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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (T) (COMM.) 108/2019, I.As. 17887-17888/2019**
NIDHI SEEDS CORPORATION AND & ANR.

..... Petitioners

Through: Mr. Sandeep Grover, Mr. Aditya
Nayyar and Ms. Vara Gaur, Advs.

versus

NATIONAL SEEDS CORPORATION LIMITED

..... Respondent

Through: Mr. Yashvardhan, Mr. Kanishk and
Ms. Kritika Nagpal, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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17.12.2019

I.A. 17888/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (T) (COMM.) 108/2019, I.A. 17887/2019

1. The present petition has been filed by the petitioners under Sections 14 and 15 of the Arbitration & Conciliation Act, 1996 with the following prayers:

“It is therefore most respectfully prayed that in light of the abovementioned facts and circumstance this Hon'ble Court be pleased to:

a. Terminate the mandate of appointment of Ld. Sole Arbitrator, Shri Mahabir Kumar Kasana, Advocate in the matter of arbitration proceedings titled 'National Seeds

Corporation v. Nidhi Seeds Corporation and Ors.' for the reasons set out in the present Application; and
b. pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”

2. Learned counsel for the petitioners has drawn my attention to Clause 21 of the agreement which reads as under:

“21. In case of any dispute / question or difference arising between SFCI and the main grower on any matter covered by the terms and conditions of tender documents or arising directly or indirectly from the present Agreement in any manner, the matter shall be referred to the sole Arbitrator, nominated by the Chairman-cum-Managing Director of SFCI or by any other Competent Authority who at the relevant time is occupying the highest office in SFCI and has been delegated with such powers for adjudication in accordance with the provisions of Arbitration and Conciliation Act, 1996.”

3. It is his submission that in the case in hand, the Arbitrator has been appointed by the Chairman-cum-Managing Director. According to him, as the Chairman-cum-Managing Director is himself ineligible to act as Arbitrator, any appointment made by him would also be *void*. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.***, in ***Arbitration Application No.32 of 2019***, dated November 26, 2019 and more specifically

Paras 15 and 16 which read as under:

“15. 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.

We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited 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 Limited⁴, 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.

16. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 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 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

4. According to him, in view of the judgment of the Supreme Court, the mandate of the Arbitrator needs to be terminated. On a specific query from the Court whether on the termination of mandate of the Arbitrator, no arbitration proceedings can be initiated against the petitioners, the answer of the learned counsel for the petitioners is that it is for the respondent to appoint an Arbitrator by following the procedure laid down in the agreement.

5. On the other hand, learned counsel appearing for the respondent on

advance notice has taken a preliminary objection on the maintainability of the petition in this Court, inasmuch as the claim of the respondent before the Arbitrator is for ₹1,67,55,204.30/-. He states that in view of the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, any claim below an amount of ₹2 Crores shall necessarily have to be filed before the District Court. He states that in terms of Para 18 of the petition as originally filed, the petitioners have conceded the claim amount as ₹1,67,55,204.30/-. According to him, later the petitioners had made changes to Para 18 of the petition to include the counter claim as well to enhance the limit beyond the amount of ₹2 Crores.

6. Apparently, the plea taken by the learned counsel for the respondent is appealing, but this court is of the view, the plea being more of a technical nature and in view of the averments made in Para 18, this Court must look into the merits of the case.

7. On a specific query to the learned counsel for the respondent with regard to the judgment relied upon by the learned counsel for the petitioners, the learned counsel for the respondent states that the said judgment is distinguishable on facts, inasmuch as in the said judgment, the Supreme Court was concerned with International Arbitration whereas the present case is of Domestic Arbitration.

8. I am not in agreement on such submission as made by the learned counsel for the respondent. Keeping in view the position of law as reproduced in the case of *Perkins Eastman Architects DPC & Anr. (supra)*, this Court is of the view that the Chairman-cum-Managing Director, who himself was ineligible to act as an Arbitrator, could not have appointed an Arbitrator by invoking Clause 21 of the agreement and even if he has

appointed an Arbitrator, the said appointment is *void*.

9. At this stage, learned counsel for the petitioners make a submission that this Court having power under Section 11 of the Arbitration & Conciliation Act, 1996 may exercise the same to appoint the Sole Arbitrator for adjudicating the dispute between the parties. On this, the learned counsel for the respondent states that he is not in a position to give consent to the submission made by the learned counsel for the petitioner. If that be so, this Court is of the view that the parties cannot be remediless as the arbitration clause, in view of the judgment of the Supreme Court has become ineffective and cannot be invoked. Accordingly, this Court deem it fit to exercise its power under Section 11 of the Arbitration & Conciliation Act, 1996 and appoints Justice Sunita Gupta, a retired Judge of this Court as a Sole Arbitrator for adjudicating the disputes and difference between the parties. The appointment of the Sole Arbitrator shall be regulated by the Rules of the DIAC.

10. The petition and connected application are disposed of.

11. Let a copy of this order be sent to Justice Sunita Gupta for information. The parties shall be at liberty to appear before Justice Sunita Gupta after taking a prior appointment on her Mobile No: 9910384628.

V. KAMESWAR RAO, J

DECEMBER 17, 2019/aky