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

Date of Decision:- 04.02.2020

+ ARB.P. 779/2019

M/S ARVIND KUMAR JAIN

..... Petitioner

Through Mr.S.W.Haider with Mr.Raghav
Agrawal, Advs.

versus

UNION OF INDIA

..... Respondent

Through Mr.Jagjit Singh with Ms.Preet Singh,
Advs.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) seeks appointment of an Arbitrator for adjudication of the disputes and differences that have arisen between the parties herein pertaining to the provision and laying of sewer line along the railway boundary at Km 292/15 to 294/15 on DLI-BTI section under ADEN/JHI, which contract of work was awarded to the petitioner vide Acceptance Letter dated 15.12.2011.

2. Upon disputes having arisen, the petitioner vide its letter dated 03.09.2019 invoked the arbitration clause contained in paragraph 64 of the General Conditions of the Contract(GCC) signed between the parties, which reads as under:-

*"64(1) (i) **Demand for Arbitration**, --In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the excepted matters' referred to in clause- se 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.*

3. On receiving the petitioner's request for appointment of an Arbitrator, in accordance with the GCC, the respondent, vide its reply dated 19.09.2019, did not deny that disputes had arisen between the parties but requested the petitioner to agree for a waiver of Section 12(5) of the Act. In essence the petitioner wanted the respondent to agree to the appointment of a Gazetted Officer(JAG/SAG) of the respondent/Railways as the arbitrator by waiving Section 12(5) of the Act.

4. Upon notice being issued, the respondent has filed its reply, reiterating that the respondent is agreeable to arbitration in accordance with clause 64 of the GCC, but the appointment of an Arbitrator is held up for want of the requisite waiver from the petitioner. Learned counsel for the respondent also reiterates that the delay in referring the disputes to arbitration is only on account of the petitioner's failure to furnish the requisite waiver. He, therefore, submits that the petitioner be directed to furnish the requisite waiver, so as to enable the

respondent to appoint any Gazetted Officer (JAG/SAG) of the Railway as the sole Arbitrator, in accordance with the terms of the Contract.

5. On the other hand, learned counsel for the petitioner submits that the petitioner has justifiable doubts regarding the impartiality of the arbitration proceedings when the respondent's own officer has been proposed as the sole Arbitrator. He further submits that once the respondent is aware that the appointment of an officer of the Railways as an Arbitrator would contravene the provisions of Section 12(5) of the Act, the respondent could not have directed the petitioner to furnish a waiver. He, therefore, prays that this Court appoint an independent Arbitrator.

6. Having considered the submissions of learned counsel for the parties, I find absolutely no merit in the pleas taken by the respondent. In the light of the admitted position that clause 64 of GCC requires disputes which have arisen between the parties to be adjudicated through arbitration, the question whether an Arbitrator needs to be appointed in the present case at all, need not detain me.

7. The question, however, is as to whether the respondent can insist on the appointment of a Gazetted Officer of Railways as the Arbitrator, especially in the light of the apprehension expressed by the petitioner and the expressed provisions of Section 12(5) of the Act. While recently considering this issue, the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (INDIA) LTD.*** [2019 SCC Online SC 1517] held as under:-

“15. The communication invoking arbitration in terms of

Clause 24 was sent by the Applicants on 28.06.2019 and the period within which the respondent was to make the necessary appointment expired on 28.07.2019. The next day was a working day but the appointment was made on Tuesday, the 30th July, 2019. Technically, the appointment was not within the time stipulated but such delay on part of the respondent could not be said to be an infraction of such magnitude that exercise of power by the Court under Section 11 of the Act merely on that ground is called for.

16. However, the point that has been urged, relying upon the decision of this Court in Walter Bau AG and TRF Limited, requires consideration. In the present case Clause 24 empowers the Chairman and Managing Director of the respondent to make the appointment of a sole arbitrator and said Clause also stipulates that no person other than a person appointed by such Chairman and Managing Director of the respondent would act as an arbitrator. In TRF Limited⁴, a Bench of three Judges of this Court, was called upon to consider whether the appointment of an arbitrator made by the Managing Director of the respondent therein was a valid one and whether at that stage an application moved under Section 11(6) of the Act could be entertained by the Court. The relevant Clause, namely, Clause 33 which provided for resolution of disputes in that case was under:

“33. Resolution of dispute/arbitration

(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

(c) All disputes which cannot be settled by mutual

negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

(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.

(e) The award of the Tribunal shall be final and binding on both, buyer and seller.”

17. In TRF Limited, the Agreement was entered into before the provisions of the Amending Act (Act No. 3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disqualified could also not nominate any other person to act as an arbitrator. The submission countered by the respondent therein was as under:—

“7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified

in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

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 Limited⁴.

8. In the light of this legal position as also the petitioner's apprehensions regarding the impartiality of the Arbitrator proposed to be appointed by the respondent, I find that the respondent cannot be allowed to contend that only a Gazetted Railway Officer ought to be appointed as the Arbitrator. Similarly, the respondent cannot compel the petitioner to furnish a waiver from the applicability of Section 12(5) of the Act. In fact, I am of the view that the insistence of the respondent to seek a waiver from the petitioner would be contrary to the ratio of decision in **Perkins Eastman Architects DPC** (*supra*), and will contravene the very scheme of Section 12(5) of the Act.

9. In these circumstances, I am inclined to accept the petitioner's prayer for appointment of an independent Arbitrator under Section 11 of the Act. The petition is, accordingly, allowed and Mr.Siddhartha Shankar Ray, Advocate (Mobile No.9871283416), is appointed as the sole Arbitrator to adjudicate the disputes and differences arising between the parties out of the Acceptance Letter dated 15.12.2011, referred to hereinabove.

10. Before commencing arbitration proceedings, the Arbitrator will ensure compliance of Section 12 of the Act and the fees of the Arbitrator shall be governed by Schedule IV of the Act. The arbitration proceeding will be conducted under the aegis of Delhi International Arbitration Centre (DIAC).

11. A copy of this order be sent to the DIAC as also the learned Arbitrator, for information and necessary action.

12. The petition stands disposed of.

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REKHA PALLI, J.

FEBRUARY 04, 2020

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