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

+ ARB.P. 189/2019

CHANNEL VAS SERVICES INDIA PVT. LTD. ...Petitioner

Through: Mr. Sandeep Sethi, Senior
Advocate with briefing counsel.

versus

BHARAT SANCHAR NIGAM LIMITEDRespondent

Through: Mr. Sameer Agarwal, Advocate

+ ARB.P. 190/2019

CHANNEL VAS SERVICES INDIA PVT LTD.Petitioner

Through: Mr. Sandeep Sethi, Senior
Advocate with briefing counsel

versus

BHARAT SANCHAR NIGAM LIMITEDRespondent

Through: Mr. Sameer Agarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **02.04.2019**

SANJEEV NARULA, J.:

1. The facts of both the petitions are similar and a common question of law arises and therefore both the petitions are being decided by a common order.

2. Petitioner company is engaged principally in the business of providing certain software and related services to telecom companies. Respondent is a telecommunication company engaged in operating cellular mobile services in India. Petitioner was the successful bidder under the tender dated 6th August 2015 floated by the Respondent for deployment of system for Easy Credit Platform in BSNL network. In terms of the tender, Petitioner furnished a performance bank guarantee to the Respondent and thereupon Respondent placed work order dated 31st January 2017 on the Petitioner.

3. Petitioner contends that due to adverse changes in the circumstances, the entire contract stands frustrated. Since disputes between the parties could not be resolved amicably, Petitioner vide notice dated 14th February 2019 invoked the Arbitration Clause contained in the tender.

4. The Chairman cum Managing Director (hereinafter referred to as 'CMD') of the Respondent in response to the invocation notice dated 14th February 2019, proceeded to appoint a retired judge of this Court as the Sole Arbitrator.

5. Aggrieved with the aforesaid appointment Petitioner, has filed the present petitions under Section 11 (5) read with Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator.

6. On 20th March 2019, the Court passed the following order:

“ARB.P. 189/2019 & ARB.P. 190/2019

2. At the outset, learned counsel for the Respondents submits that pursuant to a request for appointment of Arbitrator, the Chairman and Managing Director of Respondent Company has appointed a retired Judge of this Court as Arbitrator to adjudicate upon the disputes that have arisen between the parties. Learned counsel has handed over a copy of a letter dated 11th March 2019, copy whereof has been furnished to the Learned Counsel for the Petitioner. Mr. Sandeep Sethi learned senior counsel for the Petitioner, submits that the said appointment is invalid, in view of the clause contained in the Arbitration Agreement, which reads as under:

“18.2 In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BSNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final

and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.

18.3 Subject to the aforesaid, Arbitration and Conciliation Act, 1996 and the rules made there under, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.

18.4 The venue of the arbitration proceeding shall be the office of the CMD, BSNL, New Delhi or such other places as the arbitrator may decide "

3. He submits that in view of the judgment of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.* 2017 8 SCC 377**, the Chairman and Managing Director could not have made an appointment. He further submits that in fact while invoking the Arbitration Clause, the Petitioner Company relying on the aforesaid judgment, had called upon the Respondent to appoint an independent Arbitrator as Clause 18.2 of the Agreement is not enforceable.

4. Mr. Sethi has further argued that the judgments of this Court in ***Bhayana Builders Pvt. Ltd. v. Central Parl Infrastructure Development Pvt. Ltd.* 249 (2018) DLT 619** and ***Worlds Window Infrastructure & Logistics Pvt. Ltd. v. Central Warehousing Corporation* 2018(5) Arb. LR 51 (Delhi)** would not come in the way of the Court to appoint an Arbitrator.

5. Learned counsel for the Respondent seeks a short accommodation to take instructions.

6. List for further consideration on 2nd April 2019.”

7. Today, the learned counsel for the Respondent states that the instructions of the Respondent are the same as noted in the order dated 20th March 2019 that since an independent Arbitrator already stands appointed, the petition is not maintainable.

