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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decided on: 21st September, 2022

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ARB.P. 661/2022**SP SINGLA CONSTRUCTIONS PVT LTD**

.....Petitioner

Represented by: Mr. Aaditya Gambhir, Advocate

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Represented by: Ms. Kritika Gupta, Advocate..

CORAM:**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****NEENA BANSAL KRISHNA, J. (ORAL)**

1. A petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 has been filed wherein it is submitted that the parties had entered into a Contract Agreement dated 08th January, 2018 for construction of flyover cum rail over bridge on Urban Extension Road at Narela, Delhi. The project was required to be completed within fifteen months i.e. by 10th April, 2019. However, because of the delays and disruptions occasioned on account of various acts of breach attributable to the respondent, the petitioner has suffered tremendous loss. He raised his claims before the respondent, but the same remained unaddressed. In terms of Clause 25 of the Agreement, the petitioner has already applied for the Pre-arbitration Dispute Resolution Procedure and agitated his claim before the Dispute Redressal Committee (DRC) which culminated in the publication of DRC's finding dated 08th January, 2021. However, the claims of the petitioner have remained



unaddressed by the DRC. The petitioner thus, issued a Notice dated 30th October, 2021 for commencement of Arbitration under Clause 25 of the Agreement. Furthermore, the procedure provided for constitution of Arbitral Tribunal under Clause 25 of the Agreement is contrary to the laws applicable to the independence and impartiality of the petitioners. The petitioner has nominated Hon'ble Mr. Justice Rakesh Kumar Jain (Retired), Punjab & Haryana High Court as its nominee Arbitrator and requested the respondent to either agree to his appointment as the Sole Arbitrator or appoint its own nominee Arbitrator, so that both the nominee Arbitrators may appoint the Presiding Arbitrator and the arbitration proceedings may be initiated. The respondent has failed to respond to the Notice.

2. Hence, the present petition has been filed to recognize the appointment of Justice Rakesh Kumar Jain as the nominee Arbitrator of the petitioner and appoint an Arbitrator on behalf of the respondent who along with the nominee of the petitioner may mutually appoint the third Arbitrator or such other steps or measures may be taken to secure the constitution of an independent and impartial Arbitral Tribunal.

3. The respondent in its reply has denied all the averments made in the petition. However, the existence of the Arbitration Clause has not been challenged. It is also not been disputed that the arbitrable disputes have arisen between the parties. It is however submitted that the respondent has a panel of five eminent Engineers and any one of them may be appointed as an Arbitrator or the Court may appoint an independent nominee arbitrator on behalf of the respondent, who along with the nominee arbitrator of the petitioner, may appoint the third/ umpire arbitrator.

4. Learned counsel for the respondent submits that he has filed the reply



and further submits that he has no objection to the appointment of the Arbitrator.

5. Submissions heard.

6. The main objection taken by the petitioner is in regard to the procedure followed for appointment of the Arbitrator. The respondent had offered for appointment of a nominee Arbitrator from its Panel of select arbitrators. The petitioner has challenged it on the ground of being in breach of impartiality and neutrality of the Arbitrator and has sought appointment of the Arbitrator under Section 11(6) of the Act.

7. It is a principle which needs no reiteration that the autonomy of the parties to mutually agree on the procedure to be followed for dispute resolution and appointment of Arbitrator is to be respected. In this context reference may be made to the observations of the Hon'ble Supreme Court in Union of India vs. Parmar Construction Company MANU/SC/0445/2019 that the High Court was not justified in appointing an independent Arbitrator without resorting to the procedure for appointment of the Arbitrator which has been prescribed under Clause 64(3) of the Contract under the built-in mechanism as agreed by the parties. The ratio of Parmar Construction Co. (supra) was applied by the Supreme Court in Union of India vs. Pradeep Vinod Construction Co. MANU/SC/1573/2019 to hold that the appointment of an Arbitrator should be in terms of the Agreement and an independent Arbitrator should not be appointed ignoring the Agreement between the parties. It is thus, a settled proposition that the Court must refrain from appointment of an Arbitrator by ignoring the admitted procedure as agreed by the parties.

