GAHC010224182023

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

Case No. : Arb.P./39/2023

M/S TANISHK ENERGY PRIVATE LIMITED
A REGISTERED PARTNERSHIP FIRM, BEING REPRESENTED BY ITS PARTNER, NIRMALI GOGOI, HAVING ITS REGISTERED OFFICE AT HOUSE NO. 64A, SIMANTA PATH, P.O. PILINGKATA, BASISTHA CHARIALI, GUWAHATI-781029, KAMRUP(M), ASSAM

VERSUS

THE STATE OF ASSAM AND 2 ORS.
TO BE REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF ASSAM, AGRICULTURE DEPARTMENT, DISPUR, GHY-6.

2:THE DIRECTOR OF AGRICULTURE DEPARTMENT
ASSAM
KRISHI BHAWAN
KHANAPARA
GHY-22.

3:THE DISTRICT AGRICULTURAL OFFICER

KAMRUP(RURAL)
INTEGRATED DISTRICT OFFICE
AMINGAON-781031
KAMRUP (RURAL)
ASSA

Advocate for the Petitioner : MR. A R BHUYAN

Advocate for the Respondent : SC. AGRICULTURE

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

02.02.2024

Heard Mr. A.R. Bhuyan, learned counsel for the petitioner and Ms. G. Bora, learned Standing Counsel, Agriculture Department.

2. The petitioner has filed the instant petition under Section 11[6] of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator.

3. That pursuant to a tender process initiated by a Notice Inviting Tender [NIT] for a contract-work viz. 'Construction of 16 units of bamboo structures poly houses of size 100 square metres at different locations at Hajo and Kulhati within the Kamrup [Rural] District' ['the Contract-Work'], issued by the District Agriculture Officer (DAO), Kamrup, the petitioner was awarded a Work Order dated 08.10.2021 for a contract value of Rs. 7,36,024/-. According to the petitioner, he has successfully executed the Contract-Work. The petitioner grievance is that instead of clearing the bills of the petitioner, the respondent no.3 has directed the petitioner to repair the bamboo structures, which work the petitioner has completed. The petitioner has now invoked Clause 23 of the NIT which has provided for arbitration, in cases of dispute or differences between the parties.

4. Clause 23 of the NIT reads as under :-

> Arbitration : Any dispute or difference arising out during execution of work which cannot be amicably settled within 30 days including those

considered as such by only one of the parties, shall be finally settled at DAO, Kamrup of Government of Assam under the provision of India Arbitration and Conciliation Act, 1996 and the rules made there under amended from time to time. The decision of the Arbitration shall be final and binding on both the parties. The resulting award shall be in lieu of any other remedy other works those are not related to arbitration shall not be hampered during the process of Arbitration.

5. The petitioner has stated that he has already invoked arbitration clause by serving a notice dated 09.11.2022 upon the respondent authorities. However, no response has been forthcoming from the respondents till date.

6. Ms. G. Bora, learned Standing Counsel, Agriculture Department submits that there is no requirement to appoint a Arbitrator. The Contractor must follow the following simple procedure before payment is made for any Government beneficiary oriented scheme :

a. The site engineer will supervise the construction work and the engineer will suggest corrective measures as per plan & estimate, which has to be followed by the contractor

b. Handing over of the work must be done in presence of DNO (RURBAN) and other departmental officials and the intimation of ready works should be given in writing in advance so that the DNO (RURBAN) and other officials of department can verify and if it is ready to be handed over. Then only can the department take over and hand it over to the concerned beneficiaries. The contractor is not authorized to hand over the works to the beneficiaries directly keeping the department in dark. Also when the

beneficiaries were contacted, they informed departmental officials that they had not signed any handing over documents and that they were dissatisfied with the construction work as informed by the DNO (RURBAN)

c. The JE prepares the MB and submits it to the executive engineer for onward submission to the higher authority for payment. Without MB prepared by JE and endorsed by EE(Agri) and without any comment from DNO (RURBAN), no bill can be accepted by the DAO. These procedures are widely practice and hence the absence of the same cannot be termed as a dispute. The failure of the petitioner to follow the procedures showed his ignorance and mal-practices.

7. The learned Standing Counsel, Agriculture Department further submits that in terms of the letter no. EE/ Agri/KD/Guw/RURBAN/RURAL/2022-23/1575 dated 31.08.2022 issued by the Executive Engineer (Agriculture), Kamrup Division, Guwahati, the contract work of the petitioner was inspected by Sri Paban Das, Junior Engineer, who made the following observations, in his Joint Verification Report dated 20.08.2022 as follows :

"1. Construction of the two aforementioned works were offered to two nos. of contractors by DAO, Kamrup. Most of the structures are erected with immature bamboo and low quality polythene film. A no. of bamboo posts and the bamboo frames are already found to be damaged. These are reported to be damaged prior to the recent flood.

2. During field inspection, the undersigned along with AEA/AAI interacted with the concerned beneficiaries & most of them are not at all satisfied with the work.

3. The farmers are reluctant to give satisfactory certificate which is mandatory for bill preparation. Moreover some written statements collected from the beneficiaries are enclosed.

4. Complete measurement of the works for each structure is presently not possible as many of the items need repairing/replacement for which bill processing cannot be done.

5. Since the project involves public expenditure, hence proper utilization as per the scheme objective by the beneficiaries is required. Therefore proper completion & handing over the units is to be done."

8. On considering the submissions made by the counsels for the parties, it is clear that there is a dispute between the parties, inasmuch as, the petitioner's case is that the petitioner has successfully executed the contract work, while on the other hand, the case of the State respondents is that the petitioner has not completed the contract work, which involves use of poor quality bamboo. Further, there is the issue of non-payment of bills.

9. As it is not disputed between the parties that there is an Arbitration Clause for the purpose of settling disputes between the parties, this Court is of the view that the Arbitration Clause provided in the NIT would have to be resorted to, to settle the dispute between the parties. However, one difficulty arises with the condition in the Arbitration Clause, wherein it is stated that the arbitration shall be finally settled by the DAO, Kamrup, Government of Assam under the provisions of the Indian Arbitration & Conciliation Act, 1996.

10. The issue with regard to whether an Arbitrator can be a interested person and whether the interested person can further appoint an Arbitrator has already been settled by the Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.,*** reported in ***(2020) 20 SCC 760.*** 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.

11. 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."

12. The amended Section 12(1) of the 1996 Act provides for 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."*

13. 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 DAO, Kamrup, to be appointed the Arbitrator or to let him appoint/nominate an Arbitrator, to decide the dispute between the parties herein, inasmuch as, the NIT was issued by the DAO, Kamrup, which makes him an interested person.

14. 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.

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

16. 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 C.R. Sarma (Retired) to act as an Arbitrator in terms of the amended Section 12 of the 1996 Act.

17. The arbitration petition is accordingly disposed off.

JUDGE

Comparing Assistant