

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

**ARB No. 414 of 2021 (O&M)
Date of Decision: July 14, 2022**

**M/S. EXCEL GROUP
Versus**

.... Applicant(s)

**GENERAL MANAGER, NORTHERN RAILWAYS AND ANOTHER
..... Respondent(s)**

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Himanshu Gupta, Advocate
for the applicant.

Mr. Arun Gosain, Advocate
for the respondents.

LISA GILL, J.

This petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short – ‘the Act’), has been filed for appointment of sole Arbitrator for deciding the disputes arising out of Agreement dated 09.08.2019 (Annexure P-1), executed between the parties.

It is submitted that pursuant to execution of agreement dated 09.08.2019 dispute arose between the parties, due to which notice dated 07.02.2021 (Annexure P-7) was issued by the applicant, which was duly replied to by the respondents on 17.05.2021 (Annexure P-8), rejecting the applicant's request for termination of the contract. Notice invoking arbitration was issued by the applicant on 07.06.2021 (Annexure P-9) in

terms of Clause 25 of the Agreement. Learned counsel for the applicant submits that respondents, in an absolutely illegal manner kept raising demands for deposit of amount which the applicant it is claimed was not obligated to pay. However, to protect encashment of bank guarantee the applicant was forced to deposit the said amount.

Respondents, it is submitted, instead of exceeding to the genuine request for applicant of an independent Arbitrator, issued letter dated 23.07.2021 to the applicant sending names of four Arbitrators stated to be retired government officers and asking the applicant to select two of them for arbitration. The applicant, it is submitted, responded to the same vide communication dated 28.07.2021 (Annexure P-13), raising a specific objection that a *de novo* procedure is being adopted by the respondents for appointment of a sole Arbitrator, which is in derogation of the clause for arbitration. It was further stated that as per the Arbitration Act, an independent and impartial Arbitrator has to be appointed for adjudication of disputes and the General Manager is no longer competent to nominate the sole Arbitrator in terms of the relevant clause in the agreement.

ARB-393-2021 earlier moved by the applicant was withdrawn on 27.07.2021 with liberty to file afresh on the same cause of action after giving better particulars.

Learned counsel for the applicant vehemently argues that in terms of the relevant clause, the General Manager cannot appoint the Arbitrator and that the *de novo* procedure sought to be adopted by the respondents is clearly a futile attempt sought to be made by the respondents

after passing of the judgment by the Hon'ble Supreme Court in **Central Organization for Railway Electrification Vs. M/s. ECI-SPIC-SMO MCML (JV), 2020(14) SCC 712** . It is, thus, prayed that this petition be allowed.

Reply on behalf of the respondents stands filed. Learned counsel for the respondents does not deny the existence of an arbitral dispute or the existence of the arbitral clause. Objection raised is that the respondents had duly suggested four names vide letter dated 23.07.2021 of retired Gazetted Officers for being appointed as the sole Arbitrator. The applicant, however, instead of choosing two of them has approached this Court in an unjustified manner, which is stated to be in violation of Clause 25(2) of the agreement.

Heard learned counsel for the parties and have gone through the file.

Relevant part of Clause 25(2) of the agreement, which deals with appointment of an Arbitrator, reads as under:-

25.2. Appointment of Arbitrator:-

(i) The parties may waive off the applicability of sub-section 12(5) of Arbitration and Conciliation (Amendment) Act-2015, if they agree for such waiver, in writing, after dispute having arisen between them, in the format given under Annexure-I of the agreement.

.....
(iii) Appointment of Arbitrator where applicability of Section 12(5) of Arbitration and Conciliation Act, 1996 has not been waived off:-

(a) In cases where the total value of all claims in question added together does not exceed Rs.1,00,00,000/- (Rs. One Crore only). The Arbitral Tribunal shall consist of a Sole

Arbitrator who shall be a retired Gazetted Officer of Railway nominated by the General Manager. The retired Gazetted officer so appointed however will not be one of those who had an opportunity to deal with the matter to which contract relates or who in the course of their duties as Railway servant have expressed views on all or any of the aspects of the matter under such dispute. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway Administration.

Admittedly, the total value of all claims in this case does not exceed Rs.1,00,00,000/- (one crore).

The factual position in respect to the execution of agreement/contract dated 09.08.2019 (Annexure P-1) between the parties is not in dispute and neither is the existence of the arbitral clause or the arbitrable dispute between the parties in dispute. Learned counsel for the respondents 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 Architects DPC and another Vs. HSCC (India) Ltd., 2019 SCC Online SC 1517***, the sole arbitrator cannot be appointed by the General Manager of the respondent-Department. 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 there is indeed no impediment to the appointment of an independent sole Arbitrator to decide the dispute between the parties. Issuance of letter dated 23.07.2021 in this scenario can be of no help to the respondents. Accordingly, Mr. B.S. Mehandiratta, District and Sessions Judge (Retd.), resident of House No. 2509, Extension 6, Near Kidzee School, Old Sunny Enclave, Kharar, SAS Nagar, Mohali (Punjab) PIN 140301, Mobile No. 9814407279, is appointed as the Sole Arbitrator to resolve the dispute/differences between the parties. 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. B.S. Mehendiratta, District and Sessions Judge (Retd.), District and Sessions Judge (Retd.) at the following address:-

House No. 2509, Extension 6, Near Kidzee School, Old Sunny Enclave, Kharar, SAS Nagar, Mohali (Punjab) PIN 140301, Mobile No. 9814407279.

Petition is disposed of accordingly.

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