

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 28.01.2021

+ **O.M.P. (T) (COMM.) 59/2020**

**SCORE INFORMATION TECHNOLOGIES
LIMITED**

.... Petitioner

versus

GR INFRA PROJECTS LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Amar Dave, Mr Gautam Narayan and Mr Pankaj Jain, Advocates.

For the Respondent: Mr H. S. Chandhok, Mr Rajan Raj, Ms Shikha Thakur and Mr Hriday Kochhar, Advocates.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, seeking that the mandate of the learned Sole Arbitrator appointed by the respondent be terminated. According to the petitioner, the learned Arbitrator is *de jure* unable to act as an Arbitrator under the A&C Act.

2. The disputes between the parties arise out of a contract whereby the respondent had sub-contracted the work of “Trenching, Laying Installation, Testing of Optical Fiber Cable, PLB-Duct and accessories for construction of exclusive optical NLD backbone and optical access routes on turnkey basis for Defence Network for specified part of Package F totaling to 224 Km (approx.) in the State of West Bengal.”

3. Bharat Sanchar Nigam Limited (hereinafter ‘BSNL’) had invited tenders (Tender No. CA/CNP/NFS OFC/T-441/2013) for procurement, supply, trenching, laying, installation, testing and maintenance of optical fiber cable, PLB duct and accessories for construction of exclusive optical National Long Distance (‘NLD’) backbone and optical access routes on turnkey basis for the defence network. The tender was for the Network For Spectrum (NFS) project of the Ministry of Defence, Government of India.

4. The aforesaid works was divided into seven packages – Packages A to G. The implementation of the project was undertaken jointly by BSNL and Project Implementation Core Group (PICG). On 16.09.2014, a contract for executing Package F was awarded by BSNL to ITI Limited. The said Package consisted of 6021 Km of Optical Access Routes in the States of West Bengal, Orissa, Bihar, Jharkhand, Sikkim and Andaman and Nicobar Islands. The works were required to be completed within a period of eighteen months.

5. On 17.10.2014, ITI Limited sub-contracted the entire works to be executed under Package F to A2Z Infra Engineering Limited. It is

averred that in the month of February, 2015, A2Z Infra Engineering Limited, further, sub-contracted the work to the respondent herein.

6. On 20.02.2015, the respondent issued a Letter of Intent (hereafter 'LOI') to the petitioner for executing the work relating to "obtaining ROW, survey, trenching, laying, installation, testing and commissioning of optical fiber cable, PLB duct & accessories for construction of exclusive optical NLD backbone and optical access route for defence network for a specified part of Package F of 224 km (approximately) in the State of West Bengal". In terms of the said LOI, the petitioner was called upon to issue a bank guarantee for an amount equivalent to 5% of the total work (that is, a bank guarantee in the sum of ₹25,20,000/-). The said LOI expressly stated that a detailed Work Order setting out the terms and conditions would be executed between the parties separately, if the petitioner fulfilled the condition under the LOI of providing the bank guarantee. On 22.02.2015, the petitioner furnished a performance bank guarantee in the sum of ₹25.20 lacs being 5% of the value of the total work as mentioned in the LOI.

7. The petitioner states that thereafter, on 17.03.2015, the petitioner commenced the work in accordance with the LOI, on a representation made by the respondent that it would be paid for the same notwithstanding that the Work Order was not issued.

8. On 11.08.2015, the respondent issued a Work Order for a total of 1056.85 Km "for obtaining Row, Survey, Trenching, Laying, Installation, Testing & Commissioning of Optical Fibre Cable, PLB

Duct & Accessories for construction of Exclusive optical NLD Backbone & optical access route for Defense network for specified part of Package F totaling of 1056 Km (approx.) in the State of West Bengal and Sikkim”. It is averred that subsequently, in the month of September 2015, BSNL accepted the appointment of the petitioner as a sub-contractor for execution of part of Package F.

9. The petitioner claims that the work awarded to it entailed providing thirty-five links out of which the petitioner has completed sixteen links. The petitioner also avers that the said links were handed over and acceptance certificates for the same have been issued by BSNL and PICG.

10. The respondent alleges that the pace of the execution of the work has been slow and the petitioner has also abandoned part of the works. Accordingly, on 03.10.2017, the respondent issued a show cause notice in terms of Clause 3.4 of the Work Order placed on the petitioner.

