THE HONOURABLE SRI JUSTICE SANJAY KUMAR

ARBITRATION APPLICATION NO.54 OF 2017

O R D E R

By way of this application filed under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), M/s.Biotech International Limited, New Delhi, seeks appointment of a sole Arbitrator to resolve its claim for a sum of Rs.2,30,20,233/-, with interest thereon, raised against the A.P. State Co-operative Marketing Federation Limited, Hyderabad, the respondent herein.

The applicant company entered into Agreement dated 12.08.2015 with the respondent company for supply of bio-pesticides/bio-agents. Claiming that a sum of Rs.2,30,20,233/- still remained outstanding and payable after completion of supplies, the applicant company ultimately issued legal notice dated 10.01.2017 seeking resolution of the issue through arbitration. It nominated a Retired Judge and requested the respondent company to confirm his appointment if the same was acceptable to it. Having received no response to this notice, the applicant company preferred the present application.

Notice having been ordered, Sri P.Durga Prasad, learned counsel, entered appearance for the respondent company and filed a counter-affidavit. Therein, its Managing Director stated that as per the arbitration agreement existing between the parties, the Deputy Registrar of Co-operative Societies (Enforcement) of the respondent company or any other person nominated by the Managing Director of the respondent company was to be the Arbitrator to decide any dispute upon reference at the instance of either party and therefore, it was not open to the applicant company to nominate an Arbitrator of its choice. He further stated that as per the arbitration agreement, any dispute arising between the parties was to be dealt with as if it was a dispute under Section 61 of the A.P. Co-operative Societies Act, 1964 (*for brevity*, 'the Act of 1964'), and in terms of the said provision, the case would have to go through two stages – the dispute must be referred under Section 61 and thereafter, the Registrar, in turn, must decide to refer the dispute to an Arbitrator under Section 62 thereof. The Managing Director contended that upon a combined reading of these two sections, the inference has to be drawn that the Registrar may himself decide the issue or he may refer the parties under Section 62(1)(b) and (c) of the Act of 1964. He further stated that Section 12(5) of the Act of 1996 would have no application to the instant case and that the application was liable to be dismissed.

Heard Sri Pranav Munigela, learned counsel representing Sri Avinash Desai, learned counsel for the applicant company, and Sri P.Durga Prasad and Sri Koppula Gopal, learned counsel for the respondent company.

Clause 29 of the Agreement dated 12.08.2015 entered into by the parties embodies the arbitration agreement. It reads as under:

> 'If the dispute is not settled through such discussions, the dispute is referred for arbitration. It is mutually agreed by the Buyer and the Seller that the Deputy Registrar of Co-operative Societies (Enforcement), A.P. Markfed (who is Registrar for the purposes under Section 61 of A.P.C.S Act VII of 1964) or any other person nominated by the Managing Director of AP Markfed shall be nominated as the Arbitrator and he shall decide any such reference at the instance of either party, as if it is a dispute under Section 61 of the A.P.C.S Act VII of 1964.'

A bare perusal of the above clause would demonstrate that the understanding of the Managing Director of the respondent company, to the effect that Sections 61 and 62 of the Act of 1964 would be applicable in toto, is incorrect. The clause merely states that the dispute should be decided upon reference at the instance of either party as if it is a dispute under the said provision and no more. Significantly, there is no mention whatsoever in the clause of Section 62 of the Act of 1994. Therefore, the procedure contemplated under Section 62 of the Act of 1964 is not attracted to such arbitration.

Sri Pranav Munigela, learned counsel, would point out that the above arbitration clause required appointment of either the Deputy Registrar of Co-operative Societies (Enforcement), an employee of the respondent company, or any other person nominated by the Managing Director of the respondent company to function as the Arbitrator and assert that as the disputes arose between the parties only after 23.10.2015, the provisions of the Act of 1996, as amended by Act 3 of 2016 with effect from 23.10.2015, would apply. He would place reliance on the newly inserted Section 12(5) of the Act of 1996, which reads as under:

> '12(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
>
> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.'