8. Thus, while recognizing the right of the parties to choose the



procedure for dispute resolution including appointment of the Arbitrator in the Agreement, it has been countenanced that at fairness, transparency and impartiality are the virtues which are equally important incidents for consideration. The autonomy to choose the arbitrator is not unbridled and has to be tested on the anvil of neutrality and impartiality of the Arbitrator sought to be appointed by the parties, since these are the bedrock on which the foundation of arbitration rests.

9. In Voestalpine Schienen GMBH vs. DMRC (2017) 4 SCC 665 the Supreme Court dealt with the significance of independence and impartiality of the Arbitrator. It observed as under:

*“Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator’s appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. **The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties.***



Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial."

10. The Supreme Court in the case of TRF Ltd. vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377 held that the test for determination of competence of an Arbitrator proposed to be appointed was: "*whether he would have an interest in the outcome of the dispute*". The element of eligibility was relatable to the interest that he had in the decision. The decision of the Apex Court in Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd. 2019 SCC OnLine 1517 recognises the importance of ensuring that the Arbitrator having an interest in the outcome of the matter is not appointed so as to obviate any doubt as to the impartiality and independence of Arbitral Tribunal.

11. In Proddatur Cable TV Digi Services vs. Siti Cable Network Ltd. (2020) 267 DLT 51, coordinate bench of this court observed that one has to see the rationale and reasoning behind the judgment in the case of *Perkins Eastman* (supra) which is to ensure that the Arbitrator sought to be appointed has no interest in the outcome of the case.

12. In this back drop, one may consider the manner in which this Test of impartiality and neutrality has been applied in myriad situations while considering the application for appointment of Arbitrator under Section 11 of the Act. The Arbitration Clause 25 in the present case reads as under :



"(A) Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

(i) If the either party considers any work demanded for denied to it to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge or contractor on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, it shall promptly within 15 days request the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute. The Dispute Redressal Committee (DRC) shall give the opposing party two weeks for a written response, and, holding not more than three hearings



give its decision within a period of 60 days from the receipt of appeal from either party. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F. If the Dispute Redressal committee (DRC) fails to give its decision within the aforesaid period or any party is dissatisfied with the decision of Dispute redressal Committee(DRC), then either party may within a period of 30 days from receipt of the decision of Dispute Redressal committee (DRC), give notice to the Engineer Member for appointment of arbitrator on prescribed proforma as per appendix XV, failing which the said decision shall be the final binding and conclusive and not referable to adjudication by the arbitrator... [...]

It is also a term of this contract that no person other than a person appointed by the Engineer Member, DDA, as aforesaid, should act as arbitrator and, if, for any reason that is not possible; the matter shall not be referred to arbitration at all... [...]"

13. In the present case since the claim value is high, it is a panel of three arbitrators which is proposed to be constituted for determination of the disputes which have arisen between the parties. The respondent herein had given a panel of three Arbitrators, but the petitioner has nominated Hon'ble Mr. Justice Rakesh Kumar Jain (Retired), Punjab and Haryana High Court, as its nominee Arbitrator. The respondent has submitted a panel of three arbitrators from which the petitioner has been given a choice to select an



Arbitrator, while the second Arbitrator shall be the nominee of the respondent.

14. During the course of the arguments, learned counsel for the respondent has stated that since there is no consensus forthcoming in regard to the nominee to be appointed on behalf of the respondent, the Court may appoint a nominee Arbitrator on behalf of the respondent and the two Arbitrators may then appoint the third/umpire Arbitrator, as per the agreed procedure.

15. The arbitrable disputes have arisen between the parties and there exists an Arbitration Clause in writing. Moreover, as per the Arbitration Clause, a panel of the three Arbitrators is required to be constituted. A nominee Arbitrator has already been appointed by the Petitioner. Hon'ble Mr. Justice D.K Jain, (retired), Judge of Supreme Court of India (Mobile No. 9999922288) is hereby appointed as the nominee Arbitrator on behalf of the respondent. The two learned Arbitrators of the respective parties are at liberty to appoint the third/umpire Arbitrator.

16. This is without prejudice to the rights and contentions of the parties, which they are at liberty to agitate during arbitration or with the consent of the parties.

17. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A &C Act, 1996.

18. This is subject to the learned Arbitrators making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A &C Act, 1996.

19. Learned counsel for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to



them by the Registry of this Court.

20. The application is accordingly allowed.

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 21, 2022
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