11. Thereafter, under the cover of a letter dated 12.03.2019, the respondent terminated the Work Order placed on the petitioner alleging that the petitioner was responsible for inordinately delaying the execution of the contract awarded to it.

12. The petitioner claims that the delay in execution of the works was not attributable to the petitioner but for reasons beyond its control and those attributable to the respondent.

13. In view of the disputes that had arisen between the parties, the respondent issued a notice dated 23.11.2019 informing the petitioner that it had, pursuant to Clause 23 of the Work Order, appointed a sole Arbitrator to adjudicate the disputes between the parties.

14. The petitioner responded by a letter dated 17.12.2019 objecting to the termination of the Work Order and contesting the allegations levelled against it.

15. On 23.12.2019, the petitioner sent a letter to the respondent contending that the appointment of the Sole Arbitrator was wrongful, illegal and contrary to the Arbitration Clause. The petitioner further stated that it had not submitted to the jurisdiction of the Arbitrator appointed by the respondent.

16. The first meeting of the Arbitral Tribunal was held on 07.01.2020. The respondent claims that the representatives of the petitioner present at the hearing had expressed that the petitioner had no objection for constitution of the Arbitral Tribunal consisting of the Sole Arbitrator appointed by the respondent. This is disputed by the petitioner. The petitioner claims that the proceedings recorded by the learned Arbitrator incorrectly record that the petitioner had no objection to the constitution of the Arbitral Tribunal. The petitioner further submits that its representatives were present but did not have the assistance of any counsel. At the material time, the parties were attempting to arrive at an amicable resolution of the disputes. However, they were unable to arrive at an amicable settlement.

17. On 26.02.2020, the Arbitral Tribunal held its second hearing, wherein it directed the respondent to file its Statement of Claims on or before 15.04.2020.

18. Thereafter, both the parties sent mails to the Arbitral Tribunal. Whereas the respondent claimed that the petitioner was using dilatory tactics in delaying the proceedings; the petitioner claimed that the respondent had invoked the Arbitration as a dilatory tactics to avoid making payments of its legitimate dues. The petitioner also stated that it was advised to file a Writ Petition before this Court for impleading the necessary stakeholders and it had done so.

19. On 10.09.2020, the petitioner sent an email to the Arbitrator, *inter alia*, informing the learned Arbitrator that it had filed a Writ Petition [W.P.(C) 6174/2020] before this Court. The petitioner also stated that it was resorting to taking appropriate remedies against the claimant for wrongful and illegal invocation of Arbitration as well as the unilateral appointment of the Arbitral Tribunal. The petitioner contended that the same was contrary to various decisions including the judgment of the Supreme Court in ***Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited: Arbitration Application No 32 of 2019 decided on 26.11.2019***. Thereafter, on 29.09.2020, the petitioner filed the present petition.

Discussions and Conclusion

20. Before proceeding further, it would be relevant to refer to the Arbitration Clause as included in the General Conditions of Contract (GCC) which form a part of the Work Order. Clause 23 of the GCC is reproduced below:-

“23. DISPUTE RESOLUTION

If any dispute arises between the parties hereto during the subsistence of this Work Order or thereafter, including in connection with the validity, interpretation, implementation of any alleged breach of any provision of this Work Order or relating to any question with reference to or in connection with the work order, including the question as to whether any termination of this Work Order has been legitimate, the parties hereto shall endeavour to settle such dispute amicably within 30 days from arising of the dispute by either of the parties in writing to other party mentioning the exact nature of the subject in dispute.

In case, the said dispute could not be resolved amicably within the said period of 30 days, then immediately upon expiry of the said period in a written communication by either party to the dispute, shall inform the other party that the subject matter in dispute shall be referred to arbitration. The arbitration shall be in accordance with the Arbitration and Conciliation Act 1996 including any statutory amendments made thereof. The arbitration proceedings shall be conducted by a sole arbitrator appointed by the Company.

In case of a dispute, the Company shall appoint the sole arbitrator and send notice to such appointment in writing to the Contractor.

The sole arbitrator shall give the award as expeditiously as possible. The award of the sole arbitrator shall be binding on the parties. The venue of the arbitration as

mutually agreed by the parties to this Work Order shall be exclusively and only held in New Delhi.