Learned counsel would point out that as per Clause (1) in the Seventh Schedule appended to the Act of 1996, the Arbitrator should not be an employee, consultant, advisor or have any other past or present business relationship with a party and Clause (5) of the Seventh Schedule prohibits a manager, director or part of the management from being an Arbitrator. He would therefore assert that the stand of the respondent company in the counter affidavit that it should be permitted to appoint an Arbitrator as per the arbitration agreement, *viz.,* one of its own employees, cannot be countenanced.

In ARAVALI POWER COMPANY PRIVATE LIMITED V/s. ERA INFRA ENGINEERING LIMITED[1], the Supreme Court was concerned with a pre-amendment scenario. In that context, it was observed that in cases governed by the Act of 1996, as it stood before the Amendment Act 3 of 2016 came into force with effect from 23.10.2015, the mere fact that the named Arbitrator was an employee of one of the parties would not be an *ipso facto* ground to raise a presumption of bias or partiality or lack of independence on his part but in cases governed by the Act of 1996, after its amendment *vide* Act 3 of 2016 with effect from 23.10.2015, if the arbitration clause falls foul of the amended provisions, the appointment of the Arbitrator, even if apparently in conformity with the arbitration clause in the agreement, would be illegal and the Court would be within its power in appointing such other Arbitrator as may be permissible.

In TRF LIMITED V/s. ENERGO ENGINEERING PROJECTS LIMITED[2], the Supreme Court observed thus:

> '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.'

[1] (2017) 15 SCC 32
[2] (2017) 8 SCC 377

As per Section 21 of the Act of 1996, arbitration proceedings commence on the date on which a request for referring the dispute to arbitration is received by the respondent. In the present case, such a request was made by the applicant company well after 23.10.2015, the date on which the amendments to the Act of 1996 came into force. Merely because the agreement was executed by the parties on 12.08.2015, it would not have the effect of freezing the application of the Act of 1996 as it stood on that date to the case, irrespective of when the arbitration proceedings in relation to the subject dispute commenced. The provisions of the Act of 1996 as amended by Act 3 of 2016, with effect from 23.10.2015, would therefore be applicable to the case on hand. That being so, the observations of the Supreme Court in ARAVALI POWER COMPANY PRIVATE LIMITED[1] would be squarely applicable and it is not open to the respondent company to insist upon appointment of an Arbitrator being made as per Clause 29, i.e., an 'In-house Arbitrator'. Further, in terms of the observations made in TRF LIMITED[2], once the Managing Director of the respondent company himself stood disqualified from being the Arbitrator, he could not nominate someone else.

Though Sri Koppula Gopal, learned counsel, placed reliance on certain observations in INDIAN OIL CORPORATION LIMITED V/s. RAJA TRANSPORT PRIVATE LIMITED[3], to the effect that naming of an Arbitrator who is an employee of one of the parties would not be invalid, it may be noted that this decision arose in a pre-amendment scenario and as pointed out in ARAVALI POWER COMPANY PRIVATE LIMITED[1], the situation, post-amendment of the Act of 1996, stands on a different footing altogether. This judgment is therefore of no avail to the respondent company.

[3] (2009) 8 SCC 520

As the existence of the arbitration agreement under Clause 29 of the Agreement dated 12.08.2015 is not disputed and as the newly inserted Section 11 (6A) of the Act of 1996 postulates that while considering an application under Section 11(5) & (6) of the Act of 1996, the High Court must confine itself only to examination of the existence of an arbitration agreement and no more, it would not be within the ken of this Court to go into any other issue.

On the above analysis, this Arbitration Application is ordered appointing Sri Justice C.V.Nagarjuna Reddy, retired Judge, erstwhile High Court for the State of Telangana and the State of Andhra Pradesh, residing at Plot No. 22-A, MLA Colony Road, Road No.12, Banjara Hills, Hyderabad-34, as the sole Arbitrator for resolution of the disputes between the applicant company and the respondent company, arising out of the Agreement dated 12.08.2015, in accordance with the provisions and mandate of the Act of 1996. The learned Arbitrator shall be entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal measure. No order as to costs.

SANJAY KUMAR, J

25th MARCH, 2019

PGS