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

+ **ARB.P. 381/2019**

SRIRAM ELECTRICAL WORKS

..... Petitioner

Through: Mr. Praveen Agrawal, Advocate.

versus

POWER GRID CORPORATION OF INDIA LTD Respondent

Through: Mr. Pranay Kishore Mishra,
Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

09.08.2019

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SANJEEV NARULA, J.

I.A. 10867/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.

I.A. 10868/2019 (delay)

2. For the reasons stated in the application, the delay in filing the application is condoned and the application is disposed of.

ARB.P. 381/2019

3. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') seeks appointment of a Sole Arbitrator. The arbitration agreement is contained in Clause No. 22 of the Letter of Award, dated 23rd December 2014 which reads as under:

“22. **Arbitration:** In the event of any dispute or difference whatsoever arising under this contract or in connection therewith

including any dispute relating to existing meaning and interpretation of this contract, the same **shall be referred to the sole arbitration or some other person as appointed by Power Grid Corporation of India Limited, New Delhi.** The arbitration shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act 1996.”

4. Learned counsel for the Respondent, at the outset objects to the maintainability of the petition, contending that it is pre-mature, as the arbitration clause has not been invoked by the Petitioner. Learned counsel for the Petitioner on the contrary argues that the invocation of the arbitration clause is not necessary, as the arbitration clause has been rendered incapable of being enforced being in conflict with Section 12 (1)(a) and 12(5) of the Act. He strongly relies upon the decision of the Supreme Court in *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 and contends that in view of the ratio of the said judgment, the Respondent cannot make an appointment of the Arbitrator and the Court alone would have the authority to appoint the arbitrator, in exercise of its powers under section 11(6)(a) of the Act. He urges that for the foregoing reasons there is no requirement of invoking the arbitration clause and the Petitioner can straight away approach the Court and seek the appointment of an independent Arbitrator.

5. The Court is not convinced with the submission advanced by the learned counsel for the Petitioner. The Petitioner is overlooking the fundamental aspect of the matter-the wording of the Arbitration Clause. In the instant case, the Arbitration Clause does not name an arbitrator. It merely provides that the Respondent- Power Grid Corporation of India Limited, shall have

the right to appointment the arbitrator. The law as interpreted and declared by the Supreme Court in *TRF Ltd. (supra)*, is inapplicable to the facts of the present case. In the said case the Arbitration clause provided as under:-

“33. Resolution of dispute/arbitration

xxx

(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.”

6. In terms of the aforesaid clause the question that fell for consideration before the Supreme Court was, whether the Arbitrator who has become ineligible by operation of Law, can nominate another as an Arbitrator. Deciding this issue the Supreme Court held as under:

“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.”

7. This is not the situation in the present case. The issue in the present case is whether the right of one party to appoint an arbitrator stands extinguished by virtue of the amended Section 12 of the Act. This question has been considered in *Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers, 2018 SCC OnLine Del 7634*, wherein the coordinate bench of this Court rejected a similar contention in the following words:

“32. As far as the judgment of the Supreme Court in *TRF Ltd.* (supra) is concerned, I have already quoted the Arbitration Agreement that came up for interpretation in that case. The Arbitration Agreement provided that the disputes shall be referred to “sole arbitration of the Managing Director of buyer or his nominee”. The Supreme Court held that in view of Section 12(5) read with Seventh Schedule of the Act, Managing Director has become ineligible for acting as an Arbitrator. The question before the Supreme Court thereafter was: the Managing Director having become ineligible, does he also become ineligible to nominate an Arbitrator in his place. The Supreme Court relying upon the judgment in *State of Orissa v. Commissioner of Land Record and Settlement*, (1998) 7 SCC 162, held that a person who is statutorily ineligible cannot nominate a person to act for him. For reaching this conclusion, the Supreme Court also relied upon the maxim of “*Qui facit per alium facit per se*” (*What one does through another is done by oneself*). **Therefore, the principle followed by the Supreme Court was that where a person has himself become ineligible to act as an Arbitrator, he cannot delegate such power to another as such delegatee would also suffer from the same ineligibility. The judgment of the Supreme Court, in my opinion, cannot be read to say that even if the parties agree that one of the party to the Agreement shall appoint an Arbitrator, the said power has been taken away and such Agreement should be rendered**

void due to Section 12(5) of the Act.”

8. Similar view has been expressed in the Judgment of *D.K. Gupta v. Renu Munjal*, 2017 SCC OnLine Del 12385, relevant portion of which reads as under:

“8. However the arbitration clause pertaining to this case is on a different note. Here an arbitrator so appointed is not an employee of a party to the agreement. The arbitration clause herein rather gives a choice to one of the parties viz a lender to appoint an arbitrator. Thus perhaps is a striking difference between the two arbitration clauses viz., clause 33 of TRF Ltd.(supra) and clause 8.9.4 of the agreement dated 02.09.2013 herein. In TRF Ltd. (supra) the Managing Director of the buyer, being an employee of the buyer in a way represents the buyer itself, which is not the case here. Admittedly there exist no bar under the Act which restrains a party to appoint an Arbitrator. Rather section 11(2) of the Arbitration and Conciliation Act, 1996 empowers the parties to agree on a procedure for appointment of an arbitrator, which exactly is the situation here.”

9. In the instant case, the Arbitration clause, quoted hereinbefore, is entirely different from the arbitration clause that was the subject matter in the case of *TRF Ltd. (supra)*. Here the clause does not provide for an Arbitrator either by name or designation. It simply confers the right of appointment with the Respondent, one of the contracting party. Thus, I am unable to infer or read that 2015 Amendment of the Act obliterates contracting party's right to make an appointment of an arbitrator. Since, the parties willingly agreed to the right of appointment of the arbitrator, the said right has to be given effect as long as the clause is not in the teeth of the provisions of the Act. The Court will exercise its power under Section 11(6)

(a) of the Act, only where a party fails to act upon the appointment procedure agreed between the parties. Further the invocation of the Arbitration Clause as per the terms of agreement between the parties is also necessary as held by the Supreme Court in *Union of India v. Parmar Construction, 2019 SCC OnLine SC 442*, which reads as under:

"41. This Court has put emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle differences/disputes arising under the terms of the contract through appointment of a designated arbitrator although the name in the arbitration agreement is not mandatory or must but emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible."

10. In the said case the Court held that it should be the endeavour of the Court to first explore whether the arbitration clause contained in the agreement, can be implemented. Without offering the Respondent an opportunity to exercise its right to appoint the arbitrator, the Petitioner under Section 11(6) is not maintainable.

11. Thus, having regard to the aforesaid facts and reasons, the petition is dismissed.

SANJEEV NARULA, J

AUGUST 09, 2019

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