It is mutually agreed between the parties hereto that Courts in New Delhi subject to the aforesaid shall have exclusive jurisdiction. During the process of arbitration, the Order should be executed with no interruption, any party defaulting in performing their scope of work prior or during the subsistence or after the award has been made but before it is enforced as a rule of the court, shall be held liable for the cost incurred by the other party/parties for executing the scope of work of the defaulting party.”

21. The petitioner contends that although the Arbitration Clause provides for the unilateral appointment of a Sole Arbitrator by the respondent, such an appointment is not permissible in view of the decisions of the Supreme Court in *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited* (*supra*). Mr. Dave, learned counsel appearing for the petitioner also relies on the decision of a Coordinate Bench of this Court in *Proddatur Cable TV Digi Services v. Citi Cable Network Limited: (2020) 267 DLT 51* in support of his contention that unilateral appointment of the learned Arbitrator is not permissible.

22. In addition, he also referred to the decisions of the Supreme Court in *Bharat Broadband Network Limited v. United Telecoms Limited: (2019) 5 SCC 755*, in support of his contention that a petition for terminating the mandate of an Arbitrator, who is ineligible under Section 12(5) of the A&C Act and for the appointment of another Arbitrator in his place, is maintainable and it is not necessary for a party to challenge the learned Arbitrator under Section 13 of the A&C Act.

23. In *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited* (*supra*), the Supreme Court had, following the principle enunciated in its earlier decision in *TRF Limited v. Energo Engineering Projects Limited: (2017) 8 SCC 377*, observed 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*.”

24. In *Proddatur Cable TV Digi Services v. Citi Cable Network Limited* (*supra*), a Coordinate Bench of this Court had following the earlier decisions of the Supreme Court in *TRF Limited v. Energo Engineering Projects Limited* (*supra*) and *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited* (*supra*) held that the unilateral appointment of an Arbitrator by a company (a party to the Arbitration Agreement) would also be impermissible. The Court had founded the

decision on the rationale that an incorporated entity also acts through individuals (directors) who are ineligible to act as Arbitrators in terms of Section 12(5) of the A&C Act read with the Seventh Schedule of the A&C Act. The relevant observations made by the court are as under:

“25. Insofar as the reliance by the respondent on the judgments permitting unilateral appointment by the Authority designate of one party to the agreement is concerned, in my view, the same will have no relevance in view of the judgment of the Supreme Court in the case of Perkins (supra). The argument of the respondent that in the Arbitration Clause before the Supreme Court in the case of Perkins was with regard to the power of a Managing Director to appoint an Arbitrator whereas in the present case it is the Company only merits rejection. First and foremost, one has to see the rationale and the reasoning behind the judgment in the case of Perkins (supra). The Supreme Court held that the Managing Director was ineligible from appointing an Arbitrator on the simple logic that a Managing Director of a Company would always have an interest in the outcome of the arbitration proceedings. The interest in this context takes the shape of bias and partiality. As a natural corollary, if the Managing Director suffers this disability, even if he was to appoint another person as an Arbitrator, the thread of biasness, partiality and interest in the outcome of the dispute would continue to run. Seen in this light, it can hardly be argued that the judgment in Perkins (supra) will not apply only because the designated Authority empowered to appoint an Arbitrator is other than a Managing Director. Moreover, as brought out by the respondent itself, Company here is run by the Board of Directors. The ‘Board of Directors’ is defined in Section 2(10) of the Companies Act, 2013 as under:

“2(10) “*Board of Directors*” or “*Board*”, in relation to a company, means the collective body of the directors of the company.”

26. Thus, the Company is run none other than the Directors collectively. Duties of the Directors have been stipulated in Section 166 of the Companies Act, 2013. A bare perusal of the duties clearly reveals that the Director at all times, has to act in good faith to promote the objects of the Company and in the best interest of the Company, its employees and the shareholders. A Director shall not involve in a situation in which he may have a direct or an indirect interest that conflicts or possibly may conflict with the interest of the Company. It goes without saying that the Directors of the Company as a part of the Board of the Directors would be interested in the outcome of the Arbitration proceedings. The Company therefore, acting through its Board of Directors would suffer the ineligibility under Section 12(5) read with Schedule VII of the Act. The same ineligibility would also apply to any person appointed by the said Company. Thus, in my view, for the purposes of Section 11(6) and Section 12(5) read with Schedule VII, there cannot be a distinction based on the appointing authority being a Company.

