Assam.

5. The petitioners' counsel submits that in terms of Clause 13(a) of the NIT, there is an in-house procedure for settlement of disputes between the parties. After exhausting the procedure in terms of Clause 13(a), there is a further procedure for settlement of disputes through arbitration under Clause 13(b), if the procedure under Clause 13(a) fails. The learned Senior Counsel submits that though in-house procedure for settlement of disputes under Clause 13(a) of the NIT had been availed of by the parties, no settlement could be arrived at between the parties. As such, the petitioners are now praying for settlement of the disputes through arbitration, in terms of Section 11 of the 1996 Act and the decision of the Hon'ble Supreme Court in ***Perkins Eastman (supra)***, wherein the Arbitrator would have to be appointed by this Court and not by the CMD of the respondent Company.

6. On the other hand, the stand of the respondents is that as the arbitration clause provided under 13(b) provides that the Arbitrator should be appointed by the CMD of the respondent Company, the Arbitrator should be appointed in that

manner only, in terms of the law laid down by the Hon'ble Supreme Court in the case of ***Parmar Construction Company (supra)*** and ***Pradeep Vinod Construction Company (supra)***.

7. Clause 13(b) of the NIT which provides the procedure for settlement of disputes through arbitration, states as follows:-

“b. Settlement of Disputes through Arbitration.

If the parties fail to resolve the disputes/differences by in house mechanism, then, depending on the position of the case, either the employer/owner or the contractor shall give notice to other party to refer the matter to arbitration instead of directly approaching Court. The contractor shall, however, be entitled to invoke arbitration clause only after exhausting the remedy available under the clause 13.a.

In case of parties other than Govt. agencies, the Redressal of disputes/differences shall be sought through Sole Arbitration as under.

Sole Arbitration:

In the event of any question, dispute or difference arising under these terms & conditions or any condition contained in this contract or interpretation of the terms of, or in connection with this contract (except as to any matter the decision of which is specially provided for by these conditions), the same shall be referred to the sole arbitration of a person, appointed to be the arbitrator by the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be). The award of the arbitrator shall be final and binding on the parties of this Contract.

(a) In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his/her award being set aside by the court for any reason, it shall be lawful for the Competent Authority of CIL/ CMD of Subsidiary Company (as the case may be) to

appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(b) It is further a term of this contract that no person other than the person appointed by the Competent Authority of CIL/ CMD of Subsidiary Company (as the case may be) as aforesaid should act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to Arbitration at all.

Subject as aforesaid, Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015, and the rules there under and any statutory modification thereof for the time being in force shall be deemed to apply to the Arbitration proceedings under this clause.

The venue of arbitration shall be the place from which the contract is issued."

8. In terms of Clause 13(b) of the NIT, the CMD of the respondent Company is to appoint a sole Arbitrator. However, in the case of ***Perkins Eastman (supra)***, the Hon'ble Supreme Court has referred to another decision of the Supreme Court, i.e., ***TRF Ltd. Vs. Energo Engg. Projects Ltd.***, reported in ***(2017) 8 SCC 377*** and held that by virtue of the Amending Act (3 of 2016), the Managing Director was not eligible to become an Arbitrator, nor could he nominate a person as an Arbitrator, that is, by virtue of Section 12(5) of the 1996 Act and the Seventh Schedule. This is due to the fact that he would be having an interest in the dispute.

9. The extract of paragraph no.18, paragraph no.19, 20 and the extract of paragraph 21 in the case of ***Perkins Eastman (supra)*** is reproduced hereinbelow-

18. The issue was discussed and decided by this Court as under (TRF

Ltd. Vs. Energo Enggg. Projects Ltd., SCC pp.403-04, paras 50-54)

“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 teh Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law.....”

“19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited, [\(2017\) 8 SCC 377](#) where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be

present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. 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 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

10. The amended Section 12(1) of the 1996 Act provides the disclosures that a would be/proposed arbitrator is to make, regarding any doubts that may arise in his selection as an independent/impartial Arbitrator. Section 12(1) is reproduced hereinbelow as follows-

“12. Grounds for challenge.- [(1) *When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-*

(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.- 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."