8. The Court has heard the counsel for the parties. The Arbitration Clause contained in the tender, is already taken note of in the order dated 20th March 2019 reproduced above.

9. The only question that arises for consideration is the effect of the judgments noted in the order dated 20th March 2019, which are required to be examined in detail.

10. Mr. Sandeep Sethi learned senior counsel has laid considerable emphasis on the judgment of this Court in ***TRF Ltd. Vs. Energo Engineering Projects Limited*** reported at AIR 2017 SC 3389. In the said judgment, the question arose whether once the person who was required to arbitrate upon the disputes under the contract becomes ineligible by operation of law, would he be eligible to nominate a person as an Arbitrator. The Supreme Court after taking note of the conditions of the contract, and several provisions of the Act held that a person ineligible to act as an Arbitrator by operation of law, cannot nominate another as an Arbitrator. The Supreme Court has used the expression which aptly encapsulates the aforementioned concept i.e. “once the infrastructure collapses, the superstructure is bound to collapse”. The relevant paragraphs of the said judgment are 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."

11. In the present case, the arbitration clause is manifestly clear that in the event of any question, dispute or difference arising under the Agreement, the same shall be referred to the Sole Arbitration of the CMD, BSNL. If the CMD or the officer is unable or unwilling to act as such, then to the Sole Arbitration of some other person appointed by the CMD or the said officer.

12. The facts of the present case are squarely covered by the judgement

of the Supreme Court in *TRF* (supra).

13. The amended Section 12 of the Act reads as under:

"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, 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.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in Sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if--

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(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."

14. Sub Section 5 of Section 12 lays down that a person whose relationship to the party or the counsel for the subject matter of the dispute falls under the category specified in the Seventh schedule, he shall be ineligible to be appointed as an Arbitrator. This provision contains a proviso dealing with the concept of waiver, which can take place subsequent to the dispute having arisen between the parties. However in the present case, the said proviso is not relevant.

15. The Seventh schedule that is referred in Section 12 (5) of the Act, has three parts, namely, (i) arbitrator's relationship with the parties or counsels; (ii) relationship of the arbitrator to the dispute; and (iii) arbitrator's direct or indirect interest in the dispute. In the present case, it

is only the first part of the Seventh schedule which is applicable and the same has 14 Items. However, for the present controversy, Items 1, 5 and 12 are relevant and the same read as under:

"1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

XXXX XXXX

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

XXXX XXXX

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties."

16. In view of the aforesaid, the Court has no hesitation to hold that the Managing Director, named as the Arbitrator in the Arbitration Clause has been statutorily disqualified to act as an Arbitrator. With this being the position, the appointment of an Arbitrator by the Managing Director would also be in contravention of the provision of the Act as held by the Supreme Court in *TRF Ltd.* (Supra). The essence of TRF Ltd (supra) is that, if the Managing Director is disqualified to act as an arbitrator in view of the provisions of the amended Act, he is also rendered ineligible to appoint an Arbitrator.

17. The Argument of learned counsel for the Respondent that since the CMD has already been appointed as an Arbitrator and the present petition is not maintainable, is bereft of merit. As discussed above, since the

CMD was ineligible to be appointed as the Arbitrator, he was deprived of his right to appoint an Arbitrator. The appointment made by the CMD is therefore *ex facie* invalid and consequently the Court has the jurisdiction under Section 11 (6) of the Act to appoint an arbitrator.

18. Accordingly, in view of the above discussion, the present petitions are allowed. In both the petitions, Hon'ble Mr. Justice Dipak Misra, (Former Chief Justice of India, Supreme Court) is appointed as the Sole Arbitrator.

19. Learned Arbitrator will issue a declaration under Section 12 read with the attendant provisions of the Act before entering upon reference.

20. The Registry is directed to send a copy of this order to the learned Arbitrator.

SANJEEV NARULA, J

APRIL 02, 2019

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