

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

**ARB No. 90 of 2022 (O&M).
Date of Decision: July 14, 2022**

ERISHA AGRITECH PVT. LTD.

.... Applicant(s)

Versus

PUNJAB AGRO INDUSTRIES CORPORATE LTD. Respondent(s)

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Karanveer Jindal, Advocate
for the applicant.

Mr. Anupam Singla, Advocate
for the respondent.

LISA GILL, J.

This petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 (for short – ‘the Arbitration Act’), has been filed for appointment of the sole Arbitrator for deciding the disputes arising out of Agreement dated 03.03.2021 (Annexure P-3), executed between the parties.

It is submitted that Invoice dated 10.12.2020 (Annexure P-1) confirming the order for delivery of machine 'Self-propelled Forage Harvester FS60' was issued by the applicant on 10.12.2020 on the basis of discussions and negotiations held with the respondent. Purchase order dated 23.12.2020 (Annexure P-2), it is stated intentionally deviated from the terms of payment as mentioned in the Invoice dated 10.12.2020 wherein it is clearly stipulated that 50% of the payment was to be made in advance and

balance 50% within seven days after receipt of the machine. It is stated that this deviation was pointed out by the applicant and objection in this regard was raised vide e-mail dated 24.12.2020. However, on request of the respondent, the Forage Machine was delivered and duly accepted by the respondent on 05.02.2021 but balance payment of 50% within 7 days of delivery was not released. Certain doubts were unnecessarily raised by the respondent regarding the Forage Machine despite the same being brand new and genuine. However, in order to dispel any kind of doubt, the applicant even offered to replace the Forage Machine with a new one without any additional cost. Agreement dated 03.03.2021 (Annexure P-3) was executed between the parties wherein it was agreed that the applicant would supply another Forage Harvester Machine on or before 31.07.2021 to replace the one which was in possession of the respondent with the agreement that said Forage Machine would be returned to the applicant on or before 31.07.2021. It is submitted that though the second new Forage Machine was ready for delivery in the month of June, 2021, respondent sought to initiate discussion in June, 2021 for delivery of a higher version of the Forage Machine at the same price of earlier machine already in its possession. Due to the conduct and indecisiveness on the part of the respondent, there was deviation in the agreement dated 03.03.2021 and it failed to take delivery of subsequent Forage Machine. Respondent, it is stated, is still in possession of the earlier Machine since February, 2021 and is using the same without releasing full payment and not possession of the other one. The applicant, it is submitted, is now stuck with two Forage Machines on account of negligence of the

respondent and it accordingly asked for interest and penalty on the amount in question. It is further submitted that surprisingly respondent issued legal notice dated 05.10.2021 (Annexure P-5) to the applicant seeking refund of the amount of Rs.78,00,000/- (seventy eight lacs) in terms of agreement dated 03.03.2021. Legal notice was duly replied to on 23.10.2021 (Annexure P-6). Applicant, it is stated, issued a demand-cum-legal notice dated 01.11.2021 (Annexure P-7), whereupon the respondent chose to invoke Clause 9 of the agreement, which provides for settlement of dispute through arbitration and reads as under:-

“In the event of any question, dispute or difference arising between the parties in relation to this agreement or in connection therewith the same shall be referred to the sole arbitrator to be appointed by the Managing Director, Punjab Agro Industries Corporation Limited. The award of the Arbitrator will be final and binding upon both the parties. The Arbitrator proceedings will be governed under the Arbitration and Conciliation Act, 1996 and the office of the Arbitration will be at Chandigarh.”

Learned counsel for the applicant submits that the Managing Director of the respondent–Corporation unilaterally appointed the sole Arbitrator vide order dated 15.12.2021 without seeking consent of the applicant, which is clearly in derogation of the specific provision of the Arbitration Act as well as judgment of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd., 2019 SCC Online SC 1517***. Accordingly, this petition has been filed.

Despite opportunity, no reply has been filed on behalf of the respondent. However, arguments addressed on behalf of the parties have been heard.

The factual position in respect to execution of agreement dated 03.03.2021 between the parties is not in dispute and neither is the existence of the arbitral clause or the arbitrable dispute between the parties. Learned counsel for the respondent is unable to deny that in view of Section 12(5) of the Arbitration Act and judgment of the Hon'ble Supreme Court in ***Perkins Eastman's*** case (supra), the sole arbitrator could not have been appointed by the Managing Director of the respondent-Corporation. The Hon'ble Supreme Court in ***Perkins Eastman's*** case has 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.

In the given factual matrix, appointment of sole Arbitrator by the Managing Director of the respondent-Corporation vide order dated 15.12.2021 cannot be an impediment for appointment of an independent sole Arbitrator in this petition. This has been succinctly explained by the Hon'ble Supreme Court in ***Perkin Eastmen's*** case (supra).

Keeping in view the facts and circumstances as above, there is no impediment to the appointment of an independent sole Arbitrator to decide the dispute between the parties. Accordingly, order dated 15.12.2021 (Annexure P-9) is set aside and Mr. Justice (Retd.) Inderjit Singh, former Judge, Punjab and Haryana High Court, resident of 497, IAS IPS Society, New Chandigarh, Mobile No.8558809904, is appointed as the Sole Arbitrator to resolve all the disputes/differences between the parties arising out of agreement dated 03.03.2021. Appointment is subject to declaration to be made by the Arbitrator under Section 12 of the Act with regard to his independence and impartiality to settle the disputes between the parties. The Arbitrator to complete the proceedings within the time limit specified under Section 29-A of the Act. The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended from time to time to be borne equally by the parties.

A copy of this order be dispatched to Mr. Justice (Retd.) Inderjit Singh, former Judge, Punjab and Haryana High Court, at the following address:-

497, IAS IPS Society, New Chandigarh, Mobile No.8558809904.

Application is disposed of accordingly.

July 14, 2022		(Lisa Gill)
Sunil		Judge
	Whether speaking/reasoned:	Yes/No
	Whether reportable:	Yes/No