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

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Date of decision: 07.02.2020

+ ARB.P. 546/2019, I.A. 11873/2019

NEHA AVIATION MANAGEMENT PVT. LTD Petitioner

Through Mr. Rudreshwar Singh, Mr. Rakesh
Gosain and Ms. Snehil Sonam,
Advocates.

versus

AIR INDIA SATS AIRPORT SERVICES PVT LTD. Respondent

Through Mrs. Biji Rajesh, Advocate.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition under Section 11(5) read with Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking appointment of a Sole Arbitrator.

2. The parties entered into an agreement dated 15.09.2014 for outsourcing manpower ground handling services at Indira Gandhi International Airport for a period of three years w.e.f 01.08.2014 to 31.07.2017. The said agreement contains an Arbitration Clause which reads as under:-

"16.2 Any dispute or differences arising between AISATS and the Service Provider in connection with or arising out of this agreement which cannot be resolved amicably between them in accordance with the terms of this

agreement shall be finally decided by reference to arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any enacted for replacement thereof and shall be referred to the sole arbitrator to be nominated by Senior Vice President of AISATS. The arbitration shall be conducted in English language and the venue of the Arbitration shall be Delhi, India. The award of the sole arbitrator will be binding on the parties. Any reference to arbitration shall not relieve the Service Provider from any liability for the due and punctual performance of its obligation under this agreement.

3. Respondent invoked clause 13.1 of the aforesaid agreement and sought to terminate the agreement by giving a 30 days' notice on 12.10.2015.
4. By notice dated 03.11.2015, the respondent extended the notice period to 20.11.2015 and further extended by notice dated 16.11.2015. The period of termination was finally extended to 31.01.2015.
5. The parties were also litigating inter-se in a W.P. (C) 12185/2015 with respect to the said termination.
6. Due to the non-payment of the bills of the petitioner, certain disputes arose between the parties.
7. The petitioner vide notice dated 07.06.2019 invoked the Arbitration Agreement between the parties, seeking appointment of a retired District Judge or Additional District Judge, as a Sole Arbitrator.
8. The respondent replied to the Arbitration notice on 03.07.2019 and appointed Mr. Vivek Kumar Tandon, Advocate as the Sole Arbitrator.
9. By letter dated 11.07.2019, the respondent sent information to the Sole Arbitrator, namely, Mr. Vivek Kumar Tandon, Advocate intimating him of his appointment and also pointing out that the claims raised by the petitioner

were barred by limitation.

10. The unilateral appointment of the Sole Arbitrator was disputed by the petitioner vide letter dated 12.07.2019 and it suggested the name of two retired Additional District Judges, to be appointed as an Arbitrator.

11. On 27.07.2019, notice was sent by the Sole Arbitrator to both the parties and the matter was posted for the first procedural hearing on 01.08.2019.

12. On 01.08.2019, the petitioner sent a letter to the Sole Arbitrator stating that the petitioner was disputing the appointment of the Arbitrator. It was further informed to him that the petitioner would approach the Court for appointment of an independent Sole Arbitrator. The Sole Arbitrator, however, continued with the proceedings. On 01.08.2019 he ordered the petitioner to file Statement of Claims within a period of four weeks and the matter was listed for 01.10.2019.

13. Learned counsel for the petitioner submits that the Arbitration Clause envisages appointment of an Arbitrator by the Vice President of the respondent, who naturally will have an interest in the outcome of the Arbitration Proceedings. He thus submits that the Vice President is ineligible to appoint an Arbitrator in view of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*** 2019 SCC Online SC 1517. The disability of the Vice President to appoint an Arbitrator will also apply to the Arbitrator appointed by him, in terms of the said judgment.

14. Ms. Rajesh, however, per-contra argues that it was the petitioner who had invoked the Arbitration in terms of this very Clause. Petitioner had written a letter, where he had only requested for the change of the Arbitrator,

but had no quarrel with the power of the Vice President to appoint the Arbitrator, as is clear from the letter sent by the petitioner on 03.07.2019.

15. Ms. Rajesh further states that the Arbitrator has also made a disclosure under Section 12(5) of the Act which has been placed on record of this Court.

16. I have heard the learned counsel for the parties and examined their submissions.

17. In my view, learned counsel for the petitioner is right in his submissions that the appointment made by the respondent is contrary to the ratio of the judgment of Supreme Court in the case of *Perkins (supra)* and a recent judgment passed by this Court in *Proddatur Cable Tv Digi Services vs. Siti Cable Network Limited passed in O.M.P. (T) (COMM) 109/2019 decided on 20.01.2020*. Relevant paras of the judgment in *Perkins (Supra)* read as under:-

“20. 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 Limited, 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.

21. 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”

18. The unilateral appointment by the Vice President is thus bad in law and the mandate of the present Arbitrator deserves to be terminated.

19. In view of the above, there is no merit in the contention of the counsel for the respondent that only because the petitioner had invoked Arbitration in terms of Clause 16.2, he would be bound by the appointment of the present Arbitrator.

20. There is equally no merit in the contention that since the Arbitrator has given his disclosure, the present case will not be governed by the aforesaid Judgment of the Supreme Court.

21. The Supreme Court in case of ***Bharat Broadband Network Limited vs. United Telecoms Limited (2019) 5 SCC 755*** in context of the judgment in ***TRF Ltd. Vs. Energo Engineering Projects Ltd. 2017 8 SCC 377*** had clearly stated as soon as a clarificatory judgment is pronounced, Section 14 of the Act comes into play, automatically terminating the mandate *de jure*.

22. In view of the above, the petition deserves to be allowed.

23. The mandate of Mr. Vivek Kumar Tandon, Advocate, the present Sole Arbitrator, is hereby terminated. This, however, is not a reflection on the competence of the said Arbitrator.

24. With the consent of the parties, Mr. Justice Swatanter Kumar, former Judge of Supreme Court is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

25. The address and mobile number of the learned Arbitrator is as under:

Mr. Justice Swatanter Kumar,
Former Judge, Supreme Court of India,

C-3/5, 1st Floor, Safdarjung Development Area,
New Delhi-110016.
Mobile: 9560413636.

26. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.
27. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.
28. Needless to say that the newly appointed Arbitrator will begin the proceedings from the stage of procedural hearing.
29. Ms. Rajesh, at this stage, also points out that the claims of the petitioner are barred by time.
30. The question of the claims of the petitioner being barred by time is left open to be decided by the Arbitral Tribunal.
31. The petition is allowed and the pending application is disposed of in the aforesaid terms.

JYOTI SINGH, J

FEBRUARY 07, 2020

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