25. The said view has also been followed by a Coordinate Bench of this Court. In *M/s Omcon Infrastructure pvt. Ltd. v. Indiabulls Investment Advisors Limited: OMP(T)(COMM.) 35/2020, decided on 01.09.2020*, the Court allowed the petition filed under Section 14 of the A&C Act and terminated the mandate of an Arbitrator who had been unilaterally appointed by a party. The Court following the decision of the Supreme Court in *Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited* (*supra*), held as under:-

“9.The ratio of the decision in ***Perkins Eastman Architects DPC & Anr. (supra)*** cannot be read in such a narrow manner as has been sought to be done by the learned Arbitrator. In my view, once the Managing Director of the Respondent Company was ineligible to appoint the arbitrator in the light of the decision in ***Perkins Eastman Architects DPC & Anr. (supra)***, the same would also bar the Company itself from unilaterally appointing the sole arbitrator.”

26. After some arguments, Mr. Chandhok, learned counsel appearing for the respondent fairly conceded that in view of the decisions of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited (supra)***, ***Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited (supra)*** and the decision of this Court in ***Proddatur Cable TV Digi Services v. Citi Cable Network Limited (supra)***, it is no longer open for a company to unilaterally appoint an Arbitrator. However, he submitted that in the present case, the petitioner had agreed to the appointment of the learned Arbitrator and therefore, waived the applicability of Section 12(5) of the A&C Act. Therefore, it was not open for the petitioner to now challenge the appointment of the learned Arbitrator. He also referred to the minutes of the first meeting held before the Arbitral Tribunal on 07.01.2020, wherein the Arbitrator had recorded the statement made on behalf of the parties that they had no objection to the constitution of the Arbitral Tribunal.

27. Thus, the limited issue to be addressed is whether the petitioner has waived the applicability of Section 12(5) of the A&C Act.

28. Section 12(5) of the A&C Act reads as under:-

“12(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

29. In terms of the proviso to Sub-section 12(5) of the A&C Act, the parties may waive the applicability of Section 12(5) of the Act. However, the said waiver has to be (i) subsequent to the disputes having arisen; and (ii) made by way of “*an express agreement in writing*”.

30. Concededly, in this case, there is no written agreement between the parties, whereby the petitioner has agreed to waive the applicability of Section 12(5) of the A&C Act.

31. This Court is also unable to accept that the proceedings recorded by the Arbitrator would constitute such an express agreement in the facts of this case. The petitioner had pointed out that on that date, its representatives were not assisted by any counsel. It is also averred by the petitioner that the proceedings of the day, which are not signed by the parties, incorrectly record that the petitioner had no objection for the appointment of the learned Arbitrator. The petitioner had immediately on receipt of the notice of appointment of the learned Arbitrator, had objected to such appointment.

32. As noticed above, the petitioner had in its letter dated 23.12.2019, clearly stated that it had not submitted to the jurisdiction of the learned Sole Arbitrator. Although the petitioner had not specifically referred to its objection to the respondent unilaterally appointing the learned Arbitrator, it nonetheless, had expressed its opposition to the appointment of learned Arbitrator. Thereafter, the petitioner had objected to the appointment of the learned Arbitrator and contended that the respondent had appointed the Arbitrator as a dilatory tactic to withhold the payments due to the petitioner.

33. Thus, it is difficult to accept that the petitioner had not objected to the appointment of the learned Arbitrator. Subsequently, by an email dated 10.09.2020, the petitioner had expressly stated that the unilateral appointment of the Tribunal is contrary to the decision of the Supreme Court in ***Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited*** (*supra*).

34. In view of the above, the present petition is allowed. The mandate of learned Arbitrator unilaterally appointed by the respondent stands terminated. Justice (Retired) R.C. Chopra, a former judge of this Court is appointed as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties in connection with the Work Order dated 11.08.2015. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

35. The petition is allowed in the aforesaid terms.

36. The parties are at liberty to approach the Learned Arbitrator for further proceedings.

VIBHU BAKHRU, J

JANUARY 28, 2021
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