11. Thus, as per Section 12 of the 1996 Act and the law laid down by the Supreme Court in ***Perkins Eastman (supra)*** any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. Further, a person who is statutorily ineligible to be an Arbitrator cannot nominate a person as an Arbitrator. Keeping in view the judgment of the Hon'ble Supreme Court in the case of ***Perkins Eastman (supra)*** and the fact that the application for appointment of a sole Arbitrator has been made subsequent to the amendment of Section 12 of the 1996 Act, this Court is of the view that it would not be lawful for the CMD of the respondent Company to appoint/nominate an Arbitrator, to decide the dispute between the parties herein.

12. With respect to the decisions of the Hon'ble Supreme Court relied upon by the respondent authorities that the mechanism for appointment of an Arbitrator would have to be done, as per the terms of the contract agreed to by the parties, this Court finds that the judgments of the Hon'ble Supreme Court in the case of ***Parmar Construction Company (supra)*** and ***Pradeep Vinod Construction Company (supra)***, is not applicable to this case as the facts

are different from the facts of ***Perkins Eastman (supra)*** case.

13. In the case of ***Parmar Construction Company (supra)***, the Hon'ble Supreme Court held that it was the duty of the High Court to resort to make appointment of an Arbitrator as per the terms of the contract as agreed by the parties. It further held that the High Court was not justified in appointing an independent Arbitrator without resorting to the procedure for appointment of an Arbitrator, which had been prescribed under the arbitration clause of the contract agreement, as agreed by the parties. The extract of paragraph Nos. 46 and 47 of the above judgment is reproduced hereinbelow as follows-

“46. it was the duty of the High Court to first resort to the mechanism in appointment of an arbitrator as per the terms of contract as agreed by the parties and the default procedure was opened to be resorted to if the arbitrator appointed in terms of the agreement failed to discharge its obligations or to arbitrate the dispute which was not the case set up by either of the parties.

47. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.”

14. In the case of ***Pradeep Vinod Construction Company (supra)***, the Hon'ble Supreme Court has held in Paragraph No. 17 that when an agreement specifically provides for appointment of named arbitrators, the appointment should be in terms of the agreement. The High Court was not right in appointing an independent arbitrator ignoring Clause 64 of the general conditions of contract, which provided that the Arbitral Tribunal should consist of a sole Arbitrator who shall be a Gazetted Officer of the Railways not below JA

Grade, nominated by the General Manager, where the total value of all claims does not exceed Rs.25 lakhs.

15. However, In the above two judgments, the request to refer the dispute to arbitration had been made before the 2015 amendment, amending Section 12 of the 1996 Act, had come into force, while in the case of ***Perkins Eastman (supra)***, the application for appointment of an Arbitrator had been made subsequent to the 2015 amendment. As such, the decisions in the above two cases relied upon by the respondents being on a different set of facts, the said decisions cannot be used as a precedent to decide the issue herein, as the facts of this case is different.

16. In the present case, the application for appointment of an Arbitrator has been made subsequent to the 2015 amendment and as such, the decision of the Hon'ble Supreme Court in the case of ***Perkins Eastman (supra)***, would be applicable to the facts of this case. Accordingly, the appointment of an Arbitrator in terms of Section 11 and the amended Section 12 of the 1996 Act would require an independent Arbitrator to be appointed, which cannot be in consonance with the Arbitrator to be appointed in terms of Clause 13(b) of the NIT.

17. The Notification No. 99 dated 04.08.2023 issued by the Registry of this Court shows that Hon'ble Mr. Justice H.N. Sarma, Former Judge of the Gauhati High Court is among the panel of Arbitrators amongst others, who can be appointed as Arbitrator. As the parties do not have any objection to the Hon'ble Mr. Justice H.N. Sarma being appointed as the Arbitrator to decide the dispute between them, Hon'ble Mr. Justice H.N. Sarma is appointed as the Arbitrator in

this case.

18. Consequently, the parties shall take steps, in terms of Section 12 of the 1996 Act, to ascertain whether there is any circumstance or fact regarding the inability of Hon'ble Mr. Justice H.N. Sarma (Retired) to act as an Arbitrator in terms of the amended Section 12 of the 1996 Act.

19. The writ petition is accordingly disposed off.

JUDGE

Comparing Assistant