

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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**ARB No.213 of 2020 (O&M)
Date of decision: 18.03.2021**

Bharat Bhushan Gupta

.....Petitioner

versus

State of Haryana and others

....Respondents

CORAM: Hon'ble Mr. Justice Girish Agnihotri

Present: Mr. Vivek Khatri, Advocate for the petitioner.

Ms. Safia Gupta, AAG, Haryana.

GIRISH AGNIHOTRI, J. (Oral)

The matter has been taken up through video-conferencing on account of the restrictions due to outbreak of pandemic COVID-19.

Petitioner-Bharat Bhushan Gupta, stated to be aged 64 years, has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of Sole Arbitrator to adjudicate the dispute between the petitioner and respondents arising out of the Contract Agreement for work of Natural Calamities of flood repair and renovation of various structure vide Agreement No.BPHD/2/622 of 1996 dated 23.11.1995 (Annexure P1 and P-2).

Learned counsel for the petitioner based on pleadings in the petition submits that the respondent department had allotted a tender work to the petitioner for Natural Calamities of flood repair and renovation of

various structure at disposal works Bhiwani Town, at approximate cost of Rs.99.05 lacs, vide Agreement No.BPHD/2/622 of 1996 dated 23.11.1995 (Annexures P1 and P-2). He further submits that after allotment of aforesaid tender work to the petitioner, both the parties have executed and entered into an agreement of the aforesaid work. He then submits that during the execution of the aforesaid work, some disputes arose between the parties and as the present agreement contained an arbitration clause and on the basis of which respondent No.2 has appointed one Sh. Sarvinder Singh, Superintending Engineer, Public Health Circle Rewari, as Arbitrator to adjudicate the dispute. Thereafter, many arbitrators have been appointed but none of them have concluded the proceedings as they have been replaced by one to another from time to time by respondent No.2. He, however, submits that since the earlier arbitrator had become 'ineligible' to act as Arbitrator, therefore, the petitioner made a representation before respondent Nos. 2 and 3 to appoint any independent Sole Arbitrator.

Learned counsel for the petitioner makes reference to pleadings in the petition with specific reference to para 2(f) (ix) to submit that the respondent department and their arbitrators have failed to conclude the arbitration proceedings in the present case and was having interest and relationship with the respondent. It is submitted that as per the 7th schedule and Section 12(5) of the amended Arbitration Act, if the Arbitrator falls in anyone of the categories specified in seventh schedule, he becomes "ineligible". The petitioner, accordingly, submitted a written representation/request on 05.10.2020 to the respondents and also before the

arbitrator.

Reliance has been placed upon the judgment of this Court dated 17.03.2011 in **ARB No.24 of 2010 (M/s Akash Enterprises vs. The General Manager, Northern Railway & Ors.)**. A perusal of the said judgment would show that there was an agreement which was executed between the parties on 12.11.2007. The petitioner therein had raised a dispute on 28.05.2019 by addressing letter to the General Manager (Northern Railways), Delhi. It has been noticed in the judgment that the petition for appointment of Arbitrator was filed in February, 2010. In the said judgment, it was noticed that neither the General Manager nor respondent No.2 had appointed any Arbitrator before filing of the present petition. In the said judgment, reliance was further placed upon the judgments of the Hon'ble Supreme Court in (i) **Datar Switchgears Ltd. vs. Tata Finance Ltd. & Anr. (2000) 8 SCC 151** and (ii) **UOI vs. Bharat Battery Mfg. Co. (P) Ltd. (2007) 7 SCC 684**. The next contention of the respondents therein was that in terms of Clause 64(3)(a), the Arbitrator has to be the General Manager or a Gazetted Officer of Railways therefore in terms of Section 11(8) of the Act, the Arbitrator is required to be appointed having due regard to the terms of the agreement executed between the parties. However, this Court had taken a view that the agreement does not contemplate any special qualification for appointment of Arbitrator who is to determine the dispute between the parties. In view of the facts as noticed above, a direction was issued by this Court to appoint an Arbitrator.

Learned counsel also makes reference to judgment of Delhi

High Court in ARB.P.779/2019 (M/s Arvind Kumar Jain vs. UOI) decided on 04.02.2020 wherein reliance was placed on the judgment of the Hon'ble Supreme Court in Perkins Eastman Architects DPC vs. HSCC (India) Ltd. (2019) SCC Online SC 1517. The relevant extract of the said judgment reads 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. 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.”

In view of the above, this Court accepts the submission of learned counsel for the petitioner. The petitioner’s apprehension regarding the impartiality of the Arbitrator to be proposed by respondents is not misfounded.

Therefore, in the totality of the above circumstances, this Court is inclined to accept the petitioner’s prayer for appointment of independent Arbitrator under Section 11 of the Act. Accordingly, the petition is allowed and after hearing learned counsel for the parties, Justice Dr. Bharat Bhushan Parsoon (Retd.), a former Judge of this Court, is appointed as the Sole Arbitrator. However, such appointment would be subject to the declaration to be made by Justice Dr. Bharat Bhushan Parsoon (Retd.), under Section 12 of the Act; with regard to his independence and impartiality to settle the disputes between the parties.

The Arbitrator is requested to complete the proceedings within the time limit specified under Section 29A of the Act.

The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator.

A copy of the order be forwarded to Justice Dr. Bharat Bhushan Parsoon (Retd.), a former Judge of this Court at the given address:-

*#154, Sector 35A,
Chandigarh
M. No.8558809906
Landline No.0172-4666606*

After seeking the convenience of the Arbitrator, the parties are directed to appear before him within one month from the date of receipt of a certified copy of this order.

The matter is disposed of in the above terms.

(GIRISH AGNIHOTRI)
JUDGE

18.03.2020

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Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No