

AP 348 of 2019

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

R.K. ASSOCIATES AND HOTELIERS PVT. LTD.
-Versus-
EASTERN RAILWAY THROUGH ITS DEPUTY CHIEF COMMERCIAL MANAGER

BEFORE:

The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY

Date : 25th January, 2021.

Appearance:
Mr. Arijit Basu, Advocate
...for the petitioner.

Ms. Aparna Banerjee, Advocate
...for the respondent.

The Court : In this application under Section 11(6) of the Arbitration & Conciliation Act, 1996 (in short, 'the Act of 1996') the petitioner has prayed for appointment of an independent sole Arbitrator to adjudicate the disputes arisen between the parties herein relating to the Master License Agreement dated June 23, 2014 (hereinafter referred to as 'the license agreement').

By the said agreement executed in Kolkata the respondent railway appointed the petitioner to render the services to operate, manage and supply catering services on the Sealdah-New Delhi Rajdhani Express.

Articles 20.1 and 20.2 of the license agreement contemplated that all disputes arising between the parties thereto would first sought to be amicably resolved, failing which the disputes shall be referred to arbitration as per the provisions of the Act of

1996. Such arbitration proceeding would be conducted by a sole Arbitrator being a Gazetted Railway Officer to be appointed by the General Manager of the Zonal Railway awarding the licence. The said clause further stipulated that no person other than a person appointed by the said General Manager would act as the Arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

It appears from the records disclosed in the petition that the petitioner filed a writ petition being WP No.218 of 2017 against the respondent railway. By a judgment and order dated July 28, 2017 a Co-ordinate Bench of this Court dismissed the said writ petition on the ground of existence of the alternative remedy. Petitioner carried out the said order of dismissal in appeal being APO No.385 of 2017 which was disposed of by the Division Bench on February 25, 2019 without interfering with the decision of the learned Single Judge. Thereafter, by a letter dated March 7, 2019 addressed to the Chief Commercial Manager of the respondent railway, the petitioner invoked the arbitration agreement and pointed out that in view of the incorporation of Section 12(5), read with the entries in the Seventh Schedule to the Act of 1996, the General Manager of the respondent railway cannot nominate any Arbitrator. By the said letter the petitioner requested the respondent railway authority to accept the Arbitrator named by them. The respondent railway authority, however, refused to accept the person named by the petitioner as the sole Arbitrator. They asserted that in view of the arbitration clause between the parties it is the General Manager of the

respondent railway who alone has the authority to appoint the Arbitrator.

In the above factual background, the petitioner has approached this Court seeking appointment of an independent person as the sole Arbitrator.

Learned Counsel appearing for the petitioner referred to the decision of the Supreme Court in the case of *Perkins Eastman Architects DPC and Another -versus- HSCC(India) Limited* reported in 2019 SCC Online SC 1517 and submitted that in the said decision the Supreme Court has already held that in view of the provisions of Section 12(5), read with the Seventh Schedule to the Act of 1996 when a person himself is debarred from acting as the Arbitrator he cannot even nominate an Arbitrator. On the strength of the said decision, learned Counsel for the petitioner pressed for an order allowing the above prayer made in this application.

On the other hand, the respondent railway raised objection to the maintainability of the present application on two grounds. In the first place it was submitted that the arbitration agreement between the parties, as mentioned above, stipulates that the disputes between the parties should first sought to be resolved through amicable settlement, but in the present case, the petitioner has not taken any steps in that direction. Secondly, it is the General Manager of the respondent railway who alone has the authority to appoint the Arbitrator and, as such, when the petitioner did not invoke the arbitration agreement by issuing any notice to the General Manager, the present application on the

basis of the said letter dated March 7, 2019 issued to the Chief Commercial Manager is not maintainable.

I have considered the materials on record and the arguments advanced by the respective parties. In the present case, admittedly the Chief Commercial Manager of the respondent railway who represented the President of India in the said license agreement dated June 23, 2014. Further, in view of the introduction of sub-Section(5) of Section 12, as well as the Seventh Schedule to the Act of 1996, no Gazetted Officer of the respondent railway can act as an Arbitrator to adjudicate the disputes between the parties. In the case of TRF Ltd.-vs-ENERGO Engineering Projects Ltd. reported in (2017) 8 SCC 377 the Supreme Court held that when a person is ineligible to act as an Arbitrator because of Section 12(5) and the entries in the Seventh Schedule to the Act of 1996 he cannot even appoint any Arbitrator. Even after considering the said decision in the case of TRF Ltd. (supra) in paragraphs 20 and 21 of the decision in the case of Perkins Eastment Architects (supra), the Supreme Court held as follows:

"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, the 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 Arbitration". 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 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 recognized by the decision of this Court in TRF Limited."

In view of the above decisions of the Supreme Court, it is evident in the present case, there is a statutory prohibition impose on the General Manager of the respondent railway from involving himself with the appointment of an Arbitrator. Thus, I find no merit in the contention of the respondent railway that the petitioner could invoke the arbitration agreement only upon issuing a notice under Section 21 of the Act of 1996 to the

General Manager. The statutory prohibitions imposed by Section 12(5), read with the entries in Seventh Schedule to the Act of 1996 does not render the entire arbitration agreement between the parties inoperative.

For the foregoing reasons, the application, AP No.348 of 2019 succeeds. Mr. Surendra Kumar Kapur, Senior Advocate and Barrister of Bar Library Club (First Floor) is appointed as the sole Arbitrator to adjudicate the disputes arisen between the parties relating to the said license agreement dated June 23, 2014. The learned sole Arbitrator will be free to fix his remuneration and to engage the secretarial staff. The fees of the learned sole Arbitrator, as well as the remuneration of the secretarial staff shall be borne by the parties in equal shares.

With the above direction, the application, AP No.348 of 2019 stands disposed of without any as to costs.

Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(ASHIS KUMAR CHAKRABORTY, J.)