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

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Judgment delivered on: 12.07.2017

+ **ARB.P. 345/2017**

C P RAMA RAO

..... Petitioner

versus

NATIONAL HIGHWAYS
AUTHORITY OF INDIA

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr S.K.Mishra, Advocate.

For the Respondent : Ms Gunjan Sinha Jain, Advocate.

**CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

**JUDGMENT
12.07.2017**

SANJEEV SACHDEVA, J. (ORAL)

ARB.P. 345/2017 & IA No.6267/2017(interim relief)

1. The petitioner, by the present petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act'), seeks appointment of a Sole Arbitrator independent of the parties to decide and adjudicate the disputes between the parties.

2. The petitioner had submitted a bid consequent to a Notice Inviting Tender (NIT) dated 17.06.2016. The bid was accepted and tender was awarded to the petitioner on 30.07.2016.

3. Disputes arose between the parties during the performance of the said Contract.

4. The petitioner, by letter dated 04.04.2017, requested the respondent to consider the event as a *Force Majeure* event and grant relief to the petitioner, failing which the request be treated as a dispute/difference between the parties arising out of the Contract and accordingly be referred to arbitration for adjudication as per clause 27 of the Contract.

5. Sub-Clause (a) of Clause 27 of the Contract reads as under:-

“(a) All disputes and/or difference except those which are mentioned in the matters non-arbitral under Clause 26 above arising between the parties !out of this Contract shall be settled by Arbitration under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The Chairman of the Authority or his nominee shall be the sole Arbitrator. The award made and published in pursuance of such Arbitration proceedings shall be final and binding on both the parties.”

6. Learned counsel for the respondent submits that in terms of clause 27(a) of the Contract dated 30.07.2016, the disputes had to be referred to the Sole Arbitration of the Chairman of the respondent or his nominee.

7. Learned counsel for the respondent submits that the Chairman has already nominated Mr G.G.Saxena to act as the Sole Arbitrator.

8. Learned counsel for the petitioner submits that the appointment of the Arbitrator is illegal as it was not made with the statutory period. He further relies on the decision of the Supreme Court dated 03.07.2017 in Civil Appeal No.5306/2017 titled **TRF Limited versus Energo Engineering Projects Limited** to contend that the Chairman is ineligible under Section 12(5) of the Act for being appointed as an Arbitrator and accordingly, nominee of the Chairman would be disqualified.

9. Learned counsel for the petitioner submits that a reference may be made by appointment of a Sole independent Arbitrator independent of the parties.

10. The Supreme Court in **TRF Limited** (*supra*) was considering an identical arbitration clause, which read as under:-

“d. Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of Buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.”

11. The Supreme Court, while dealing with clause (d) referred to above held as under:-

“53. 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.”
(underlining supplied)

12. Further, the Supreme Court in **TRF Limited** (*supra*) with regard to the power of nomination by a Managing Director, who becomes

ineligible under Section 12(5) further held as under:-

“57. 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.”

(underlining supplied)

13. The Supreme Court in **TRF Limited** (*supra*), where an identical clause was under consideration as in the present case, has held that the Managing Director would be ineligible under Section 12(5) of the Act and since the Managing Director would be ineligible under Section 12(5) of the Act, he becomes ineligible to nominate someone as an Arbitrator. Further, Supreme Court has held that a person, who becomes statutorily ineligible, cannot nominate a person. Once the

infrastructure collapses, the superstructure is bound to collapse. Once the identity of the Managing Director as the Sole Arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated.

14. In view of the decision in **TRF Limited** (*supra*), in the instant case also, the Chairman of the respondent – Authority becomes ineligible under Section 12(5) of the Act to act as the Sole Arbitrator. Since the Chairman becomes ineligible to act as the Sole Arbitrator, the Chairman also loses the Authority to nominate someone to act as the Sole Arbitrator.

15. In view of the above, the contention of learned counsel for the respondent cannot be accepted.

16. It is not in dispute that there is an arbitration clause between the parties which requires that the settlement of all disputes between the parties should be by resort to arbitration.

17. The later part of clause that the Chairman or his nominee shall be the Sole Arbitrator needs to be severed from the main arbitration clause.

18. Accordingly, in my view, an independent Sole Arbitrator needs to be appointed to adjudicate all the disputes between the parties in connection with the Contract dated 30.07.2016.

19. In view of the above, the nomination of Mr G.G.Saxena as a sole Arbitrator is set aside.

20. At this stage, learned counsel for the parties have jointly suggested the name of Justice R.C.Jain (Retd.), former Judge, Delhi High Court to be appointed as the Sole Arbitrator.

21. Accordingly, Justice R.C.Jain, (Retd.), former Judge, Delhi High Court, is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12 of the Act of not being ineligible under Section 12(5) of the Act.

22. The Arbitral Tribunal shall examine the claims of the petitioner and the counter claims, if any of the respondents.

23. The Arbitrator shall fix his fee in consultation with learned counsel for the parties.

24. The parties are at liberty to approach the learned Arbitrator for elucidating the necessary disclosures and for further proceedings.

22. The petition is accordingly disposed of.

23. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

JULY 12, 2017

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